

University of South Dakota School of Law

From the SelectedWorks of Frank Pommersheim

2013

Land Into Trust: An Inquiry Into Law, Policy, And History

Frank Pommersheim, *University of South Dakota School of Law*



SELECTEDWORKS™

Available at: http://works.bepress.com/frank_pommersheim/68/

LAND INTO TRUST: AN INQUIRY INTO LAW, POLICY, AND HISTORY

FRANK POMMERSHEIM*

TABLE OF CONTENTS

I. INTRODUCTION	519
II. ALLOTMENT AND THE BACKGROUND OF SECTION 5 OF THE INDIAN REORGANIZATION ACT	521
III. THE ADMINISTRATIVE PROCESS OF PUTTING LAND INTO TRUST.....	527
A. Application, Notification, and Final Decision	527
B. Administrative Appeal and Judicial Review	528
IV. LEGAL CHALLENGES: THE EXAMPLE OF SOUTH DAKOTA	529
V. SUPREME COURT DECISIONS ON LAND-INTO-TRUST ISSUES.....	541
VI. SEARCH FOR COMMON GROUND	542
A. New Federal Reimbursement Plan.....	543
B. State-Tribal Partnership Approach	544
C. National Intertribal Infrastructure Development Authority.....	545
VII. CONCLUSION: COMING FULL CIRCLE	545

I. INTRODUCTION

The land-into-trust policy of the Indian Reorganization Act (“IRA”)¹ is an express legislative attempt to undo, or at least ameliorate, the massive loss of Indian land that resulted from the federal government’s allotment policy of the late nine-

* Professor of Law, University of South Dakota School of Law. I want to thank the University of South Dakota Foundation for a grant to support this research. I also want to thank my outstanding research assistant, Steve Iverson, USD Law, class of 2013.

1. See Indian Reorganization Act, 25 U.S.C. § 465 (2012). This section reads:

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

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id.

teenth and early twentieth centuries.² The allotment policy occasioned a severe reduction in the national Indian land estate without any benefit to the affected Indians and tribes including the vaunted goals of assimilation and the reduction of poverty in Indian country.³ The extensive loss of land produced much economic hardship, cultural strain, and erosion of tribal governing authority.

2. See generally General Allotment Act, ch. 119, 24 Stat. 388 (1887), which provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section;

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

For a more detailed discussion, see *infra* Part II.

3. This part of the General Allotment Act (also known as the Dawes Severalty Act) was repealed by 25 U.S.C. §§ 461–462 (2012) (prohibiting the further allotment of Indian lands and extending periods of trust and restrictions on alienation).

The subsequent attempt of IRA law and policy to reverse this process of severe land loss raises significant questions about the ability of law, and Indian policy in particular, to repair history without creating new conflict that reprises, even deepens, old animosities. This article will survey and analyze this process from both a policy and empirical point of view. In addition, this piece will review the nitty-gritty administrative procedures for putting land into trust, the various procedural challenges to this process, as well as substantive legal challenges to the validity of the land-into-trust portions of the IRA, especially in the state of South Dakota. Finally, the article will tally the empirical results to date, and conclude by examining non-litigation strategies and solutions with an eye on their ability to meet the needs of all concerned.

II. ALLOTMENT AND THE BACKGROUND OF SECTION 5 OF THE INDIAN REORGANIZATION ACT

The pressure of western expansion did not abate with the signing of treaties, and the federal policy of measured separatism soon gave way to a policy of vigorous assimilation, which had dire consequences for reservations as islands of Indianness.⁴ The homelands were cut open. The bright line separating Indians and non-Indians was obliterated. Much land was lost as many non-Indian settlers came into Indian country. Cultural ways were strained, and traditional tribal institutions were undermined and weakened. For many, this was the most devastating historical blow to tribalism and Indian life.⁵

The linchpin of this policy was the Dawes Severalty Act, also known as the General Allotment Act of 1887.⁶ President Theodore Roosevelt most forcefully described this Act as “a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.”⁷ The General Allotment Act authorized the Bureau of Indian Affairs (“BIA”) to allot 160 acres of tribal land to each head of household and forty acres to each minor.⁸ Allotments were originally to remain in trust for twenty-five years; they would be immune from sale and local property taxes during the period of transition from being a tribally-owned communal resource to an individually-owned piece of land managed and used like surrounding non-Indian farms and ranches.⁹ This twenty-five-year trust period was undermined by the Burke Act of 1906,¹⁰ which allowed the transfer of a fee patent

4. The information in this section is taken largely from FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 19–24 (University of California Press 1995).

5. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 19–23 (1987) (discussing the undermining of tribal institutions, culture, and traditions).

6. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381 [1983]).

7. S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* 104 (1973) (quoting President Theodore Roosevelt).

8. See 25 U.S.C. § 336 (1946); WILCOMB E. WASHBURN, *RED MAN’S LAND/WHITE MAN’S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 75 (1971); WILKINSON, *supra* note 5, at 19.

9. TYLER, *supra* note 7, at 96–97.

10. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (1906).

to “competent” Indians prior to the expiration of the trust period.¹¹ Competency commissions were quickly established to determine whether individual Indians were “competent” to receive fee patents, which would remove restrictions against alienation and tax obligations.¹² These commissions often made competency determinations based on the most perfunctory of findings, including whether the individual was one-half degree Indian blood or less.¹³ In addition to authorizing allotments, the Act permitted the opening of so-called surplus reservation lands for non-Indian homesteading.¹⁴

The allotment policy was imposed from the top down without tribal input and consent.¹⁵ It was grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions; it was insensitive to the hunting and food-gathering traditions of nonagricultural tribes; and it was devoid of any cultural understanding of the roles of tribal social organization such as the *tiyospaye* (the extended family of the Lakota), often assigning to individuals allotments outside their home communities and beyond their familial landscape. Seen from this perspective, the allotment policy was apparently formulated to fail.

The results were truly devastating. The national Indian land estate was reduced from 138 million acres in 1887 to 52 million acres in 1934.¹⁶ More than 26 million acres of allotted land were transferred from the tribe to individual Indian allottees and then to non-Indians through purchase, fraud, mortgage foreclosures, and tax sales.¹⁷

Sixty million of the 86 million acres lost by Indians during the allotment era were lost because of the “surplus” land provisions of the Act.¹⁸ According to the historian Father Francis Prucha, 38 million acres of unallotted tribal lands were declared “surplus” to Indian needs and were ceded to the federal government for sale to non-Indians.¹⁹ The federal government opened to homesteading another 22 million acres of “surplus” tribal land.²⁰ The ravages of the allotment policy were halted only by the IRA of 1934,²¹ which permanently extended the trust status of all existing allotments and halted the issuance of any new allotments.

These ravages had equally scarring collateral effects. For the first time the reservations became checkerboards of tribal, individual Indian, individual non-Indian, and corporate properties.²² Individual Indian allotments quickly fractionated within several generations, often split among dozens or even hundreds of heirs.²³ In

11. TYLER, *supra* note 7, at 104.

12. WILKINSON, *supra* note 5, at 19–20.

13. See generally LeAnn LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners Be Liable for Government's Wrongdoing?*, 30 S.D. L. REV. 59 (1984).

14. 25 U.S.C. § 348 (1983); WILKINSON, *supra* note 5, at 20.

15. WILKINSON, *supra* note 5, at 20–21.

16. *Id.* at 20.

17. *Id.*

18. *Id.*

19. 2 FRANCIS P. PRUCHA, *THE GREAT FATHER* 896 (1984).

20. *Id.*

21. 25 U.S.C. §§ 461–478 (1983).

22. WILKINSON, *supra* note 5, at 20.

23. *Id.*

addition, land that remained in trust was more often leased to non-Indians than used by the allottees.²⁴

More difficult to assess is the direct effect of the allotment process on tribal government and tribal institutions. Some commentators have argued that when the reservations were opened, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal government was undermined.²⁵ The great influx of non-Indian settlers, coupled with the loss of communal lands and the attendant yoke of federal support of these policies, simply eradicated much of the tribes' support of these policies and the tribes' ability to govern. In the resulting void, the BIA and Christian missionaries became the true power brokers and the de facto governing forces.²⁶

The missionaries in particular wreaked havoc with their religious and educational programs, particularly the boarding school program, which took Indian children away from their families for substantial periods of time and specifically forbade the speaking of tribal languages in school.²⁷ It is not difficult to perceive the strain and pressure placed on traditional culture under these circumstances. This is even more apparent when these policies were joined to BIA directives outlawing traditional religious practices such as the Sun Dance.²⁸ As a result, the core of the culture was driven underground into a shadow existence.

