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Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources

Stacy Leeds

STACY L. LEEDS*

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ABSTRACT

Tribal governments and individual American Indians lack autonomy over their lands and natural resources. Rather than owning their lands outright and enjoying the autonomy that property ownership ensures, tribes are relegated to a beneficiary status beholden to the federal government as the trustee over tribal lands. This article, by advocating a return to tribal control, provides new alternatives to the out-dated federal policies controlling the tribal land tenure system.

I. INTRODUCTION

When the federal government initiated the Indian allotment policy[1] in the late nineteenth century, there was a clear exit strategy. The allotment process was designed to be the federal government's final series of transactions before officially getting out of the Indian business.[2]

The series of transactions was simple. First, the federal government would force the redistribution of tribal land base from the tribal government to the individual Indian.[3] Then, the federal

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* Stacy L. Leeds is a Professor of Law and Director of the Tribal Law and Government Center at the University of Kansas. Professor Leeds also serves as Justice on the Cherokee Nation Supreme Court. The author would like to thank the Natural Resources Journal editors and staff for their work on this manuscript. Special thanks to Susan Tackman, Em Hall, and Sam Deloria for the invitation to participate in this symposium. The author extends thanks to law students Benjamin Lowenthal, William Reynolds, Mark Dodd, Yonne Tiger, and Elizabeth Cook for their assistance on this project.

1. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing the allotment policy and its aftermath); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001) (dispelling some common misconceptions about the federal rationales for the allotment process).

2. Getting out of the "Indian business" meant more than doing away with contiguous tribal land bases and federal supervision over Indian lands. In many instances, the allotment process was coupled with the termination of tribal governments and an end to the federal-tribal relationship.

3. "The forced allotments of communally owned tribal lands...was conducted almost completely without tribal consent and against the active opposition of most tribes." Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 115 (2005).

government would take on a brief supervisory and protectorate role as trustee over the newly allotted lands.[4] After an adjustment period for the new individual owners, the federal government would then step aside and the Indian landowners would hold fee title.[5] In the end, the lands would become freely alienable.

This series of transactions presumed that tribal governments would cease to exist,[6] that the Indians would become fully assimilated citizens of the United States,[7] and that federal Indian law and policy would be nothing more than a chapter for the history books. There was never an intention on the part of the federal government to continue indefinitely as trustee over Indian lands.

Yet today, due to shifts in federal policy and the resilience and revitalization of tribal governments, millions of acres of land within the United States are currently held in trust by the federal government for the benefit of tribes or individual Indians.[8] As the trustee, the federal government administers tribal and individual Indian trust lands.[9]

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4. The federal role as trustee was intended to be temporary, as set forth in the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–381 (1887). A 25-year trust period for allotted lands was established by 25 U.S.C. § 348. After the trust period expired, the allottees received a fee patent to the land. *Id.*

5. 25 U.S.C. § 348 (2000).

6. Some allotment agreements expressly provided for the termination of tribal governments once allotment was finalized. The 1902 agreement to allot Cherokee lands contemplated the final termination of the Cherokee Nation. *See* Act of July 1, 1902, ch. 1375, 32 Stat. 716. The termination never came to fruition because the deadline set for termination was extended by federal legislation. *See* Five Tribes Act of 1906, ch. 1876, 34 Stat. 137, 148 (extending tribal existence in perpetuity by stating "[t]hat the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations [were to be] continued in full force and effect for all purposes authorized by law, until otherwise provided by law"). The Five Tribes have recently celebrated the 100-year anniversary of this reaffirmation of their existence. *Five Civilized Tribes Commemorate Act of 1906*, CHEROKEE NEWS PATH, May 5, 2006, http://www.thepeoplespaths.net/Cherokee/News2006/May2006/CNO-FiveCTribes060505CommemorateActOf1906.html. See also Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 832 (2006) (noting the failure of federal policy to terminate tribes or assimilate Indians).

7. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.03[6][b], at 66 (Nell Jessup Newton et al. eds., 2005).

8. There are approximately 11 million acres of land held in trust for individual Indians. H.R. REP. NO. 108-656 (2004), *reprinted in* 2005 USCAAN 1952, 1953.

9. The federal-tribal trust relationship, and by extension federal power over tribal lands, has its origin in the early cases before the U.S. Supreme Court. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823) (tribal lands were deemed inalienable to all entities except the federal government); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (the notion of federal protection for Indian wards was solidified); Lone Wolf v. Hitchcock, 187 U.S. 553, 564–67 (1903) (federal powers over Indian lands were upheld and federal decisions affecting Indian lands were upheld over the objection of the tribes).

Federal administrative powers include the authority to approve or disapprove sales, leasing, and all other types of property conveyances, including probate.[10] Federal control also extends to income derived from trust property.

Tribal governments and their citizens who are the beneficiaries of trust lands lack autonomy over their own land. Not only must they seek the approval of the federal government for all land transactions,[11] but they are forced to rely on the good faith of the federal government, as trustee, for the management of proceeds derived from allotted lands.[12] Although history is replete with stories of federal mismanagement of trust resources, Indians have little choice in ousting the unilaterally imposed trust.[13] Subjecting tribes to mandatory federal oversight of their lands and natural resources is rooted in outdated notions of Indian inferiority and dependency. These concepts are not only suspect, they are also inconsistent with and detrimental to tribal self-determination.[14]

Reform efforts rarely are multiple critiques of the current system of federal trusteeship over Indian lands. Reform efforts have been ongoing for years.[15] The bulk of the reform efforts seek to limit the amount of trust lands as an effort to ease the federal government's administrative burden. There, reform efforts rarely consider a return of tribal land bases and control of Indian land tenure back to the tribes as a viable alternative.

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10. *See generally* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1 (2004) (discussing the role of the BIA).

11. 25 U.S.C. § 464 (2000).

12. *See* H.R. REP. NO. 108-656 (2004).

13. Asking the federal government to simply remove the trust status without other amendments to federal law could be dangerous for tribes. Once land is held in fee title, even with the tribe as the owner, the land becomes subject to state taxation and eminent domain powers. *See* Burke Act of 1906, Pub. L. No. 149, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (2000)). *See also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 263 (1992) (finding that state taxation of fee lands owned by Indians is permissible once Congress makes lands alienable); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 106 (1998).

