The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process

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I. INTRODUCTION

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be transferred but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.¹

Title to any lands or rights acquired pursuant to this Act 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

¹ Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810) (citations omitted). "Municipal right" refers to the internal laws of the United States.
such lands or rights; shall be exempt from State and local taxation.\textsuperscript{2}

Asked what Indians called this land before white people arrived, one Indian activist simply answered: "Ours."\textsuperscript{3} During the Indian removals,\textsuperscript{4} generally occurring between 1825 and 1845, and the Indian Wars of the 19th century designed to force tribes onto reservations with corresponding cessions of the tribal land base, tribes were deprived of all but about 138,000,000 acres of their lands,\textsuperscript{5} though often guaranteed by contract through solemn treaty.\textsuperscript{6} Throughout the majority of this period, treaties between the United States and Indian Tribes, Bands, and Nations, with rare exceptions, spoke of drawing a boundary between the United States and the Indian tribal nation, of ceding some tribal lands to the United States reserving the remainder, or swapping lands with the United States with the new lands to be held as Indian lands are held under an aboriginal treaty recognized title.\textsuperscript{7} Only a few of the several hundred treaties actually suggested that tribal lands were to be held "in trust" for the Tribe.\textsuperscript{8}

In the General Allotment Act of 1887, Congress for the first time imposed American real property and inheritance\textsuperscript{9} law upon Indian territories, unilaterally forced the division of the tribal domain amongst the individual citizens of the tribe to be held by the United States "in trust" for the individual allottee, and thereby created a fictitious "surplus" of tribal land that the tribe could be forced to sell.\textsuperscript{10} The result was devastating to the Indian land base:

\begin{itemize}
  \item \textsuperscript{3} VINE DELORIA, CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 169 (1969).
  \item \textsuperscript{5} To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing Before the S. Comm. on Indian Affairs on S. 2755, 73d Cong. 17 (1934) [hereinafter Hearing on S. 2755].
  \item \textsuperscript{6} See Johnson, 21 U.S. (8 Wheat.) 543; Cherokee Nation, 30 U.S. (5 Pet.) 1; Worcester, 31 U.S. (6 Pet.) 515; Cherokee Nation, 270 U.S. 476 (reciting more history as to this particular Nation's travails). Other tribes endured similar treatment by their "trustee." BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL 310 (2003).
  \item \textsuperscript{7} G. William Rice, Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—an Essay, 82 N.D. L. Rev. 811 (2006). In particular note the text of that article between pages 816-22 and 833–34 considering the language of various treaties between the United States and Indian tribes.
  \item \textsuperscript{8} Treaty with the Senecas, Mixed Senecas and Shawnees, Quapaws, arts. 16, 20, Feb. 23, 1867, 15 Stat. 513; Treaty with the Delawares, July 2, 1861, 12 Stat. 1177 (requiring that if purchase money was not paid, land had to be returned to United States in trust for the tribe); Treaty with the Senecas, Tonawanda Band, art. 3, 11 Stat. 735; 12 Stat. 991, November 5, 1857 (authority to repurchase lands from the holder of "the fee" who had previously purchased the Indian title).
  \item \textsuperscript{9} See Jones v. Meehan, 175 U.S. 1, 24 (1899).
Through sales by the Government of the fictitiously designated "surplus" lands, through sales by allottees after the trust period had ended or had been terminated by administrative act; and through sales by the Government of heirship land, virtually mandatory under the allotment act: Through these three methods, the total of Indian landholdings has been cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934.

These gross statistics, however, are misleading, for, of the remaining 48,000,000 acres, more than 20,000 acres are contained within areas which for special reasons have been exempted from the allotment law; whereas the land loss is chargeable exclusively against the allotment system.

Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.

In his testimony in support of the Thomas-Rogers Oklahoma Indian Welfare Act of 1936, Commissioner Collier presented the following materials as a "case study" of the effect of the federal policies of allotment and assimilation on certain tribes located in the eastern half of Oklahoma:

The situation in Oklahoma in 1908 was something like this: The Indians in the Five Civilized Tribes' area in the eastern part of the State were the owners of 15,000,000 acres of land which had been allotted to them, but the trust period had not been terminated. At that time in all Oklahoma the Indians owned about 22,000,000 acres of land, including some of the best land of the State. In 1908 legislation was adopted which had the effect of terminating trust periods rapidly and bringing various classes of Indians in the eastern part of the State under the jurisdiction of State laws upon the death of the original allottees.