Many people on the reservation vividly recall these times. Albert White Hat, an instructor of Lakota thought and philosophy at Sinte Gleska University on the Rosebud Sioux Reservation, speaks of the many instances in which he and his classmates at St. Francis Indian School had their mouths washed out with soap for speaking Lakota in school. As Mr. White Hat eloquently summarized without rancor: "You gave us the Bible, but stole our land. You taught us English only so we could take orders, not so that we might dream."²⁹

The point is not to assign blame—an essentially fruitless exercise—but rather to comprehend more deeply the forces at work on the reservation. The governmental and religious policies of assimilation were, at least in hindsight, clearly erroneous; but they were, at least in part, driven by worthy motives. The more sinister motives of greed, ethnocentrism, and religious exclusivity are clear, even glaring, but it is also true that many well-meaning individuals and groups clearly identified as Indian supporters believed that the policies of allotment and assimilation were the only way to stave off complete obliteration at the hands of the forces of manifest destiny. As the leading historian of the allotment era, D.S. Otis, has written:

That the leading proponents of allotment were inspired by the highest motives seems conclusively true. A member of Congress, speaking on the

24. See, e.g., *id.*; FRANK POMMERSHEIM, *BROKEN GROUND AND FLOWING WATERS* 69–71 (1979).

25. See, e.g., WILKINSON, *supra* note 5, at 21; WASHBURN, *supra* note 8, at 75–76.

26. WILKINSON, *supra* note 5, at 21.

27. See, e.g., David Wallace Adams, *Fundamental Considerations: The Deep Meaning of Native-American Schooling, 1880–1900*, 58 HARV. EDUC. REV. 1 (1988).

28. See, e.g., Federal Agencies Task Force, *American Religious Freedom Act Report*: Pub. L. No. 95-341, 1–17 (1979).

29. Interview with Albert White Hat, Rosebud Sioux Reservation (May 1983).

Dawes bill in 1886 said, “It has . . . the endorsement of the Indian rights associations throughout the country, and of the best sentiment of the land.”³⁰

A minority of Congressional opponents saw it more unsparingly. In 1880 the minority report of the House Indian Affairs Committee stated:

The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indians are but the pretext to get at the lands and occupy them If this were done in the name of greed it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian’s welfare by making him like ourselves whether he will or not is infinitely worse.³¹

With all this imposed slash and burn, cultural and institutional loss was inevitable. Federal government endorsement of these policies was reversed with the IRA, which ended the allotment process, supported the development of tribal self-government, and most importantly for purposes of this article, authorized the land-into-trust process.³²

In South Dakota, the ravages of allotment were exacerbated by a number of “diminishment” cases that have altered reservation boundaries in such a way as to reduce the size of the reservation.³³ In South Dakota, four of nine reservations have been diminished.³⁴ They include Rosebud,³⁵ Pine Ridge,³⁶ Sisseton-Wahpeton,³⁷ and Yankton.³⁸ These cases diminished each in the following way: The Rosebud Reservation lost Gregory, Tripp, Mellette, and part of Lyman County.³⁹ Pine Ridge lost Bennett County.⁴⁰ Sisseton-Wahpeton lost all non-trust land and became an “open” reservation without recognized, contiguous borders.⁴¹ The same was true for Yankton. The total acreage affected is approximately 3.5 million acres.⁴²

30. D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 8 (Francis P. Prucha ed. 1973).

31. *Id.* at 19.

32. 25 U.S.C. §§ 461–478 (2012).

33. Erin H. Fouberg, *Diminishment and the Question of Indian Character in BAYS ET AL., THE TRIBES AND THE STATES: GEOGRAPHIES OF INTERGOVERNMENTAL INTERACTION* 73–74 (Brad A. Bays et al. eds., 2002).

34. *Id.*

35. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

36. *United States ex. rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).

37. *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425 (1975).

38. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The Supreme Court has also held that the Cheyenne River Sioux Reservation has not been diminished. *See Solem v. Bartlett*, 465 U.S. 463 (1984).

39. *Kneip*, 430 U.S. at 603, 609, 614.

40. *Parkinson*, 525 F.2d at 124.

41. *DeCoteau*, 425 U.S. at 427–28, 448.

42. *See* U.S. CENSUS BUREAU, BUREAU OF STATISTICS, 2010 CENSUS GAZETTEER FILES, available at <http://www.census.gov/geo/maps-data/data/gazetteer2010.html> (last visited Apr. 17, 2013) (follow the “Counties” hyperlink; then choose “South Dakota” as the state for land areas for the counties that were completely excluded (Bennett, Gregory, Mellette, and Tripp Counties) which totals 5,119.42 square miles, or 3,276,428.80 acres; next, on the original page, follow the “American Indian/Alaska Native/Native Hawaiian Areas – Reservations Only” link; then click the “Download the American Indian/Alaska Native/Native Hawaiian Areas – Reservations Only Gazetteer File” to determine the amount of diminishment

Diminishment cases do not affect land ownership *per se*, but rather alter the boundaries of the original reservation in such a way as to reduce the amount of territory within Indian country as defined in 18 U.S.C. § 1151.⁴³ Because the parameters of 18 U.S.C. § 1151 delineate the geographic scope of tribal governmental sovereignty, diminishment is a forceful constraint to tribal authority. Couple this with the loss of more than 7 million acres in the sacred Black Hills⁴⁴ and the total loss of land and tribal authority was near catastrophic. To be sure, all of these losses were the result of federal, not state, laws, but South Dakota has been zealous and adamant in its commitment to maintaining and upholding these losses.⁴⁵

The IRA was largely the effort of Indian Affairs Commissioner John Collier, whose primary goal of ending the forty-seven years of federal allotment policy resulted in the loss of 90 million acres of Indian land.⁴⁶ Collier sought to completely reorganize the structure of Indian governments, change Indian education, improve tribal economic infrastructures, secure Indian land holdings, and create a uniform Indian court system.⁴⁷ Collier's first proposal of the IRA was actually a consolidation of several bills that Collier and his administration were working on at that time.⁴⁸ Collier also enlisted the aid of Felix S. Cohen, as one of two draftsmen to help draft the IRA proposal.⁴⁹ Collier's IRA proposal was not well received by Congress, with senators and representatives claiming the proposal was confusing and lacked clarity.⁵⁰ As such, Senator Wheeler, then Chairman of the Senate Committee on Indian Affairs took the lead on Collier's bill and, with the help of Indian Affairs Assistant Commissioner Zimmerman, substantially altered the original pro-

for the Yankton Sioux (Charles Mix County (1,097.49 sq. miles) subtracting the current reservation (665.47 sq. miles), equaling 432.019 sq. miles, or 276,492.16 acres) equaling roughly 3.55 million acres of land). Note that these rough statistics do not include diminishment for the Lake Traverse Indian Reservation of the Sisseton-Wahpeton Sioux.

43. Section 1151 reads:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or 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.

18 U.S.C. § 1151 (2012).

44. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 383 n. 14 (1980).

45. South Dakota is the only state litigant, not the federal government, routinely arguing for diminishment. Further, South Dakota consistently opposes all (off-reservation) land-into-trust applications in the state.

46. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-781, INDIAN ISSUES: BIA'S EFFORTS TO IMPOSE TIME FRAMES AND COLLECT BETTER DATA SHOULD IMPROVE THE PROCESSING OF LAND IN TRUST APPLICATIONS 8 (2006), available at <http://www.gao.gov/new.items/d06781.pdf> (referencing 25 C.F.R. § 151(2013)) [hereinafter GAO 2006 REPORT].

47. See H.R. 7902, 73rd Cong., (2d Sess. 1934) (original proposal of John Collier's bill); see also THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 8-19 (Vine Deloria, Jr., ed., 2002).

48. ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 190 (Univ. of Nev. Press 2000).

49. *Id.* at 192-93.

50. *Id.* at 220-236.

posal.⁵¹ The pair trimmed the proposed bill down from sixty sections to nineteen sections.⁵² Entire titles, such as provisions for an Indian court system, charter devices to establish Indian communities, and allowing Indians to remove their local superintendents, were completely removed.⁵³

However, the Act remained an important instrument for the development and acquisition of lands. A critical part of the Act was “to conserve and develop Indian lands and resources.”⁵⁴ Securing the land holdings in trust for the native population was seen as the key component for both economic security and self-determination for Indians.⁵⁵ Representative Howard, Senator Wheeler’s counterpart in the House, stated that section 5 would “provide land for Indians who have no land or insufficient land, and who can use land beneficially.”⁵⁶ Several instances in the legislative history of the Act made reference to providing land to the “landless Indian” by using section 5.⁵⁷ Therefore, a common argument of opponents to section 5 acquisitions is that Congress intended to trust land transfers to only “landless Indians.”⁵⁸

However, after comparing Collier’s original version of the IRA with the adopted version from 1934, and also considering how case law has interpreted section 5 based on congressional intent, the “landless Indian” argument is shaky at best. When John Collier proposed the first version of the IRA, the comparable section to section 5 was within title III (Indian Lands), section 7.⁵⁹ This section allowed the secretary to acquire lands “for the purpose of providing land for Indians for whom reservation or other land is not now available and who can make beneficial use thereof”⁶⁰ In contrast, section 5 of the current Act allows the secretary to acquire lands and place them into trust “for the purpose of providing land for Indians.”⁶¹ Based on this difference alone, it appears that Congress intentionally moved away from a narrow application of the section 5 power.