14. *See* William Bradford, *Another Such Victory and We Are Done: A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 80 (2004) (noting that the trust doctrine has "roots in cultural racism and xenophobia" that leads to increased dependent status).

15. In fact, early reform efforts led to the end of allotments after the critiques of the Meriam Report of 1928. *See* BROOKINGS INST., INST. FOR GOV'T RESEARCH, PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam tech. dir., 1928). More modern calls for reform are addressed in Thomas V. Panoff, *Legislative Reform of the Indian Trust System*, 41 HARV. J. ON LEGIS. 517 (2004), *and* Christopher Barrett Bowman, Comment, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of* Cobell v. Norton, 53 CATH. U. L. REV. 543 (2004).

This article offers ideas and alternatives for beginning a new era of tribal control over land and natural resources. Both international law and domestic policy pronouncements require the recognition of tribal self-determination,[16] particularly over land and natural resources.[17] A necessary first step in reclaiming tribal autonomy over the land base is the removal of federal supervision and a shift toward an exclusive tribal control.

Part two of this article details the federal system of holding Indian lands in trust.[18] Part three notes that the federal rationales and justifications for continuing supervision of Indian lands is largely rooted in out-dated racial stereotypes.[19] Part four details how federal control of Indian lands leads to increased tribal dependency and inefficiency in land use.[20] Part five sets forth the proposal to end federal control and return land tenure decisions to the tribe.[21] The article concludes with a series of alternatives for setting the proposal in motion.

II. FEDERAL LAW AND INDIAN LANDS

A. Historical Background

The United States experimented with the concept of allotting tribal lands to individual Indians early in the nineteenth century.[22] Although there were a few treaty provisions that provided for allotments,[23] there was no comprehensive allotment policy prior to the General Allotment Act of 1887 (GAA).[24] Proponents of the GAA believed

16. *See generally* COHEN, *supra* note 7, § 5.07[3][b], at 473–83 (discussing emerging norms of self-determination); Hurst Hannum, *The Right of Self-Determination for the Twenty-First Century*, 55 WASH. & LEE L. REV. 773 (1998) (linking self-determination and human rights).

17. *See* U.N. Comm'n on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples, August 26, 1994, 34 I.L.M. 541 (1995).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. COHEN, *supra* note 7, § 16.03[2][a], at 1040–41, DAVID GETCHES ET AL., FEDERAL INDIAN LAW 166–71 (4th ed. 1998).

23. Treaty with the Shawnee of May 10, 1854, 10 Stat. 1053, 1054–1056 (providing for the allotment of certain lands in Kansas).

24. General Allotment Act of 1887, ch. 119, 24 Stat. 388. The General Allotment Act was not self-executing and it did not apply to all tribes. For the most part, allotment varied from reservation to reservation, as detailed in tribally specific allotment agreements. *Compare* Act of July 1, 1902, ch. 1375, 32 Stat. 716 (allotment of lands of the Cherokee Nation), *with* Act of June 28, 1898, ch. 517, § 11, 30 Stat. 495 (known as the Atoka

that individual land ownership would promote and accelerate the assimilation of Indians into mainstream American society.[25] It was also believed that, by teaching Indians how to use their land more efficiently, the Indian would become economically self-sufficient and thereby diminish the need for federal supervision or protection.[26]

The allotment policy required that the tribal land bases be divided and reduced to individual parcels of land.[27] Much of the allotted land was conveyed to individual tribal citizens. Once the land was redistributed to tribal citizens, however, the remaining tribal lands were deemed "surplus" lands by the federal government and subsequently returned to the federal domain or redistributed to non-Indian settlers.[28]

The tribes were entitled to compensation for the "surplus" lands that passed out of Indian ownership.[29] The tribal governments were never compensated for lands that were allotted to tribal citizens.[30] The conveyance of tribal land to individual Indians was deemed a permissible change in the corpus of the trust property held by the United States.[31] Tribal takings claims seeking compensation for the loss of these lands have failed. It is well-established that the United States, wielding the power of trustee, can change the status of trust land,[32] even over the objection of the beneficiaries.

Agreement). The Kiowa Tribe was subject to the General Allotment Act, yet federal negotiators sought tribal consent under the Jerome Agreement of 1892. When the tribe failed to consent, the lands were allotted against the tribe's will. *See* Act of June 6, 1900, ch. 813, 31 Stat. 672, 676–77. *See also* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding congressional power to allot tribal lands).

25. *See* 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, 656–71 (1999).

26. John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 520 (1991).

27. *See* Hodel v. Irving, 481 U.S. 704, 706 (1987); Babbit v. Youpee, 519 U.S. 234, 237–39 (1997). *See also* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW, CASES AND MATERIALS 170–72 (2002).

28. Act of August 15, 1894, Pub. L. No. 53-290, ch. 290, art. VIII, 28 Stat. 286, 316. *See also* Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 66–67 (2005) (characterizing surplus lands policy as a governmental taking).

29. *See generally* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (discussing compensation when a taking has occurred).

30. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See also* Joseph William Singer, Lone Wolf, *or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37 (2002).

31. Singer, *supra* note 30, at 38–39.

32. *See* United States v. Creek Nation, 295 U.S. 103, 109 (1935); *Lone Wolf*, 187 U.S. at 568.

The tribal citizen typically received an ownership interest in the allotted land, but the property interest was subject to temporary restrictions on alienability.[33] Many of the individual parcels were held in trust by the federal government for a specified time period, usually 25 years.[34] At the end of a specified time period, or earlier if an individual Indian was deemed "competent" to own her land in fee,[35] the restrictions terminated. At that point, the land became freely alienable and federal oversight ended. The individual owner would then hold fee title to the land.[36]

Despite this plan for increased private property ownership in Indian country, and reduced federal oversight, the allotment policy was never fully implemented. Before the allotment process was complete, and lands were still held in trust by the federal government, the allotment policy was deemed a failure and a reactionary shift in federal policy followed.[37] The most noted failure was the loss of Indian land to non-Indian interests. Tribal land holdings decreased from 138 million acres to 52 million acres by the time the Indian Reorganization Act of 1934 (IRA) was enacted.