The holdings of the Five Civilized Tribes, the tax-exempt holdings, diminished from 15,000,000 acres in 1908 to 1,500,000 acres at the present time, meaning a 90-percent shrinkage.

11. Hearing on S. 2755, supra note 6, at 17.
In the East, as the result of the course of events which I have described, the Five Civilized Tribes have become predominantly landless. Data that we acquired last year indicates that 72,000 members of the Five Civilized Tribes [of approximately 100,000] are at present wholly landless. The poverty of this great group of tribes in the East, exclusive of the Osages and Seminoles, has become very great. The per capita per annum income of the Five Civilized Tribes, excluding a few who are rich from zinc or oil or other minerals, runs around $48, a figure arrived at by totaling all that they consume. I mean all they wear and eat in a year. They are very poor. desperately poor.13

Commissioner Collier understood that the legacy of the allotment policy had similar effects not only throughout Oklahoma, but throughout the other allotted reservations. For example, the allotment system had rendered nearly two-thirds of the Indian people in those areas landless, large portions of the lands remaining in trust were unusable due to fractioned ownership, and fractionated heirship cost the Government millions of dollars for Bureau of Indian Affairs realty operations to account for those interests and their rents that could not benefit Indians or correct the worst elements of the allotment system.14 Moreover, these ever increasing administrative costs were incurred to the detriment of Indian health care, distress relief, education, and other beneficial programs and services.15

II. THE INDIAN REORGANIZATION ACT

The Roosevelt administration, with support from Secretary of the Interior Ickes and with Commissioner Collier as the point man, proposed to provide an Indian “new deal” focused on two primary legs. The first was to stop the loss of Indian lands and provide a mechanism and funding to acquire additional lands for Indians.16 The second was to provide statutory authority for Indian home rule or self-government that would be binding on the Secretary of the Interior and require that office to deal with tribally-chosen tribal leadership and tribal initiatives.17 The result of this plan was the enactment of the Wheeler-
Howard Indian Reorganization Act of 1934 (IRA), and the Thomas-Rogers Oklahoma Indian Welfare Act of 1936 (OIWA). The focus here is upon the first leg of the IRA program.

There are several provisions of the IRA that address the loss of Indian lands by Indian allottees and tribes, and the acquisition of land by or for Indians. There were originally four primary "stop-loss" provisions of the IRA dealing with Indian lands. Section 1 prohibited further allotment of tribally-owned lands. Section 2 extended the federal trust periods, and restrictions against alienation imposed upon Indian allotments, until further action by Congress. Section 4, "Section 4, Affairs, 74th Cong. 27 (1935) (statement of Hon. John Collier, Commissioner of Indian Affairs):

Mr. Collier: . . . Now, the act is extremely simple in this detail. It says that when they organize under the act, under the Thomas-Rogers bill, and adopt a constitution and bylaws by a majority vote, by a vote of the majority of the votes cast at a referendum, and when thereafter the constitution and bylaws are O. K.'d by the Secretary of the Interior, from that time forward the Secretary may not change the constitution and bylaws except with the consent of the tribe itself through a majority vote. He is bound by the constitution and bylaws. They are binding upon him, as binding as acts of Congress. The tribe may change its constitution and bylaws. The tribe may abandon its constitution and go back to the old way. Of course, Congress may change them, but not the Department.

Mr. DONAHEY. Is this the first time there has been an act to embody that principle of Indian home rule?

Mr. COLLIER. The Wheeler-Howard Act (Act of June 18, 1934, 48 Stat. L. 984) embodies it, and this act carries the same thing over to the Indians [in Oklahoma].