In addition, courts have interpreted Congress’s lofty goals of economic security and self-determination as an indication that section 5 was intended to serve a much broader Indian population. For example, the Eighth Circuit stated in *South Dakota v. U.S. Department of Interior* (“*South Dakota IV*”) that “[a]lthough the legislative history [of the IRA] frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indi-

51. *Id.* at 235, 250.

52. *Id.* at 250.

53. *Id.* at 251.

54. *South Dakota v. U.S. Dep’t of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (quoting H. R. REP. NO. 1804, 73rd Cong., 2d Sess., at 5 (1934)).

55. *Id.* (citing S. REP. NO. 1080, at 2 (1934)).

56. 78 CONG. REC. 11,370 (1934).

57. *See e.g.*, 78 CONG. REC. 11,726–11,727 (1934) (stating that the IRA would permit “the purchase of additional lands for landless Indians”); H. R. REP. NO. 1804, 73rd Cong., 2d Sess., at 6 (1934) (stating that the IRA would help “[t]o make many of the now pauperized, landless Indians self-supporting”).

58. *See e.g.*, *Examining Executive Branch Authority To Acquire Trust Lands For Indian Tribe: Hearing Before the S. Comm. On Indian Affairs*, 111th Cong. 136 (2009) (statement of Lawrence Long, S.D. Atty. Gen.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg52879/pdf/CHRG-111shrg52879.pdf>.

59. H.R. REP. NO. 7902, 73rd Cong., 2d Sess. (1934).

60. *Id.* (emphasis added).

61. 25 U.S.C. § 465 (2012).

ans.”⁶² Rather, Congress merely implied that section 5 acquisitions would more commonly be used for giving land to landless Indians.⁶³

III. THE ADMINISTRATIVE PROCESS OF PUTTING LAND INTO TRUST

In 1980, the Department of Interior (“DOI”) for the first time promulgated a regulatory process to make fee-to-trust transactions more uniform.⁶⁴ The final rule was established on September 18, 1980, as part of 25 C.F.R. part 120a but was redesignated as 25 C.F.R. part 151 in 1982.⁶⁵ Even though the DOI’s regulations were now subject to notice and comment, scholars argued that the process was too similar to the pre-1980 unpublished guidelines, where the DOI acted solely by discretion.⁶⁶ The 1980 regulations were significantly revised in 1995 to specifically address off-reservation acquisitions.⁶⁷ Prior to 1995, the regulations did not distinguish on- and off-reservation lands, and the new distinctions were primarily triggered by the Eighth Circuit’s decision in *South Dakota v. U.S. Department of Interior* (“*South Dakota I*”).⁶⁸

Currently, the application process for land into trust tracks the regulations set out in the C.F.R., but it has also been clarified with a recently published handbook from the BIA.⁶⁹ The procedure follows this general pattern: application, notification, final decision, administrative appeal, and judicial review.

A. Application, Notification, and Final Decision

Applications are generally processed by a combination of BIA realty staff at the Office of Trust in Washington, D.C., a BIA regional office, or a local BIA agency office.⁷⁰ If a tribe is considering placing land into trust, a written application must contain: (1) a map and legal description of the land; (2) justifications why the land should be placed in trust; (3) a description of the present use, the intended use, and whether there are any improvements on the land; and (4) a legal instrument showing ownership of the land.⁷¹ The BIA has additional requirements if an individual tribal member is petitioning for transfer.⁷²

62. *South Dakota v. U.S. Dep’t of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (*South Dakota IV*); see also *State of S.D. & Moody Cnty. v. Acting Great Plains Reg’l Dir.*, BIA, 39 IBIA 283, 289–90 (2004) (stating that Indians need not be landless for the Secretary to acquire land for them under authority of 25 U.S.C. § 465).

63. *South Dakota IV*, 423 F.3d at 798.

64. GAO 2006 REPORT, *supra* note 46, at 12.

65. *Id.* at 12 n. 12.

66. Padriac I. McCoy, *The Land Must Hold the People: Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 453–54 (2003).

67. GAO 2006 REPORT, *supra* note 46, at 12 n. 12.

68. *South Dakota v. U.S. Dep’t of Interior* (*South Dakota I*), 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).

69. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, *Fee-to-Trust Handbook, Version II*, 2011 [hereinafter *Handbook*], available at <http://www.bia.gov/idc/groups/xraca/documents/text/idc-002543.pdf>.

70. GAO 2006 REPORT, *supra* note 46, at 14.

71. *Handbook*, *supra* note 69, at 7–8.

72. *Id.* at 8–9. For example, individual tribal members petitioning for a trust transfer must also show “a) Evidence of eligible Indian status of the applicant. b) Amount of trust or restricting Indian land

After the submission from a tribe, the process differs based on whether the land is on-reservation, off-reservation, or for gaming. On-reservation, non-gaming applications are reviewed under 25 C.F.R. section 151.10. After the BIA receives a tribe's application, the secretary will notify the state and local governments, giving them thirty days for written comment on issues of jurisdiction and taxes.⁷³ If the state or local government responds, the tribe is given "reasonable time" to reply and/or request the secretary to make a decision.⁷⁴ A decision by the secretary for on-reservation land is based on the following factors:

1. Existence of statutory authority for the acquisition;
2. Need for the additional land by the tribe;
3. Purposes for which the land will be used;
4. If for an individual, the amount of land already in trust;
5. Impact on state and local governments' tax rolls;
6. Any jurisdictional conflicts that may arise;
7. Whether the BIA is prepared for the acquisition; and
8. Compliance with the National Environmental Protection Act.⁷⁵

Prior to a decision, the BIA has other internal procedures it follows such as coordinating with environmental compliance agencies and visiting the piece of land in question.⁷⁶

For off-reservation applications, a tribe must follow the same guidelines prescribed for on-reservation acquisitions, but must also provide the following information: (a) the location of the land and distance from the boundaries of the reservation and (b) a business plan if land is being acquired for business purposes describing the anticipated benefits.⁷⁷ When making the final decision, the secretary considers these additional factors and is required to give more scrutiny based on the distance of the land from the reservation.⁷⁸

B. Administrative Appeal and Judicial Review

After a tribe has applied for a transfer of land into trust, the state and local governments have been notified, and a final decision has been rendered by the BIA, the next step is either an administrative appeal or a judicial review of the decision. For administrative appeals, the process differs depending on who made the initial decision. An administrative appeal must be filed within thirty days.⁷⁹ If the initial decision was made by a BIA superintendent, an appeal is then filed with the re-

already owned by the applicant. c) Information or a statement from the applicant addressing the degree to which the applicant needs assistance in handling their affairs. . . ." *Id.*

73. On-Reservation Acquisitions, 25 C.F.R. § 151.10 (2013).

74. *Id.*

75. *Id.* It is important to note that weight and how the factors are applied are not stated within the IRA nor in the BIA's regulations, which is a common complaint of opponents to Indian land acquisition and also the GAO. GAO 2006 REPORT, *supra* note 46, at 15.

76. *Handbook*, *supra* note 69, at 13, 18.

77. *Id.* at 20.

78. Off-Reservation Acquisitions, 25 C.F.R. § 151.11(b) (2013).

79. GAO 2006 REPORT, *supra* note 46, at 14.

gional director who must render a decision within sixty days.⁸⁰ Subsequently, the decision can be appealed to the Interior Board of Indian Appeals (“IBIA”).⁸¹ If the initial decision was made by the regional director, then the decision can only be appealed to the IBIA.⁸² Lastly, if the Assistant Secretary of Indian Affairs made the decision, the decision is final and cannot be appealed to the IBIA.⁸³ For administrative appeals, IBIA reviews the discretionary decisions of superintendent or regional director to determine whether BIA gave proper consideration to all legal prerequisites, including any limitations on discretion established by federal regulation.⁸⁴

For judicial review of the land-into-trust acquisition, parties must file an appeal in federal court within thirty days after the BIA’s decision is published in the Federal Register or local newspaper.⁸⁵ Decisions by the BIA on whether to accept a fee-to-trust application are reviewed under an “arbitrary and capricious” standard as required by the Administrative Procedures Act.⁸⁶

IV. LEGAL CHALLENGES: THE EXAMPLE OF SOUTH DAKOTA

While no case has reached the Supreme Court concerning any of the myriad challenges—procedurally and substantively—there is a significant (and growing) body of federal district and circuit court jurisprudence on these issues. With one exception, the cases have uniformly upheld the constitutional, statutory, and regulatory scheme of section 5 of the IRA.

The lone exception is the case of *South Dakota v. U.S. Department of Interior*.⁸⁷ In this case, the State of South Dakota challenged the Secretary of Interior’s decision to take into trust ninety-one acres of land for the use of the Lower Brule Sioux Tribe.⁸⁸ The land is located seven miles from the Tribe’s reservation and is partially within the city of Oacoma.⁸⁹ The Tribe stated that the land would be used to create an industrial park adjacent to an interstate highway, explaining that the “status for the land and tax advantages are critically necessary for the development to occur.”⁹⁰

The State of South Dakota and the City of Oacoma protested in writing to the BIA.⁹¹ The BIA’s Aberdeen Area Director notified the State and City in March 1991 that the application would be approved, and they subsequently appealed to the

80. *Id.*

81. *Id.*

82. *Id.* at 15.