When the shift in federal policy occurred, many of the individual allotments were still held in trust by the federal government because the time-specific trust period had not yet expired. With the passage of the IRA,[38] the trust periods were extended into perpetuity[39] and the federal government was back in the business of holding Indian land in trust for good.

B. Modern Realities

Lands that continued in trust until the passage of the IRA remain under federal supervision to this day.[40] As trustee, the federal government must approve all land transactions, including surface and

33. 25 U.S.C. § 349 (2000) (detailing the expiration of the trust period for allotments).

34. *See* 25 U.S.C. § 348.

35. 25 U.S.C. § 349. The Secretary is given the discretion to issue a fee patent "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs...." *Id.*

36. 25 U.S.C. § 349 (detailing the expiration of the trust period for allotments).

37. COHEN, *supra* note 7, § 16.03[2][c], at 1042. *See also* Bobroff, *supra* note 1, at 1559 (noting that the allotment policy was "an unquestionable disaster").

38. Indian Reorganization Act, Pub. L. No. 109-229, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

39. 25 U.S.C. § 462.

40. *See* McCarthy, *supra* note 10, at 14.

mineral leases.[41] As trustee, the federal government (through the Department of the Interior) also collects and distributes income derived from leases of these allotted lands.[42]

The IRA did more than just freeze the clock on trust allotments that would have otherwise expired to become fee lands. The IRA contains provisions for land consolidation and reacquisition of tribal land bases.[43] The IRA authorizes the Secretary of the Interior to take additional lands into trust for tribes or individual Indians,[44] thereby providing an avenue for tribal communities to reclaim lands that were lost in the allotment process or through other means.[45] The role of the federal government with respect to Indian lands has come full circle. There was a time when the federal government sought to limit federal oversight and administration of tribal lands. By increasing private ownership in Indian country, the allotment process was designed to reduce tribal dependence on the federal government.[46] Instead, due to federal laws that perpetuate federal control of tribal lands, the United States remains obligated to administer trust lands and the funds arising from them.[47]

Tribal lands are held in trust by the federal government for the benefit of the tribe or individual Indians.[48] The federal government holds title to the land and the tribe or the individual holds only a beneficial interest.[49] Lands that are held in trust are subject to federal restraints against alienation and encumbrances. The federal restraint against

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41. The proceeds are collected by the Department of the Interior and held in Individual Indian Money (IIM) accounts and deposited in the U.S. treasury. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999). *See also* David M. English, *A Uniform Probate Code for Indian Country at Last*, 20 PROB. & PROP. 20 (2006) (discussing generally IIM accounts).

42. McCarthy, *supra* note 10, at 19–25.

43. 25 U.S.C. § 465 (2000).

44. *Id.*

45. Tribes have historically lost lands through several other federal policies, in addition to allotment. *See* Leeds, *supra* note 28, at 58–67 (examining the "discovery doctrine," Indian removal, allotment, and surplus lands).

46. Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 732–33.

47. Cobell v. Norton, 240 F.3d 1081, 1087 (D.C. Cir. 2001).

48. *See* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id.

49. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (noting that the "fee is in the United States" and that tribal land use is subject to federal guardianship).

alienation also shields trust lands from taxation, including both state and tribal ad valorem taxes.[50]

The burden on the United States in labor and financial resources for administration of tribal trust lands is substantial and that burden increases each year.[51] Because allotments were not intended to remain in trust forever, it was presumed that Indian land ownership would evolve in the same pattern as any other type of fee ownership. Lands would be used efficiently and the market would favor alienability, both during life and at death. Because the property law system of fee title favors alienability, land is usually held by a single owner or by a very small number of co-tenants.

The present status of most Indian land is the exact opposite.[52] Trust allotments are inalienable without the consent of the federal government, and market forces that typically apply to the sales of other lands do not have the same impact on tribal lands. There are many factors that impact tribal decisions concerning the alienability of land. First, tribes typically want to retain trust lands indefinitely rather than sell them to the highest bidder. Trust lands tend to be the only remaining land base for many tribes and individual Indians. Once land passes out of tribal hands, the territorial land base is proportionally and permanently diminished.

Second, there are jurisdictional concerns that influence tribal decisions to convey or encumber lands. Tribal jurisdiction is secure so long as lands are held in trust.[53] Tribes retain adjudicatory and regulatory jurisdiction over lands that have been set aside for them[54] under federal supervision.

Tribal jurisdiction over fee lands is less certain.[55] At the most, tribes retain a concurrent regulatory jurisdiction with the state over lands

50. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998) (states can tax Indian lands unless the trust status is retained). *See also* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (discussing the presumption against tribal jurisdiction over non-members on non-Indian fee lands).

51. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

52. Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595 (2000); Shoemaker, *supra* note 46, at 787.

53. Montana v. United States, 450 U.S. 564, 566–67 (1981) (suggesting that tribes retain jurisdiction on those lands that they maintain a right to exclude).

54. Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996).

55. *See Montana*, 450 U.S. at 547 (implying that when land is held in fee by a non-Indian there is a presumption against tribal jurisdiction).

held in fee, even when the tribal government is the land owner.[56] Federal courts have determined that alienability of lands opens the door for state taxation,[57] and perhaps other types of regulatory control.[58]

Because the federal courts have linked jurisdiction to the status of land, tribes that want to maintain regulatory and adjudicatory jurisdiction over their lands are forced to keep their lands under the supervision of the federal government.[59] This notion, more than anything else, has led to an increase in the total number of acres held in trust by the federal government.

When a tribe is fortunate enough to buy back lands that were lost in the allotment process, the tribe must decide whether to petition the Secretary of the Interior to place the lands in trust. If the tribe is successful in having the lands placed in trust, they subject themselves to federal oversight and the possibility of federal mismanagement. If they choose not to place their lands in trust, their jurisdiction and control over their own lands will be called into question. The federal courts have made it very clear that tribes cannot unilaterally restore their jurisdiction over their lands.[60] Restoration of tribal jurisdiction over lands must be done by the federal government. At present, the only way for tribes to restore tribal jurisdiction is to petition for the lands to be placed in trust.[61] Tribes are, therefore, forced to accept dependency on the federal government or have their lands controlled by the state. There is no alternative, under existing federal law, for true tribal autonomy over lands.

III. RATIONALES FOR FEDERAL CONTROL OF INDIAN LAND

During the allotment process, the federal rationales for forcing the land transaction and continuing federal supervision after the conveyances was rooted in the notion that Indians were inferior and needed the assistance of the federal government.[62] To justify the forced

56. Tribes have been unsuccessful in their attempts to oust state regulatory powers even where the tribe owns the land. *See* City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).

57. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 263–64 (1992) (permitting state taxation of Indian allotment).

58. *Montana*, 450 U.S. at 556–58.

59. *See City of Sherrill*, 544 U.S. 197.

60. Buzzard v. Okla. Tax Comm'n, 992 F.2d 1073 (10th Cir. 1993) (finding that tribes lack the power to unilaterally create Indian country by the purchase of land).

61. Acquisition of trust property by the Secretary of the Interior is governed by 25 C.F.R. § 151 (2005). Title is to be held by the federal government. 25 C.F.R. § 151.2.

62. Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 829–32 (2004).

allotment, it was stated that Indian land uses were inefficient and inferior.[63] It was believed that the Indian could only advance so far in a system of common ownership and that, to truly take advantage of civilization progress, the tribes needed to adopt American concepts of individual property ownership.[64]

The stereotype that all tribes hold their land in common with no mechanism for private property ownership has been refuted by many scholars. It is well-documented that many tribes, both pre-contact and at the eve of allotment, had elaborate private property law systems pursuant to tribal law. The federal government simply ignored the existence of tribal law when it implemented the allotment policy.[65] The failure to acknowledge tribal property systems is not surprising given the fact that the federal government viewed the allotment process as the end to tribal governments[66] and thereby tribal law.

The current rationale for continued federal supervision, as trustee, over Indian lands does not differ in any significant degree from the allotment era justifications. There is still the prevailing notion that the federal government needs to protect Indians.[67] Accordingly, the federal government believes that Indian lands need to be protected against encroachment. Indians need to be protected against unscrupulous business dealings from companies who do business on their lands. Indian tribes also need to be protected against the interference of state regulatory laws.

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63. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN 624 (1984).

> Three hundred thousand people (the Indians) have no right to hold a continent and keep at bay a race of able people to it and provide the happy homes of civilization....We do owe the Indian sacred rights and obligations, but one of those duties is not the right to let them hold forever the land they did not occupy, and which they were not making fruitful for themselves and others.

Id. (quoting Reverend Lyman Abbott in support of allotting lands).

64. FRANCIS PAUL PRUCHA, AMERICANIZING THE AMERICAN INDIANS: WRITINGS OF THE "FRIENDS OF THE INDIANS" 1800-1900, at 83-86 (1973).

65. *See generally* Royster, *supra* note 1, at 7-12 (discussing the allotments and assimilation).

66. *See* Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, ch. 676, 31 Stat. 861, 872 (1901). Some allotment acts specifically provided for a termination date for the tribal government once the lands were allotted. *Id.*

67. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498 ("for sovereign native nations to function within a larger, increasingly powerful majority, the promised separatism had to be policed by the federal government").

Each of these concerns suggests that tribes and individual Indians continue to be incapable of looking out for their own best interests. It assumes that the federal government, as the superior, will do a better job of making business decisions for the tribes and for handling tribal assets.[68] It also suggests that tribes must continue in a child-like state of wardship forever. The federal government continues as the trustee of Indian lands, the story goes, because Indians need the federal government. Indians are dependent on the federal government.

The ill-conceived stereotypes and paternalism that led to the allotment of Indian lands continues to permeate the present federal system of administering Indian lands.[69] It is undisputed that the allotment policy was a total failure, yet the rationales for putting that policy into motion have never been meaningfully re-evaluated. Instead, the role of the federal government as trustee for tribal lands has been converted from a temporary measure to a permanent solution—a solution that is unmanageable by the federal government and detrimental to the tribes.

IV. INCREASED DEPENDENCY ON THE FEDERAL GOVERNMENT—THE CHEROKEE EXAMPLE

The Cherokee Nation's history with respect to federal supervision of tribal lands illustrates how the existing federal trusteeship of tribal lands increases tribal dependency on the federal government, even where such dependency did not exist prior to allotment. When the Cherokee Nation was removed from their homelands in the southeastern United States, the federal government issued a fee patent to the lands that now make up the 14 counties in the northeast corner of present-day Oklahoma.[70]

When the Cherokee Nation received a fee patent to lands as a matter of Anglo property law, there was a single owner in fee simple absolute to the entire reservation, the Cherokee tribal government.[71] The

68. *See* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

69. *See generally* Bradford, *supra* note 14 (arguing that *United States v. Lara*, 541 U.S. 193 (2004), is made of the same base metals—the discovery doctrine, plenary power, and stare decisis—from which the entire corpus of federal Indian law has been conjured).

70. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (The language contains no reservation of rights in the United States.). The land was conveyed from the United States, which "gives and grants" the lands to the Cherokee Nation "to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging to the said Cherokee Nation forever." *Id.* at 116.

71. *See generally* RESTATEMENT (FIRST) OF PROPERTY § 15 (1936). "An estate in fee simple absolute is an estate in fee simple which is not subject to any special limitation or a

Cherokee Nation exercised jurisdiction over these lands and, like the many tribes, it created an elaborate private property law system.[72] The Cherokee property laws were not dissimilar to conventional Anglo property laws.[73] Rather than owning the full estate, individuals could acquire an ownership interest in the surface of the land.[74] Surface ownership included the right, protected by tribal law, to construct fixtures on the land[75] and reap the economic benefits of crops, leases, and other profits that flow from the land.[76] Yet, the territorial boundaries of the tribe were preserved from encroachment because the tribal government maintained an ownership right in the entire territory. This has been characterized as analogous to the present federal trust system because, in effect, the Cherokee Nation held title to the territorial lands for the benefit of the people.[77] The Cherokee title to territorial lands did not, however, involve the same type of governmental oversight the current federal trust system requires. The Cherokee system left autonomy with the individual and did not require governmental approval of conveyances.