83. *Id.* at n. 17. Even though a decision by the Assistant Secretary of Indian Affairs is final, the decision may be appealed to federal court.

84. *Skagit Cnty., Wash., v. Nw. Reg’l Dir.*, 43 IBIA 62, 63 (2006).

85. GAO 2006 REPORT, *supra* note 46, at 14.

86. 5 U.S.C. § 706(2) (2013). *See also* *City of Lincoln v. U.S. Dep’t of Interior*, 229 F. Supp. 2d 1109, 1124 (D. Or. 2002) (holding the BIA did not act arbitrarily or capriciously when it approved fee-to-trust transfer of tribally-owned land within city limits, even though transfer had potentially adverse impact on city’s tax base).

87. 69 F.3d 878 (8th Cir. 1996) *vacated*, 519 U.S. 919 (1996). Given the ensuing litany of South Dakota cases, this case shall be referenced to as *South Dakota I*.

88. *Id.*

89. *Id.* at 880.

90. *Id.*

91. *Id.*

IBIA.⁹² The BIA then disclosed that the Assistant Secretary for Indian Affairs had approved the application in December 1990, without notifying the State or municipality.⁹³ The Board dismissed the appeal because it had no jurisdiction to review decisions by the assistant secretary.⁹⁴

The State and City then brought an action against the DOI in federal court seeking judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701–706.⁹⁵ The State and City asserted that they were aggrieved in many ways by the Secretary’s decision to place the land in trust.⁹⁶ Specifically, they asserted that the action of the Secretary improperly deprived them of (property) tax revenue and regulatory authority over the land inasmuch as section 465 of the IRA was an unconstitutional delegation of legislative power.⁹⁷ On the procedural side, they asserted that the Assistant Secretary acted beyond the scope of his delegated authority and that “the approval was arbitrary and capricious and not in accordance with the agency’s governing regulations” set out at 25 C.F.R. sections 151.1 through 151.14.⁹⁸ Lastly, the State and City asserted that the real reason of the Tribe for placing the land into trust was not to create an industrial park, but to develop a gaming casino, and such action failed to comply with the approval procedure of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721.⁹⁹

The Secretary moved to dismiss on the ground that section 465 acquisition is action “committed to agency discretion by law.”¹⁰⁰ The district court granted the motion to dismiss, concluding that section 465 was not an unconstitutional delegation of legislative power because the statute identified the agency to which the power was delegated and “clearly delineate[d] the general policy to be applied and the bounds of that delegated authority.”¹⁰¹ Somewhat oddly, the court did not reach the “committed to agency discretion” issue and on its own motion held that it had no jurisdiction to review any other claims because the Quiet Title Act, 28 U.S.C. § 2409(a), “does not apply to trust or restricted Indian lands.”¹⁰²

The Eighth Circuit, in a two-to-one decision reversed, holding that section 465 was unconstitutional based on the statute’s violation of the non-delegation doc-

92. *Id.*

93. *Id.*

94. *Id.* (citing *South Dakota v. Aberdeen Area Dir., Bureau of Indian Affairs*, 22 I.B.I.A. 126 (1992)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* This is somewhat of a peculiar assertion inasmuch as the Indian Gaming Regulatory Act expressly requires the Governor’s approval before any such land would be eligible before gaming pursuant to a State-Tribal gaming compact. *See* 25 U.S.C. § 2719 (b)(1)(A) (2012).

100. *South Dakota I*, 69 F.3d at 880.

101. *Id.* *See also* 5 U.S.C. § 701 (a)(2) (2012); *Heckler v. Chaney*, 470 U.S. 821, 828–30 (1985).

102. *South Dakota I*, 69 F.3d at 880–81. The court of appeals found this assertion dubious, stating:

We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue. The court in *Florida* conceded that the Quiet Title Act does not bar claims “that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land.” *Id.* at 880–81 n. 1 (quoting *Fla. Dep’t of Bus. Regulation v. U.S. Dep’t of Interior*, 768 F.2d 1248, 1255 n. 9 (9th Cir. 1985)).

trine.¹⁰³ The court noted that while the doctrine—“Congress may not constitutionally delegate its legislative power to another branch of government”—is easy to state, it is difficult to apply.¹⁰⁴

The court began its analysis with an examination of the very broad language of section 465:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.¹⁰⁵

The court found that there were “no perceptible ‘boundaries’ [or] ‘intelligible principles’” within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be “for Indians.”¹⁰⁶ In addition, the court found that such broad, even extravagant, interpretation was not justified by the legislative history of section 465.¹⁰⁷ In this history, the court found an agrarian focus that was completely disregarded by the Secretary.¹⁰⁸

The court was clearly annoyed and upset by the Secretary’s (arrogant) unwillingness to discern any limitations on his authority:

The Secretary has responded by asserting all of the unlimited power conferred by the statute’s literal language. First, he promulgated regulations that place no restrictions on the purpose for which land may be placed in trust “for Indians.” See 25 C.F.R. Section 151.10. Second, when his acquisition procedures and decisions were challenged in court, he asserted that his exercise of this power is not subject to judicial review under the APA because it is “committed to agency discretion.”¹⁰⁹

The court was further put off by the evasiveness of the Secretary’s answer as to whether the activities on this land within the boundaries of the City of Ocoma would be subject to its zoning rules.¹¹⁰

The court ultimately held that the statute was “invalid” because it “fails all three of the [relevant] non-delegation criteria.”¹¹¹ The court was appalled by an agency run amok:

103. *South Dakota I*, 69 F.3d at 885.

104. *Id.* at 881 (quoting *Touby v. United States*, 500 U.S. 160, 165 (1991)).

105. *Id.* at 882 (quoting 25 U.S.C. § 465 (2012)).

106. *Id.* at 883.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 883–84.

111. *South Dakota I*, 69 F.3d at 885:

First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our

Those who drafted § 465 failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles.¹¹²

Justice Murphy's dissent admonished the majority for its unnecessary stretch to consider the constitutionality of the underlying statute, when non-constitutional issues needed to be considered and resolved *against* the State and City before directly considering the constitutionality of the statute.¹¹³ Specifically,

Rather than addressing the jurisdictional issue, the majority stretches to consider the constitutionality of the underlying statute. A cardinal principle guiding federal courts is that constitutional issues should not be reached unless necessary to a decision. *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985). This is a 'fundamental rule of judicial restraint.' *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984). The court suggests, but does not decide that the district court had jurisdiction to consider the claims brought under the APA. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the plaintiffs.¹¹⁴

The decision in this case sent shockwaves throughout the world of Indian law. What dire consequences would potentially come from it? The dilemma most directly confronting the DOI was how to deal with this most adverse precedent that had *not* been recognized or established in any other circuit. Certainly, the Department had to file a petition for certiorari with the Supreme Court in light of the circuit split.¹¹⁵ Yet there was concern that approaching the appeal in such a routine manner risked the likelihood that the petition for certiorari would be granted and affirmed by the Supreme Court, thereby wiping out the primary federal vehicle for undoing,

Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards.

Id. (quoting *Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (citations omitted)).

112. *Id.* at 885.

113. *Id.* at 885 (Murphy, J., dissenting).

114. *Id.*

115. See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 24-50 (9th ed. 2007) (stating "[t]he Supreme Court often, *but not always*, will grant certiorari where the decision of a federal court of appeals . . . is in direct conflict with a decision of another court of appeals on the same matter of *federal law* . . .") (emphasis in original); see also SUP. CT. R. 10(a) ("Considerations Governing Review on Writ of Certiorari").

or at least tempering, the ravage of allotments and the loss of 90 million acres of Indian land.

The DOI, in a strategy largely crafted by then-Deputy Solicitor Robert Anderson,¹¹⁶ filed its petition for certiorari, but expressly requested that the court grant certiorari, then immediately vacate its order (without briefing or oral argument) and remand the case to the Eighth Circuit to reconsider its decision in light of new land-into-trust regulations promulgated by the BIA.¹¹⁷ The petition for certiorari was granted on these conditions, and the case was remanded.¹¹⁸

In an unusual move, Justice Scalia (joined by Justices O'Connor and Thomas) filed a brief written dissent to this action taken by their colleagues.¹¹⁹ The principal grounds for dissent were that the new regulations by their terms would not apply to the case at bar because the land in issue had already been taken into trust by the Secretary.¹²⁰

Despite these qualms, the case was remanded, and thus began a long series of encounters between the DOI (along with South Dakota tribes) and the State of South Dakota. In accordance with the DOI's new rules for taking land into trust, the BIA withdrew the land from trust status.¹²¹

In round two, the land was again placed into trust after a full BIA review under the (new) amended regulations found at 25 C.F.R. section 151.¹²² The State of South Dakota subsequently sued the DOI seeking declaratory and injunctive relief to prevent transfer of the property in trust for the Lower Brule Sioux Tribe.¹²³ Both parties filed motions for summary judgment.¹²⁴ The State raised two issues: namely

116. Now a professor of law at the University of Washington School of Law and Harvard Law School.

117. *Dep't of Interior v. South Dakota (South Dakota II)*, 519 U.S. 919, 920 (1996).