In some ways, the Cherokee property laws gave individual owners a higher form of property interest than what land owners have under U.S. property law. For example, the Cherokee Nation had no express constitutional provisions reserving the power of eminent domain to the government.[78] Individual Cherokee citizens perfected claims to the surface of lands and to the improvements on those lands. The Cherokee

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condition subsequent or an executory limitation." *Id.* This well-established concept of fee simple absolute gives the most control over use and ownership of the property.

72. *See* Stacy L. Leeds, *Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 494 (2001).

73. *See id.* at 493. The Cherokee Nation established a police force to suppress the stealing of property in Cherokee Territory and protect the rights of Cherokee women and children who have inherited property. *Id.*

74. *See* Cherokee Constitution of 1839, art. I (1839).

> The lands of the Cherokee nation shall remain common property; but the improvements made thereon, and in the possession of the citizens....respectively who made, or rightfully be in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatsoever, to the United States, individual States, or to individual citizens thereof.

Id. § 2, *reprinted in* Constitution and Laws of the Cherokee Nation: Passed at Tal-Le-Quah, Cherokee Nation, 1839–51, at 5–6 (1852).

75. *Id.*

76. *Id.*

77. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294, 302 (1902) ("As we have said, the title to these lands is held by the tribe in trust for the people.").

78. Leeds, *supra* note 72, at 495.

Nation maintained elaborate property records of individual property, similar to records presently held in county land records offices. Some of these land records include large tracts of land of several hundred acres, which suggests that, for some Cherokees, allotment actually meant a decrease in the amount of real property held by an individual.[79] The idea that the allotment process allowed Indians the right to own property for the first time is simply false in the Cherokee context and in the context of many other tribes.[80]

Individual property rights in the Cherokee system were less absolute than in the Anglo-American fee simple model in only one respect—the ability to freely alienate property.[81] Individuals were free to sell their property interest to individual citizens of the Cherokee Nation, but they were not allowed to sell lands to non-citizens.[82] The tribal restriction on alienation only applied to foreign sales.

During the allotment process, the Cherokee Nation was exempt from the General Allotment Act. As was typical of many tribes, Congress passed tribe-specific allotment legislation[83] following negotiations between the tribe and the United States.[84]

Although the Cherokee Nation's allotment was conducted pursuant to an agreement between the federal government and the Cherokee Nation, the process was far from consensual. In fact, the Cherokee Nation vehemently opposed allotment.[85] The Cherokee Nation only entered into an allotment agreement after Congress passed legislation authorizing the unilateral allotment of Cherokee lands.[86] The choice presented to the Cherokee Nation was to do nothing and to watch the federal government unilaterally allot their lands or try to negotiate the allotment and secure for themselves a better disposition.[87]

In the experience of most tribes, allotment required the action of the federal government as a grantor in the property conveyance. Most tribal land bases were already held in trust by the federal government at the time of allotment. To effectuate allotment, the federal government

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79. *See* Leeds, *supra* note 62, at 830–34.

80. *See generally* Bobroff, *supra* note 1 (highlighting the private property regimes of several Indian nations).

81. Leeds, *supra* note 72, at 495.

82. *See id.* The Cherokee legislation may be viewed as a self-imposed Trade and Intercourse Act of 1790 (i.e., Non-intercourse Acts), which prevent the alienation of tribal lands. *Cf.* 25 U.S.C. §§ 177–202 (2000).

83. *See* Act of July 1, 1902, 32 Stat. 716 (1902).

84. *Id.*

85. Choate v. Trapp, 224 U.S. 665, 667–68 (1912).

86. Five Tribes Act of 1906, ch. 1876, 34 Stat. 137 (also known as the Curtis Act).

87. *See* Leeds, *supra* note 28, at 65–66 n.119.

conveyed the beneficiary interest directly to the individual allottee and retained legal title in the federal government as trustee. The tribal government did not act as an intermediary, nor did it appear as a grantor in the chain of title.

In the Cherokee scenario, the tribal land base was held in fee by the tribal government at the time of allotment. The federal government had no title or property interest in the Cherokee land. The conveyance to the tribal citizens as allottees required the action of the tribal government. The federal government was not an intermediary, nor does the federal government appear in the chain of title. The conveyance was a grant of fee title from the tribal government to the tribal citizen. The citizen received fee title subject to restraints on alienation. This was not a new arrangement for the Cherokee people because Cherokee law had also imposed certain restrictions on alienation. The difference now was that the restraint on alienation was imposed by federal law to the deconstruction of tribal property law systems.

In the Cherokee allotment transactions, the federal government received no property interest. Therefore, the creation of a federal supervisory role, or trust power, was not created by legal consequence of the federal government holding title to the land for the benefit of the Cherokee people. The Cherokee allotments became subject to restrictions on alienation by federal legislation only.

The transfer of autonomy from the Cherokee Nation to the federal government, in fact, had monumental ramifications. Recall that, before allotment, Cherokees could freely alienate their property interest to each other or to the Cherokee Nation itself. The Cherokee restriction only kept lands from passing to non-Cherokee citizens as a way of maintaining autonomy over the tribal land base and keeping the contiguous land base intact.

After federal restrictions on alienation began to govern Cherokee land transactions, all tribal autonomy was defeated. Cherokees holding allotments subject to federal restrictions now needed the permission of the federal government to transfer their property interest even to their own family members. When the federal restriction was eventually lifted, lands became freely alienable and were often lost through forced sales, state eminent domain, or through transfers to non-Indians. Once the land passed into fee status, regardless of the manner in which it was alienated, the exclusive tribal land base was diminished. Even when lands are conveyed between Cherokee citizens, the fact that the land is freely alienable makes the land subject to state tax and arguably beyond the reach of tribal regulatory jurisdiction. As such, there are lands inside the Cherokee Nation's boundaries where the chain of title from the

Cherokee Nation lists only Cherokees citizens, and the state of Oklahoma is the sovereign exercising regulatory jurisdiction.

The Cherokee Nation continues to lose land to state jurisdiction on a daily basis. Of the original 16 million acres allotted to citizens of the Five Tribes[88] in Eastern Oklahoma, only two hundredths of one percent remains in restricted status.[89] Federal legislation targeting tribes in eastern Oklahoma, however, removes federal restrictions on alienation based on the percent of Indian blood of the owners.[90] Under this tribally specific federal law, when the blood quantum of the property owner falls below one-half Indian blood, the federal restriction on alienation is lifted and the land becomes alienable.[91] The federal notion, it would seem, would be that the less "Indian" the individual, the more likely they can handle their own affairs. Individuals who are more "Indian" or have higher blood quanta are still in need of federal oversight and protection.[92] This federal law, which continues to allow state control over tribal lands, is a race-based application that turns on the percentage of Indian blood. It is not a question of political affiliation because it is not based on citizenship in a tribe; instead, it strictly ties alienability of land to a property owner's racial composition.

The Five Tribes that are unilaterally subjected to this law have tried unsuccessfully for years to have the legislation overturned. The tribes seek to have all lands restricted against alienability to preserve their remaining land base and ensure tribal jurisdiction over the lands.

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88. *See* Five Tribes Act of 1906, ch. 1876, 34 Stat. 137 (The Five Tribes in eastern Oklahoma are Cherokee, Muscogee (Creek), Seminole, Choctaw and Chickasaw.).

89. Letter from Chad Smith, Principal Chief of the Cherokee Nation of Oklahoma, to James M. Inhofe, Senator (Sept. 30, 2002) (in support of HR 2880, the Five Nations Indian Land Reform Act), *available at* http://www.cherokee.org/CurentNewsRelease.asp?ID=656 (*last visited* Aug. 24, 2006). The measure has never passed.

90. Act of August 4, 1947, ch. 458, 61 Stat. 731, 733.

91. *Id.*

92. *See* Letter from U.S. Department of the Interior to Miss Nina Leeds (Jan. 17, 1955) (on file with author) (A member of my (author's) family received notification from the Department of the Interior informing them that, because the federal government calculated their blood quantum to be one-fourth, the restrictions on their land were being lifted.).

> In July 1932, this office purchased 30 acres from your mother, Edith Yates now Leeds, for you, Louis, Robert, Arline, Jimmie, Johnnie, George, Ellen, Harrison and Jesse Leeds, said deed taken on a restricted form. Since you and your brothers and sisters were only ¼ Cherokees, this was in error...and the land was and still is unrestricted.

Id. Attached to the letter was an application for removal of restrictions pursuant to the Act of May 10, 1928, 45 Stat. 495-733. The application requires the blood quantum of the property owners for removal of restrictions. The letter also contains a field report listing the degree of Indian blood. *See id.*

Since 1934, the lands of other tribes have been preserved against further alienation by operation of the Indian Reorganization Act.

The Five Tribes are permitted to petition the Secretary to place fee lands into trust when the tribe is successful in re-acquiring their former lands.[93] The tribes simply cannot reacquire lands at the rate that will offset the loss of lands pursuant to the federal legislation and, as such, the tribal land bases continue to diminish.

One provision that the Cherokee Nation was successful in negotiating in their 1902 allotment agreement was the reservation of certain properties that were not to be allotted.[94] The Cherokee Nation built several governmental buildings in the period between 1839 to1898, including universities, orphanages, public schools, courthouses, and jails. The Cherokees also built, during this time period, a capital building[95] and the Supreme Court building, which still stand in the town square in Tahlequah, Oklahoma. These buildings were built on lands owned by the tribe in fee and these properties were specifically reserved to the tribe under the allotment agreement.

Following the allotment, the Cherokee capital building eventually passed out of tribal ownership and was owned by the local county until the Cherokee Nation reacquired the properties. After the tribal courts had functioned in the historic Cherokee Capital building for several years, there arose an absurd legal question: could the Cherokee Nation exercise regulatory and adjudicatory jurisdiction over its own courthouse? Those who sought to defeat tribal jurisdiction argued that, because the land was owned by the tribe in fee and not held in trust by the federal government for the benefit of the tribe, the tribe lacked jurisdiction over the lands.

It is without question that the courthouse was owned in fee. It was owned in fee when the Cherokee Nation received a fee patent from the United States. The land was never held in trust by the federal government for the Cherokee Nation. And when the Cherokee Nation reacquired the land from the county, it was conveyed back to the Cherokee Nation in the same way it was acquired from the Cherokee Nation—in fee simple.

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93. Although originally exempted from the Indian Reorganization Act, the Cherokee Nation can now take advantage of the Act for the purpose of petitioning the Secretary to accept lands into trust.

94. *See* Act of July 1, 1902, ch. 1375, § 24, 32 Stat. 716, 719 (listing the lands that were excluded from the Cherokee allotment).

95. *Id. See also* Cherokee Nation Judicial Branch, History, Pictures of Judicial Buildings, Information on the Cherokee National Courthouse, www.cherokeecourts.org (last visited Oct. 26, 2006).

Setting legal arguments aside and focusing on practical considerations, the Cherokee Nation avoided the risk of "losing" its jurisdiction over its own courthouse by submitting its lands to federal government oversight. The Cherokee Nation petitioned to have the land placed in trust. The Cherokee's petition was granted and the federal government now holds the properties in trust. The Cherokee Nation successfully resolved the jurisdictional ambiguity and avoided further challenges to its jurisdiction, but at what cost? No longer does the tribe hold its historic courthouse and capital in fee, the way it received it originally. Now the courthouse is under federal supervision and, as a result, tribal autonomy over its most sacred and historically relevant structure is diminished. It is truly a sad day for the Cherokee Nation when federal entanglement and oversight is required in order preserve the tribe's jurisdiction over the building that houses the Supreme Court of the Cherokee Nation. But as a means of clarifying the Cherokee Nation's jurisdiction over its own courthouse, the Cherokee Nation, even after successfully exempting these properties from the allotment process, had to acquiesce to the creation of a new federal property interest in Cherokee lands. For the first time since the original fee patent in the 1840s, the federal government now holds title to tribal lands.

The Cherokee Nation had limited options. Either the Cherokee Nation allowed federal supervision of tribal lands or they faced the possible loss of recognized autonomy and jurisdiction over their own historic governmental buildings. Federal supervision was one option. Loss of jurisdiction to the state was the other option. Exclusive tribal autonomy was not an option.