118. *Id.*

119. *Id.*

120. *Id.* at 921 (Scalia, J., dissenting). This dissent expressly stated:

But we have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the court of Appeals is obvious. ("Heads I win big," says the Government; "tails we come back down and litigate again on the basis of a more moderate Government theory.") Today's decision encourages the Government to do what it did here: to "go for broke" in the courts of appeals, rather than get the law right the first time.

Id. at 921. The term "GVR" is shorthand for the Supreme Court's rare practice to grant a petition for certiorari then immediately vacate it and remand it based on some significant change of circumstances. In this case, the significant change would be the expansion and greater detail of new land into trust regulations.

121. *South Dakota v. U.S. Dep't of Interior (South Dakota III)*, 314 F.Supp.2d 935, 939 (D.S.D. 2004). See 25 C.F.R. § 151.12(b) (2013) which provides:

Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

Id.

122. *South Dakota III*, 314 F.Supp.2d at 940.

123. *Id.*

124. *Id.*

that the BIA action was arbitrary and capricious and thus a violation of the Administrative Procedures Act, and that section 465 of the IRA was an unconstitutional delegation of legislative authority.¹²⁵

The district court ruled against the State on both issues and upheld the constitutionality of the statute and the decision of the BIA to place the land into trust. Specifically, the district court found that this (off-reservation) land was merely for tribal economic development, did not deprive the State (and County) of significant tax revenue, and did not create significant jurisdictional issues.¹²⁶ In addition, the district court upheld the constitutionality of the statute because the new regulations properly narrowed the BIA's discretion within appropriate "boundaries" and, more importantly, satisfied the broader (and more recent) delegation test recognized in *Whitman v. American Trucking Associations, Inc.*¹²⁷

South Dakota appealed this decision to the Eighth Circuit and raised the same issues. The panel unanimously affirmed the district court's decision.¹²⁸ The court noted in passing that the Supreme Court had only struck down two statutes on non-delegation grounds,¹²⁹ and the Court was increasingly inclined not to second-guess Congress on such matters. In fact, no congressional statute had been struck down on non-delegation grounds since 1935.¹³⁰

The court concluded that

an intelligible principle exists in the statutory phrase "for the purpose of providing land for Indians" when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department. We therefore affirm the grant of summary judgment for the Department on the nondelegation doctrine challenge.¹³¹

The court also upheld the district court's finding that the BIA had not acted arbitrarily or capriciously by putting the land into trust.¹³² Further, its findings relevant to tribal economic development, minimal loss of state and county property tax revenue, and lack of jurisdictional problems did not constitute an abuse of discretion.¹³³

In sum, the trajectory of *South Dakota I, II, III, and IV* ranges from the Eighth Circuit's original decision that section 465 of the IRA was an unconstitutional delegation of legislative authority ("*South Dakota I*"); to the decision by the United

125. *Id.*

126. *Id.* at 942–47 (construing 25 C.F.R. Parts 151.1, 151.10(b)–(c), 151.10(e), 151.10(g), 151.11(b) and 151.3(a)(3)).

127. *Id.* at 948–53 (citing *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457 (2001)).

128. *South Dakota v. Dep't of Interior (South Dakota IV)* 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 549 U.S. 813 (2006).

129. *Id.* at 795 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

130. *Id.* at 795.

131. *Id.* at 799. The Court also noted that because the Supreme Court had vacated the Eighth Circuit's earlier decision from 1995, the present panel was not bound by its earlier decision. *Id.* at 796.

132. *Id.* at 801.

133. *Id.* at 799–802.

States Supreme Court (“*South Dakota II*”) to issue a GVR (granting certiorari, vacating the judgment below, and remanding the case with minimal direction) based on the new land-into-trust regulations promulgated by the BIA; to the decision of the federal district court (“*South Dakota III*”) finding section 465 constitutional as well as finding the Secretary’s decision to put the land into trust (again) was not arbitrary and capricious; and finally to the Eighth Circuit’s decision to affirm the judgment of the district court (“*South Dakota IV*”).

One might think that this would have been the end of the South Dakota saga concerning land-into-trust issues, but it was not. In this regard, it is also worth noting that no other federal district or circuit court has found section 465 to be unconstitutional. In fact, it has been expressly upheld as constitutional in the District of Columbia,¹³⁴ First,¹³⁵ and Tenth¹³⁶ Circuits and by a Ninth Circuit district court.¹³⁷

Despite this unanimous precedent to the contrary, South Dakota has continued to challenge *every* decision by the Secretary of Interior to put off-reservation land into trust for a South Dakota tribe. These include cases involving the Yankton Sioux Tribe,¹³⁸ the Sisseton-Wahpeton Sioux Tribe,¹³⁹ and the Flandreau Santee Sioux Tribe.¹⁴⁰ South Dakota lost all three cases.

The accompanying chart graphically illustrates the text.

134. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009) (ruling that section 465 was not an unconstitutional delegation because section 465 and other sections within the IRA contained an “intelligible principle,” and approving the DOI’s taking of two parcels of off-reservation land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians).

135. *Carcieri v. Kempthorne*, 497 F.3d 15, 22 (1st Cir. 2007) (en banc), *rev’d on other grounds*, 555 U.S. 379 (2009) (holding that section 465 does *not* apply to tribes that were federally recognized after 1934).

136. *United States v. Roberts*, 185 F.3d 1125, 1136–37 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (rejecting a criminal defendant’s argument that section 465 was an unconstitutional delegation in an attempt to disrupt the federal government’s jurisdiction under the Major Crimes Act); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 549 U.S. 809 (2006) (relying on *Roberts*, the court ruled that section 465 was not an unconstitutional delegation, and restricted the State of Utah and City of St. George from exercising police powers on tribal lands).

137. *City of Lincoln City v. U.S. Dep’t of Interior*, 229 F.Supp.2d 1109, 1115 (D. Or. 2002) (ruling a trust transfer within city limits was not arbitrary and capricious, and rejecting city’s claims that section 465 violated republican form of government and was an unconstitutional delegation).

138. *See generally* *Cnty. of Charles Mix v. U.S. Dep’t of Interior*, 674 F.3d 898 (8th Cir. 2012).

139. *See generally* *South Dakota v. U.S. Dep’t of Interior*, 775 F. Supp. 2d 1129 (D.S.D. 2011), *aff’d*, 665 F.3d 986 (8th Cir. 2012). This case is particularly interesting in that South Dakota, while it raised its standard arguments of unconstitutional delegation concerning section 465, arbitrary and capricious in violation of Administrative Procedure Act, denial of republican form of government, and denial of due process specifically because of the alleged bias of the local BIA Superintendent because he is a tribal member and was the former Chair of the Tribe (and lost on all of its arguments), it raised only the due process claim before the Eighth Circuit, which it also lost. Does this potentially mean that the State now accedes to the rule of all the other Circuits that held section 465 is constitutional? Only time will tell.

140. *See generally* *South Dakota v. U.S. Dep’t of Interior*, 487 F.3d 548 (8th Cir. 2007).

Chart A

Case	Tribe Involved	Amount of Land Involved	State Legal Arguments	Result
<i>South Dakota v. Dept' of Interior</i> ¹⁴¹	Lower Brule Sioux	91 acres	Non-delegation; arbitrary and capricious decision; acquisition violated Indian Gaming Regulatory Act ¹⁴²	IRA § 5 ruled constitutional delegation; Secretary's decision not arbitrary and capricious; no intent of tribe to use for gaming ¹⁴³
<i>Cnty. of Charles Mix v. Dep't of Interior</i> ¹⁴⁴	Yankton Sioux	39 acres	Non-delegation; Republican form of government; violation of Tenth Amendment; Tribal Council lacked jurisdiction; arbitrary and capricious decision ¹⁴⁵	IRA § 5 ruled constitutional; no violation of Tenth Amendment or the Republican Guarantee Clause; Court lacked jurisdiction over actions of the Tribal Council; Secretary's decision not arbitrary and capricious ¹⁴⁶
<i>South Dakota v. Dep't of Interior</i> ¹⁴⁷	Sisseton-Wahpeton Sioux	366 acres	Violation of Due Process due to bias ¹⁴⁸	Bias claim dismissed for lack of standing ¹⁴⁹
<i>South Dakota v. Dep't of Interior</i> ¹⁵⁰	Flandreau Santee Sioux	310 acres	Non-delegation; acquired land beyond requisite economic criteria; land did not constitute "Indian Country" ¹⁵¹	State and county lost on all claims in Eighth Circuit; IRA ruled constitutional ¹⁵²

141. *South Dakota IV*, 423 F.3d 790 (8th Cir. 2005).

142. *Id.* at 795, 802.

143. *Id.* at 799, 802–03.