V. THE PROPOSAL: AN EXCLUSIVE TRIBAL TRUST

There must be an option, within the federal legal structure, for exclusive tribal autonomy over lands and natural resources. Tribes should not be placed in the situation of yielding autonomy over lands to the federal government for the sake of protecting themselves against state jurisdiction. In the remaining pages of this article, I set forth a proposal for a gradual end to federal supervision of Indian lands and a termination of the federal trusteeship in favor of exclusive tribal autonomy.

My proposal encompasses three basic tribal objectives that call for an end to the present federal trust powers over Indian lands and natural resources. First, tribes seek to exercise jurisdiction over their territories and have the outside world recognize the validity of that jurisdiction. Second, tribes seek to avoid regulatory interference from outside sovereigns, federal and state. Finally, tribes want to ensure that

the tribal land bases are preserved in Indian ownership. Each of these objectives can be achieved without the federal government holding tribal lands in trust.

The proposed model for reform offers a gradual return of tribal autonomy over lands that would benefit the tribes and the federal government. Under this proposal, not only would Indian nations benefit from a return of autonomy, but the federal government would be relieved of the considerable administrative costs associated with the land trust system.

True tribal autonomy over lands and natural resources requires that tribes, and not the federal government, hold legal title to tribal lands. It also requires the recognition of exclusive tribal jurisdiction over tribal lands. A tribe cannot have meaningful autonomy simply by becoming a landowner. They must be the only governmental entity exercising regulatory jurisdiction over the lands. Autonomy means more than financial control over lands; it must be accompanied by land use controls.

In order to restore tribal autonomy, the proposal involves a combination of property conveyances and amendments to existing federal law. The first step is conveyance of fee title from the federal government to the tribal government or the Indian allottee. Once the conveyance is complete, the tribe could make the decision for themselves whether they wish to act as a trustee over these lands, similar to the federal model, or whether the tribe's goals for land use can be governed by enactment of tribal laws alone.

Under this proposal, any federal conveyance of land back to the tribes, or to individual tribal citizens, must be accomplished by tribal consent. Similar to the manner in which the tribes currently petition the Secretary of the Interior to place lands in trust, tribes would initiate the request to regain legal title from the federal government.[96] This process would ensure that the tribes, and not the federal government, have the discretion of whether to change the legal status of their lands. Although some tribes have the infrastructure to immediately accept such a transfer, some tribes might choose to defer this action until they are

96. *See* 25 U.S.C. § 465 (2000). The Secretary of the Interior may acquire "through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands...for the purpose of providing land for Indians." *Id.* However, title to any of these lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the lands is acquired, and such lands or rights shall be exempt from State and local taxation." *Id.* The ability to petition the acquisition of these lands stems from federal regulations. *See also* 25 CFR § 151.9 (2006) (tribes desiring to acquire land in trust status must file a written request for approval of the Secretary of the Interior).

ready to assume the responsibility. Many tribal governments are in the early stages of recovery after forced federal termination and are in the process of reorganization. No tribe should be forced to reassume full autonomy, just as they should have never been forced to accept federal oversight in the first instance.

The proposal for return of tribal autonomy could not be effectively implemented by the property transaction of reconveying land to the tribes. Amendments to existing federal law would be required. Current federal law subjects all freely alienable tribal lands to state jurisdiction, at least for tax purposes. If lands were simply reconveyed in fee to the tribes, this would produce a windfall to states because all the reconveyed land would instantly become subject to state taxation. This would defeat the purpose of restoring exclusive tribal automony because it would immediately subject lands to state control.

To protect against state interference and preserve tribal autonomy, the conveyances of fee title would need to be accompanied by changes in federal law. A necessary amendment to existing federal law would be a congressional mandate that tribes maintain exclusive jurisdiction over tribal lands, including federally conveyed fee lands. This would, of course, ensure that states and local laws, regulatory and otherwise, would not extend into Indian country.

Such legislation could come in the form of a federal restraint on alienation for tribal lands, regardless of whether the lands are held in fee or trust status. The Non-Intercourse Act already protects trust lands from such alienation, and that protection would also extend to fee lands. Under the present Non-Intercourse Act,[97] federal approval is required to alienate tribal trust lands. This protects tribal trust lands from state eminent domain powers, adverse possession, and taxation.[98] An amendment would extend the protection against alienation to fee lands as well but leave the approval to the tribal governments. Such an amendment would allow tribes, at their own election, to lease, encumber, or otherwise convey their property interest without the need to seek approval of the federal government.

The current protections for trust lands would be retained for those tribes that wish to continue having their trust lands supervised by the federal government. But for those tribes that choose to act as their own trustee over tribal resources, the tribe will make the determination

97. *See* 25 U.S.C. §§ 177–202 (2000).

98. 25 U.S.C. § 177. "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id. See also* Johnson v. M'Intosh, 21 U.S. 543 (1823).

of whether its lands may be otherwise encumbered as a matter of tribal law.

The most important aspect of the transfer of title back to tribal ownership is that it allows the tribe to exclusively control zoning, land use, land tenure, and, ultimately, alienability.[99] There were many tribal laws prior to allotment that led to very effective tribal property systems.[100] If tribes were able to apply those laws or enact new tribal laws, the true autonomy could be obtained. Tribes can decide for themselves whether they will allow tribal lands to be mortgaged for capital or whether leasehold interests or commercial transactions are in the best interest of the tribe. Tribes can also begin the process of making their lands more efficient by addressing the highly fractionated ownership caused by the allotment process and never adequately addressed by the federal government.

Returning to the Cherokee example, several Cherokee property laws that were in effect in the years after 1839 included (1) that people who permanently left the tribal jurisdiction had to abandon their property interest[101] and (2) that people could not sell their property to non-citizens.[102] An individual who chose to leave the jurisdiction of the Cherokee Nation did not instantly forfeit all property interests without compensation. Instead, the laws simply imposed a "use it or lose it" approach to ensure efficient property use. These property laws are similar to the way water law is governed in the western United States. It is well-established that individuals who do not put their water rights to continued beneficial use can lose those rights for non-use.

In the Cherokee Nation, citizens who left the Cherokee Nation permanently had the option to sell their property to a Cherokee citizen or to the Cherokee Nation itself. Implementing a similar law today would be beneficial for the Cherokee Nation.[103] If they chose not to avail themselves of these permissible transactions, abandonment laws would follow.