144. *Cnty. of Charles Mix v. U.S. Dep't of Interior*, 674 F.3d 898 (8th Cir. 2012).

145. *Id.* at 901–03.

146. *Id.* at 901–04.

147. *South Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129 (D.S.D. 2011) *aff'd*, 665 F.3d 986 (8th Cir. 2012).

148. *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 987–88 (8th Cir. 2012).

149. *Id.* at 991.

150. *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548 (8th Cir. 2007).

151. *Id.* at 551.

152. *Id.* at 551, 553–54.

Additional research also demonstrates that only one challenge to the constitutionality of section 465 in other circuits was actually advanced by the state itself.¹⁵³ All other cases involved private litigants making the challenge.¹⁵⁴ Nor were there persistent and repeated constitutional challenges in any other circuit. This is, of course, in line with circuit court jurisprudence that prohibits any panel of the circuit from overruling or overturning the precedent of the circuit, even if it was decided by a different panel within the circuit.¹⁵⁵ The State of South Dakota does not appear to recognize or to honor this rule.

This South Dakota persistence, even intransigence, is doctrinally indefensible, extremely costly to the state, and with little or no cost benefit. For example, South Dakota consistently complains about the loss of local property tax revenue when land is placed into trust. While this is a completely legitimate argument, it makes sense to examine the *amount* of property tax revenue loss and evaluate it within a cost/benefit framework.

The relevant acres and (lost) tax revenues are tabulated on the following chart for South Dakota:

153. See *Carcieri v. Kempthorne*, 497 F.3d 15, 21–22 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 379 (2009).

154. See *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008) (non-profit corporation affirmatively raising issue of constitutionality); *United States v. Roberts*, 185 F.3d 1125, 1136 (10th Cir. 1999) (criminal defendant defensively raising issue of constitutionality); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 970 (10th Cir. 2005) (presenting a unique case where the tribe was the plaintiff and the state only raised the issue of IRA's constitutionality after the tribe filed for injunctive relief).

155. See, e.g., *United States v. Wright*, 22 F.3d 787, 788 (8th Cir. 1994) (stating that “a panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc”); see also *Salmi v. Sec’y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”).

Land Into Trust: South Dakota's Property Tax Loss (Chart B)

Case	Tribe	Acres at Issue	(Lost) Tax Revenue
<i>South Dakota v. Dep't of Interior</i> ¹⁵⁶	Lower Brule Sioux	91 acres	2,587.02 ¹⁵⁷
<i>Cnty. of Charles Mix v. Dep't of Interior</i> ¹⁵⁸	Yankton Sioux	39 acres	6,423 ¹⁵⁹
<i>South Dakota v. Dep't of Interior</i> ¹⁶⁰	Sisseton-Wahpeton Sioux	366 acres	3,289.92 ¹⁶¹
<i>South Dakota v. Dep't of Interior</i> ¹⁶²	Flandreau Santee Sioux	310 acres	4,119.10 ¹⁶³
Totals		806 acres	16,419.04

The total land involved and lost tax revenue in these cases (from 1995–2012) is quite modest, arguably less by several magnitudes than the cost of litigating these cases up and down the federal system. Indeed, the state has given no indication that it plans to adopt any new approach inside or outside its commitment to litigation. No state anywhere in the United States has adopted a more comprehensive and combative strategy than South Dakota to oppose land-into-trust applications. Despite the zealous and expensive commitment, the state attorney general's office has never issued a press release relative to land-into-trust issues and has no written public policy as to what the state's goals are in this area of tribal-state relations.¹⁶⁴

156. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 549 U.S. 813 (2006).

157. *South Dakota v. U.S. Dep't of Interior*, 314 F.Supp.2d 935, 945 (D.S.D. 2004), *aff'd*, 423 F.3d 790 (8th Cir. 2005).

158. *Cnty. of Charles Mix v. U.S. Dep't of Interior*, 674 F.3d 989 (8th Cir. 2012).

159. Brief of Appellant Cnty. of Charles Mix, *Cnty. of Charles Mix v. U.S. Dep't of Interior*, 674 F.3d 989 (8th Cir. 2012) (No. 11-2217), 2011 WL 4351442 at *3.

160. *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986 (8th Cir. 2011).

161. *South Dakota v. U.S. Dep't of Interior*, 775 F.Supp.2d 1129, 1143 (D.S.D. 2011).

162. *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548 (8th Cir. 2007).

163. Federal Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, *South Dakota v. U.S. Dep't of Interior*, 2005 WL 36535314, Civ. No. 04-4073 (D.S.D.).

164. Unfortunately, this is not atypical or out of the ordinary for the state. Contentious litigation, without (written) public policy, is also found in the areas of Indian voting rights and representation, Indian inmates' First Amendment rights, and the Indian Child Welfare Act. *See, e.g.*,

Voting Rights:

- *Emery v. Hunt*, 615 N.W.2d 590, 597 (S.D. 2000) (ruling on a certified question from Federal District Court and holding that South Dakota's 1996 legislative districting plan was void, stating the South Dakota Legislature "acted beyond its constitutional limits");
- *Bone Shirt v. Hazeltine*, 200 F. Supp.2d 1150 (D.S.D. 2002) (ruling that South Dakota's state redistricting plan creating a "supermajority" of Indian voters in one district violated the Voting Rights Act and diluted the Indian vote in South Dakota);

It is also quite interesting to consider the reverse process of trust land going into fee status and entering county tax rolls. The following chart for South Dakota and neighboring states is quite revealing:

Fee-to-Trust / Trust-to-Fee Transactions (2000–2012) (Chart C)¹⁶⁵

State	Fee to Trust		Trust to Fee	
	Count Total	Acres Total	Count Total	Acres Total
Minnesota	3	160.000	7	293.520
North Dakota	0	0.000	31	4,310.910
Montana	30	5,909.622	188	35,972.163
New Mexico	0	0.000	6	1.642
South Dakota	2	1,869.640	160	24,008.420
TOTAL	35	7,939.262	392	64,586.655

- *Weddell v. Wagner Cmty. Sch. Dist.*, No. 02-4056 (D.S.D. Mar. 18, 2003) (challenging a school board’s use of at-large voting to elect the board of education and eventually the claim was settled after the school board agreed to use cumulative voting);
- *Kirkie v. Buffalo Cnty.*, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 12, 2004) (challenging a county’s districting, which packed almost all of the Indian population into one district, leaving the remaining two county commission spots to be elected by 17% of the white population and therefore control the county commission);
- *Cottier v. City of Martin*, 466 F. Supp.2d 1175 (D.S.D. 2006) (finding city council districting so diluted the Indian vote that the plan violated Indian voter’s Equal Protection rights, and after refusing to create a remedial plan, the District Court implemented a plan), *rev’d*, 604 F.3d 553 (8th Cir. 2010) (en banc) (finding no vote dilution);
- *Brooks v. Gant*, 2012 U.S. Dist. LEXIS 144893 (D.S.D. Oct. 4, 2012) (challenging Shannon County’s failure to provide early voting for Shannon County residents, a county located entirely within the Pine Ridge Indian Reservation);
- For an in-depth discussion of voting rights cases involving South Dakota and Tribes see Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, a Case Study*, 29 AM. IND. L. REV. 43 (2005).

Native American Religion:

- *Native Am. Council of Tribes v. Weber*, 2012 U.S. Dist. LEXIS.133937, 2012 WL 4119652 (D.S.D. Sept. 19, 2012) (ruling against the South Dakota Penitentiary System’s ban of tobacco in prisons, finding no compelling interest to burden Indian prisoners’ use of tobacco as part of ceremonial sweat lodges, and suggesting the parties negotiate a policy to allow inmates to practice the Lakota religion).

Indian Child Welfare Act:

- *Cheyenne River Sioux Tribe v. Davis*, 2012 SD 69, ¶ 11, 822 N.W.2d 62, 65 (ruling in favor of a South Dakota circuit judge’s use of state law instead of the Indian Child Welfare Act during a temporary (emergency) custody hearing involving three Indian children).

165. Statistics provided by the Bureau of Indian Affairs, Office of Trust Services, Division of Land Titles and Records based on data extracted from the Trust Asset and Accounting Management System (TAAMS), Nov. 3, 5, 2012, on file with author. The statistics do not include any land into trust from recently litigated cases, including *S.D. v. U.S. Dep’t of Interior*, 423 F.3d 790 (8th Cir. 2005) (involving the Lower Brule Sioux Tribe); *S.D. v. U.S. Dep’t of Interior*, 487 F.3d 548 (8th Cir. 2007) (involving the Flandreau Santee Sioux Tribe); *S.D. v. U.S. Dep’t of Interior*, 665 F.3d 986 (8th Cir. 2011) (involving the Sisseton-Wahpeton Sioux Tribe); and *Cnty. of Charles Mix v. U.S. Dep’t of Interior*, 674 F.3d 898 (8th Cir. 2012) (involving the Yankton Sioux Tribe). Even including land going into trust from the recently-litigated cases, it changes the numbers only slightly (increasing fee to trust from 1800 to 2600 acres).

The results are very surprising because in each state considered, especially South Dakota, there is a net gain of land being placed on the tax rolls as opposed to being taken off the tax rolls. South Dakota's numbers are particularly revealing in that it appears that at least ten times more land has gone onto the tax rolls between 2000 and 2012 than leaving the tax rolls during the same period (24,008 acres leaving trust status versus roughly 1,869 acres entering trust status).¹⁶⁶

The issue of jurisdiction, especially law enforcement, is another mainstay in South Dakota arguments against land-into-trust applications by South Dakota tribes. The state makes this routine argument for land-into-trust applications involving land outside the current boundaries of a reservation. This "checkerboard" argument has never prevailed, but it is not completely without merit. This is especially true in the area of criminal jurisdiction, in which public safety issues exist for both law-abiding Indians and non-Indians.

It is not difficult to grasp the public safety concerns and potential law enforcement issues. Understaffed tribal law enforcement will have more territory to cover in the off-reservation land-into-trust situations without any additional resources. Yet the answer is not necessarily either the risk of no land into trust (state's position) or all land into trust regardless of public safety concerns (tribes' position), but rather a middle ground commitment to use and to obtain the benefits of cross-deputization. Cross-deputization does *not change* the jurisdictional rules, but allows for a more *efficient* enforcement of the (current) rules. An efficiency designed to advance (new) public safety, not the (old) animosity of race and reaction.

The public safety issue, while not tracked in any detail in any federal judicial opinion to date¹⁶⁷ is not likely to continue to remain under the radar. For example, if, as is likely, the Rosebud Sioux Tribe seeks to place the 1,940 acres it recently purchased in the Black Hills into trust, the criminal jurisdiction/public safety issue will potentially find itself front and center. The land in question is over 150 miles from the western boundary of the Rosebud Sioux Reservation, and practical law enforcement questions will likely be readily forthcoming.

This situation is also fraught because the land at issue is not simply land that was originally part of the Great Sioux Nation Reservation as established by the Fort Laramie Treaty of 1868, but it is part of the sacred Black Hills, the holy place of the creation for Lakota people.¹⁶⁸ This particular land parcel is identified as "Reynolds Prairie" but is referred in Lakota as "Pe'Sla."¹⁶⁹ In fact, this Black Hills land situation has resulted in one of the few public statements by the South Dakota Attorney General on land-into-trust issues. Attorney General Jackley said: "I couldn't

166. *Id.*

167. Jurisdiction and distance from reservation borders are relevant factors in any land into trust application. *See* 25 C.F.R. §§ 151.10(f), 151.11(b) (2013).

168. *About Borderlands*, BORDERLANDS RANCH, <http://www.borderlandsranch.org/about.htm> (last visited May 13, 2013).

169. *Id.*

tell you what the policy would be now Before any decisions would be made, we'd have to sit down with the governor's office and talk about policy and law."¹⁷⁰

V. SUPREME COURT DECISIONS ON LAND-INTO-TRUST ISSUES

In addition to the Supreme Court's decision to GVR the Lower Brule Sioux case,¹⁷¹ it has decided two other cases involving land-into-trust issues. These cases are *Carcieri v. Salazar*¹⁷² and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.¹⁷³

In *Carcieri*, the Court confronted the question whether there was any language in section 465¹⁷⁴ that limited its applicability to certain tribes. The Court found that the single word "now" that appears in the IRA's definition of the term "Indian" at section 479¹⁷⁵ limited section 465's reach to tribes (and individual Indians) that were federally recognized at the time that the statute was enacted in 1934. The Narragansett Tribe of Rhode Island—the challenged tribe in this instance—was federally recognized in 1983, and the decision in this case excluded it from participation in the land-into-trust process.¹⁷⁶

The Court's reasoning about the *meaning* of the word "now" is not implausible, but simply misapplied. The Court never adequately explains why the statutory definition of the term "Indian," referring to individual Indians, should apply to Indian tribes, which are sovereign entities engaged in self-governance. The field of Indian law has never conflated the two. As Justice Stevens notes in his dissent, the term Indian tribe appears several times elsewhere in the statute without any reference to the word "now."¹⁷⁷ Justice Stevens further explains that there is good reason

170. Steve Young, *Tribe Wants Land Held in Trust*, SIOUX FALLS ARGUS LEADER, Sept. 17, 2012, at 1A, 4A, available at http://www.argusleader.com/article/20120917/NEWS/309170026/Tribe-wants-land-held-trust?nclick_check=1.

171. U.S. Dep't of Interior v. South Dakota, 519 U.S. 919 (1996); see also *supra* notes 69–102 and accompanying text.

172. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

173. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012).

174. 25 U.S.C. § 465 (2012).

175. The statutory definition reads:

The term "Indian" as used in this Act shall include all persons of Indian descent who *are members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood

Carcieri, 555 U.S. at 388 (quoting 25 U.S.C. § 479 (2012)) (emphasis in original).

176. *Id.* at 384, 395–96. This decision effectively eliminated at least forty tribes from participating in the land into trust program because they were not federally recognized in 1934. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25–26 (2001), available at <http://www.gao.gov/assets/240/232806.pdf>. There is now a move afoot in Congress to amend section 465 of the IRA so as to include all federally recognized tribes regardless of the date of their federal recognition. To date, the proposed legislation, often referred to as the *Carcieri* fix, has not been enacted into law.

177. *Id.* at 402, 404–08 (Stevens, J., dissenting).

to treat individual Indians differently from Indian tribes for purposes of putting land into trust.¹⁷⁸

The Supreme Court also recently weighed in on another important procedural aspect of land-into-trust challenges. In the *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*¹⁷⁹ case, the Court held in an eight-to-one decision that the United States waiver of sovereign immunity under the Administrative Procedures Act¹⁸⁰ does *not* create any bar to legal challenges to the Secretary's decision of putting land into trust.¹⁸¹ Specifically, the Court found that the federal Quiet Title Act¹⁸² authorizes a plaintiff to bring suit based on a "right, title, or interest" in real property that conflicts with a "right, title, or interest" claimed by the United States.¹⁸³ The same provision contains an exception for "trust or restricted Indian lands."¹⁸⁴ The Court decided that this proviso did not reach a challenger who does *not* assert any *right, title, or interest* in the disputed property, but rather asserts economic, environmental, or aesthetic harms from the casino's operation.¹⁸⁵

The Court's decision in the opinion authored by Justice Kagan proceeds in a quite linear approach, but it seems to miss the essential oddity of concluding that an individual with a *lesser* interest (i.e. no "right, title, or interest" in the property) gets more opportunity than someone with a greater interest to continue to challenge and prolong the administrative process of placing land into trust.

As Justice Sotomayor's dissent indicates, this will allow such individuals (perhaps someone "recruited" for that very purpose) to prolong the land-into-trust process all through federal court appeals upon the exhaustion of administrative remedies.¹⁸⁶ Such an extension of judicial review may well undermine the ability of the tribe to engage in the planned economic activity (e.g. gaming, retail, and manufacturing activities) because willing economic partners will be put off by such additional delay.¹⁸⁷ Potential economic advances in Indian country will again be sloughed off and cast aside for no good reason.

VI. SEARCH FOR COMMON GROUND

The persistence of the South Dakota strategy in these matters to litigate first, last, and always might lead one to think that there is no other option. Yet there are several alternative approaches close at hand—approaches that are arguably more balanced and offer potential for achieving some middle ground. These include a

178. *Id.* at 404–08 (Stevens, J., dissenting) (stating that "[h]aving separate definitions for 'Indian' and 'tribe' is essential for the administration of IRA benefits.").

179. *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012).

180. 5 U.S.C. § 702 (2006).

181. *Patchak*, 132 S. Ct. at 2207–08.

182. Quiet Title Act (QTA) of 1975, Pub. L. No. 92-562, 86 Stat. 1176.

183. *Patchak*, 132 S. Ct. at 2205 (referencing 28 U.S.C. § 2409a(d) (2012)).

184. *Id.* (referencing 28 U.S.C. § 2409a(a) (2012)).

185. *Id.* at 2211–12. The facts in this case are that respondent Patchak owned land adjoining the land placed into trust for the petitioner Tribe's casino in Wayland, Michigan. *Id.* at 2203. The casino was completed in 2011 and has been in continuous operation since then. Garret Ellison, *Supreme Court Decision on Gun Lake Casino Lawsuit Reaches Far Beyond Michigan*, MLIVE MEDIA (June 18, 2012, 8:02 PM) http://www.mlive.com/business/west-michigan/index.ssf/2012/06/supreme_court_decision_on_gun.html.

186. *Patchak*, 132 S. Ct. 2199.

187. *Patchak*, 132 S. Ct. at 2217 (Sotomayor, J., dissenting).

new federal reimbursement approach, a state-tribal partnership approach, and the establishment of a national intertribal infrastructure development authority.