Petitioning the federal government for a conveyance back to tribes is not the only way to achieve tribal autonomy. Tribes could consider extending a tribal trust status over lands held in fee by tribal citizens after the federal government steps aside. This can be accomplished through two avenues.

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99. *See generally* Leeds, *supra* note 72 (detailed discussion of better management through tribal ownership).

100. *See* Bobroff, *supra* note 1, at 1571-600.

101. Leeds, *supra* note 72, at 495.

102. *Id.*

103. *See id.* at 497 (discussing the proposed "use it or lose it" approach).

When the federal government re-conveys a trust allotment back to an individual allottee, tribal law would then control that parcel of land. The individual Indian co-tenants could be given the option of conveying their land to the tribe and having the tribe hold the lands in trust for the benefit of the allottee.[104] The legal title would then rest with the tribe as trustee analogous to the current federal trust system. Noting that tribal citizens might be reluctant to subject their land to a tribal trust, the same objectives could be reached by enacting a tribal law restricting alienation. By passing such legislation, a certain amount of autonomy is left with the individual but the tribe can still control land use and limit the loss of lands to non-tribal entities. This solution might best suit tribal citizens, many of whom have seen their lands mismanaged by the federal system, who may be leery of the tribe as a trustee. It is understandable that tribal citizens might be unwilling to consent to continued wardship, even if the trustee was the tribal rather than the federal government.

The idea of the tribal government as trustee of tribal lands is novel, but not new. The concept of tribal trust lands was contemplated by the federal government, albeit in hindsight. As mentioned before, the Cherokee Nation received a fee patent to their lands. In a prelude to the Allotment Era, federal agents in the late 1890s attempted to control Cherokee lands by approving leases to non-Indian interests. The Cherokee Nation filed an action in federal court on the basis that the federal government had no business and no supervisory role where the tribe owns the lands in fee.

The U.S. Supreme Court allowed the federal intrusion by reclassifying the tribe's land ownership status. The Cherokee Nation did not hold fee title to its lands, the Court concluded, but instead held the land in trust for its own citizens. After reclassifying the way in which the Cherokee Nation held title to the lands, the federal government argued that tribal mismanagement of its trust responsibility justified federal intervention and an end to the tribal trusteeship.

The Cherokee example is useful in two ways. First, it notes that the concept of the tribe as trustee for tribal trust lands has historical foundations. Second, if the alleged mismanagement of tribal trust funds was a rationale for taking Cherokee trust title and replacing it with federal oversight, then the same rationale may also apply to the abolishment of the federal trust model in favor of tribal control.

The current federal mismanagement that has been exposed over the last decade in the *Cobell* litigation is reason enough to re-evaluate

104. *See id.*

whether the federal government should continue to possess the broad powers of trusteeship over Indian lands. The *Cobell* litigation has brought to the mainstream a truth that Indian people have known for a century: the federal government cannot be trusted to effectively manage tribal trust properties and the assets that flow from such properties.

Part one of this proposal, as detailed above, addresses only the lands that are presently held in trust by the federal government. It does not address lands that the tribes may acquire in the future. Many tribes would be reluctant to agree to an end to the federal land-into-trust process because they see this as the only viable means of expanding the tribal land base and ensuring that those lands are placed under the exclusive jurisdiction of the tribe.

The recent U.S. Supreme Court decision in *Sherrill*[105] confirms the precarious position of tribes with respect to placing lands in trust. In that case, the Oneida Indian Nation sought recognition of its present and future sovereign immunity from local taxation on "parcels of land it purchased in the open market, properties that had been subject to state and local taxation for generations."[106] The Court denied this relief on equitable grounds, taking into consideration that the newly purchased tribal properties had not been under tribal jurisdiction for over 200 years.[107]

The U.S. Supreme Court noted that the only way for the lands to be considered within the tribe's territory is if the tribe were to avail themselves of the present land-into-trust process. Therefore, the Court reiterated the fact that the only way for tribes to regain tribal jurisdiction over their own lands, is to ask the federal government to take legal title and become the tribe's trustee.

The ruling in *Sherrill* could be redressed either through legislation or through a second proposal of property transactions. First, Congress could pass legislation placing restrictions on alienation, subject to tribal consent, on all fee land owned by tribes. If the political climate rendered this type of legislation unattainable, the other solution could be found by invoking the present land-into-trust provisions.

A tribe could petition the federal government to take the lands into trust, but on a limited and temporary basis. Once the land is placed into trust, it is free from state interference and considered Indian country over which the tribe can exercise jurisdiction. Once that status is obtained, the tribe would petition the federal government to reconvey the land to the tribe in fee simple. The tribal jurisdiction was first

105. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).
106. *Id.* at 199.
107. *See id.* at 221.

restored through the existing land-into-trust process and then the tribal ownership would be restored through the initial proposal of a federal re-conveyance to the tribe.

Each of these proposals requires federal action either through legislative amendments or through property conveyances from the Secretary of the Interior. Yet the federal action necessary to restore exclusive autonomy will be less arduous than the existing federal trust system. It will, in the end, accomplish for the federal government one of their unfulfilled goals for the allotment process: it will get the federal government out of the Indian business.

These proposals will accomplish for the tribes a restoration of autonomy and jurisdiction that will make appropriate land ownership in Indian country a real possibility for the first time in over 100 years.

VI. CONCLUSION

If tribes are to have any meaningful autonomy over tribal lands, a significant shift in the current federal law is necessary. The only model that will return control and autonomy to tribes is one that envisions a final end to the federal trust of Indian lands.

Tribes have been placed in a precarious position when it comes to controlling their own lands and natural resources. Despite a prevailing international law and domestic policy of indigenous self-determination, tribes in the United States are afforded no viable option for exclusive tribal autonomy over lands and natural resources.

Under the current federal system, a tribe has only two options for land control. They can subject ownership of tribal lands to the federal trusteeship in order to remain free from state regulation of tribal land, or they can maintain fee ownership of tribal land and watch their tribal lands be controlled by state regulatory power. Tribes must either allow federal supervision or state regulation. Neither scenario is acceptable.