A. New Federal Reimbursement Plan

The federal government, more specifically Congress, has often demonstrated a remarkable inability to foresee basic problems with its legislation in the field of Indian affairs. The General Allotment Act¹⁸⁸ itself provides a classic example. While a central component of the General Allotment Act was to provide land allotments to individual Indians, it never addressed the most practical of consequences relative to inheritance and potential fractionalization through multiple heirs when allottees (and their heirs) die without wills. For example, if an original allottee of 160 acres dies intestate and leaves four heirs, and this repeats itself for two additional generations, there would be sixty-four individuals with interest in that original allotment. This process of fractionalization continues to go on in a largely unresolved manner.¹⁸⁹

When land into trust became part of the IRA's commitment to reverse and ameliorate the more direct issue of land loss, the statute failed to see the likely result of taking *taxable* land into trust without the slightest recognition of the reduction of the taxable land base within local counties. This loss of local property tax—especially in poor states like South Dakota—would appear problematic—robbing Peter to pay Paul—and shortsighted. As the chart above indicates, even though the tax revenue loss is quite modest, shouldn't there be a federally funded property tax reimbursement program to ease the loss? Certainly, it would seem fair and quite likely to ease tribal-state acrimony on this controversial issue. In fact, such a program already exists.

The federal Payment in Lieu of Taxes Act ("PILT Act") allows the federal government to allot funds to pay states for lands held by certain federal agencies in lieu of paying property taxes for the properties.¹⁹⁰ The law covers lands held by the DOI including Bureau of Land Management lands, Wildlife and Fisheries lands, and National Park Service lands, and lands held by other agencies like the Army Corps of Engineers and Department of Agriculture as National Forest and National Wilderness lands.¹⁹¹ A noticeable absence from the PILT Act is trust lands held by the DOI for the benefit of tribes and tribal members.¹⁹²

The DOI is charged with administering the entire program, even though other agencies are involved.¹⁹³ The formula for payments to states is dependent on several factors: acres of eligible lands in the county, population of the county, previous

188. Indian General Allotment Act (Dawes Act) (GAA) of 1887, ch. 119, 24 Stat. 388 (1887).

189. FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 129–31 (Oxford University Press 2009).

190. 31 U.S.C. §§ 6901-07 (2006).

191. *Payments in Lieu of Taxes*, U.S. DEP'T OF THE INTERIOR, <http://www.doi.gov/pilt/index.cfm> (last visited Mar. 21, 2013).

192. See M. LYNNE CORN, CONG. RESEARCH SERV., RL31392, *PILT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED* 13 (2012) CONG. RESEARCH SERV. 13 (July 25, 2012), available at <http://www.fas.org/spp/crs/misc/RL31392.pdf>. Other noticeable exclusions include National Wildlife Refuge System lands, military bases, post offices, and federal office buildings. *Id.* at 6.

193. *Payments in Lieu of Taxes*, *supra* note 191.

year's payments under other federal payment programs, amount of required funding from the federal government that passes to other local government entities, and increases in the Consumer Price Index.¹⁹⁴ Federal PILT payments are made in addition to revenues derived from federal lands, which are later transferred to states (e.g. oil and gas leasing, timber harvesting, and livestock grazing),¹⁹⁵ but PILT payments may be reduced by such revenue-sharing payments.¹⁹⁶

The mandates under the federal PILT program are notoriously underfunded.¹⁹⁷ The PILT Act requires annual appropriations from Congress before the DOI can make any payments.¹⁹⁸ Often, appropriations are not sufficient to meet what the Act allows for payments. For example in 2003, Congress allocated slightly more than \$200 million for PILT payments when the Act authorized (and states should have received) payments totaling roughly \$325 million.¹⁹⁹ Despite these practical shortcomings, the Payment in Lieu of Taxes Act provides an existing legal framework through which the federal government could quite easily advance the viability of land-into-trust efforts by offsetting any state and local tax revenue concerns. Such an approach certainly enhances the IRA goal of providing more land for Indians and Indian tribes.

B. State-Tribal Partnership Approach

Creative efforts by the state are also possible. For example, the state might take a more holistic approach by looking at the other half of the land-into-trust question. The state should also examine the *addition* of Indian land to the local property tax rolls through the trust-to-fee process in order to more accurately determine whether there is a net gain or loss to the tax base.²⁰⁰ A complete accounting of these fee-to-trust (loss of tax revenues) and trust-to-fee (gain of tax revenues) transactions provides a more comprehensive and reliable record to address the tax revenue issue.

Another creative and respectful approach by the state might be to seek ways that it might work together with a tribe. For example, might it be possible for the state and tribes to discuss and to explore ways to engage in cooperative efforts with respect to sacred lands put into trust in the Black Hills? A jointly-sponsored park, sacred site, cultural museum? Such possibilities might easily be seen as too far out there, but then again, maybe not. Beneficial possibilities begin with their articulation. And as mentioned previously, there is the positive potential of cross-deputation in the context of public safety.²⁰¹

194. See CORN, *supra* note 192, at 4.

195. *Id.*

196. See CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL32393, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND AND RESOURCES MANAGEMENT 18 (2004), available at <http://www.nationalaglawcenter.org/assets/crs/RL32393.pdf>.

197. See *id.* at 18.

198. *Id.* at 17.

199. *Id.* at 18.

200. See *supra* note 165 and accompanying text and Chart C.

201. See *supra* notes 167–170 and accompanying text.

C. National Intertribal Infrastructure Development Authority

As I have written in a slightly different context,²⁰² one policy initiative with which to confront this challenge might involve the establishment of a National Intertribal Infrastructure Development Authority (“NIIDA”). Given the growing asymmetry of wealth and economic development in Indian country, it makes sense that the more wealthy tribes (e.g. Mashantucket Pequot, Prairie Island Indian Community, Saginaw Chippewa Tribe) that already disperse a small percentage of their net revenues to local non-Indian groups and county and city governments should commit a similar (if not greater) stream of revenue for infrastructure development of less developed tribes, who are often stymied by their own lack of resources. It makes little political or cultural sense not to comprehensively address some of the most apparent structural impediments to the advancement of tribal sovereignty, particularly for the treaty tribes of the western plains who remain outside the windfall of much casino gaming.

The development of such an Infrastructure Development Authority would provide a focused dedication of tribal financial resources to both acquire land to be placed into trust, as well as commitment to pay the (lost) property taxes for twenty-five years. As tribes, or at least some tribes, amass significant amounts of capital, it makes good practical and public policy sense to develop a comprehensive program to assist poorer tribes to (re)acquire land to be placed into trust. A small part of this plan would be to dedicate a portion of the fund to (lost) property tax revenues in order to promote equity and to eliminate, or at least significantly reduce, state opposition that is based on fiscal concerns.

VII. CONCLUSION: COMING FULL CIRCLE

Despite the federally-rooted nature of the land-into-trust issue in South Dakota and elsewhere, there is a new opportunity to forge meaningful tribal-state dialogue and relations. Both the tribes and the state are here for the duration. Therefore it is likely a propitious time to revisit some first principles in the area of tribal-state relations.²⁰³ Most significantly, these include the idea that tribal-state relations are best grounded in the notion of intergovernmental cooperation and not the more intractable issue of jurisdiction.²⁰⁴ Studies have indicated that such intergovernmental cooperation can be most fruitful and enduring in such areas as cross-deputization and taxation.²⁰⁵ While the cross-deputization and tax revenue issues in the land-into-trust context are somewhat unique, they are certainly not intractable.

202. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 57 (2010).

203. See, e.g., the seminal work recounted in Tassie Hanna, Sam Deloria, and Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553 (2012). In addition, there is the developing work of J.R. LaPlante (USD Law, class of 2010), South Dakota Secretary of Tribal-State Relations, which is advancing in this direction, particularly in the context of pursuing a collaborative mediation approach involving the Yankton Sioux Tribe and Charles Mix County. See also POMMERSHEIM, *supra* note 4, at 141–61.

204. Hanna, Deloria & Trimble, *supra* note 203, at 580.

205. *Id.*

The basic point is solving intergovernmental problems²⁰⁶ by showing mutual respect for each other's sovereign status. Sovereignty rhetoric down; problem solving up!

In light of the sweep of past and present (allotment) history, land into trust remains a very (modest) way of dealing with severe loss of tribal homelands, painful cultural abrasion, and eroded governmental authority. This history is largely grounded in the federal policies of debilitating nineteenth century expansion and assimilation and twentieth century efforts of the IRA to end allotment and even to reverse its harsh legacy.

Yet even if this modest federal effort has been slowed, if not quite thwarted, by strong resistance in some quarters, especially South Dakota, both the federal and state governments need to take additional fiscal and policy steps to move forward. Honorable attempts to mitigate the severe harm of allotment history ought not to be allowed to fail because of the lack of sufficient understanding and imagination of all three—federal, tribal, and state—sovereigns. The past always haunts present Indian law and policy, but in those rare instances like land into trust, where policy and practice seek to undo past ravages, present effort should not be allowed to fail because of the inability to revisit some initial, but unintended, shortcomings.

206. Intergovernmental issues exist whenever there are multiple sovereigns such as federal and state, state and state, county and state. From this perspective, tribal-state intergovernmental issues are not all that unusual.