20. Section 19 of the IRA defined the term "Indian tribe" as follows: "The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Id. § 479 (2006).
21. Section 19 of the IRA defined the term "Indian" as follows: "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. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians." Id. § 479 (2006).
22. Id. § 461.
23. Id. § 462. This section was originally inapplicable to certain named Indian tribes in Oklahoma. Id. In most cases, allotments were held in trust by the United States for the allottee pursuant to the Indian General Allotment Act or specially negotiated tribal allotment agreements. In a few cases, the allottees received a "restricted fee" title. In those cases, the allottee received a fee patent to their land, but the ability to alienate that property was subject to the approval of the Secretary of the Interior -- thus the notion of a "restricted fee." See U.S. v. Ramsey, 271 U.S. 467 (1926).
effectively repealed in part in 1948, 24 originally limited the ability to sell or devise Indian allotments by requiring that all sales or devises be to the tribe, other Indians, or the owners' lineal descendants, except when the land was exchanged for land of equal value with the approval of the Secretary of the Interior. 25 Finally, section 16 of the IRA contained a provision that authorized any tribe organized under the IRA “to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.” 26 These provisions significantly retarded the rate of Indian land losses. However, they did not stop such losses due to the enactment of the 1948 act referenced above and other factors. 27 

For the first time, a number of provisions of the IRA provided generally for the consolidation of Indian lands into tribal ownership, or the acquisition of new lands by or for tribes or individual Indians. First, the third section of the IRA 28 authorized the Secretary of the Interior to “restore to tribal ownership” the remaining “surplus” lands of any Indian reservation that had been opened for sale or homesteading, but remained in the hands of the United States 29 Lands to which the United States held the fee title after cession by or a taking from the

24. The “stop loss” effect of this Section was generally eviscerated by the enactment of the Act of May 14, 1948, 25 U.S.C. § 483, which provided, “The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of the Act of June 18, 1934 (48 Stat. 984), or the Act of June 26, 1936 (49 Stat. 1967).” Id. § 483.


27. For instance, some tribes “opted out” of the IRA pursuant to the authority of Section 18 of the Act and these limitations were therefore inapplicable to such tribes and their members. See 25 U.S.C. § 478. Many tribes were terminated in the 1950's, and their lands lost, though some have since been restored to federal recognition and regained some (often small) portions of their land. Other factors have also been at work. See generally Memorandum from Mastin G. White, Solicitor to the Dir., Bureau of Land Mgmt., Sol. Op. No. M-34796, Status of Indian Surplus Lands Withdrawn from Public Entry, Dep’t of the Interior Relating to Indian Affairs, reprinted in 2 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974 at 1477, available at http://thorpe.ou.edusol_opinions/p1476-1500.html#m-34796 (October 22, 1947).


29. Rundle v. Udall, 379 F.2d 112 (D.C. Cir. 1967) (relying upon and adopting Bowman v. Udall, 243 F.Supp. 672 (Dist. D.C. 1965), which held that lands ceded from an unallotted reservation were “surplus lands”).

Tribe, and lands to which the tribes retained no title, have been recognized as “surplus lands” even though not ceded or sold in a transaction related to allotment of a reservation. Such lands are eligible for restoration under this section, which authorizes restoration but does not require it. Presumptively, general American property rules would expect a conveyance of title and delivery of seizin from the United States Secretary of the Interior to the tribe, and the tribe would have to accept that delivery to effectuate a transfer of ownership.

Section 4 of the IRA provides two separate mechanisms through which lands may be acquired by a tribe or Indians. The first method provides that restricted Indian lands “may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located.” The phrase in this sentence requiring the approval of the Secretary has been interpreted to apply to the conveyance from the restricted Indian. This section also contains an authorization for the exchange of lands between Indians, between an Indian and a tribe, and between Indians and non-Indians. This proviso states that “the Secretary of the Interior may authorize voluntary exchanges of lands of equal value” under certain conditions. While it does not appear that this phrase has been judicially interpreted, the difference in language in these two provisions within the same section indicates that the approval of the Secretary in the first phrase applies to the release of title by the allottee or heir, while the Secretary’s ability to “authorize” exchanges would necessarily constitute an “approval” as to both Indian parties to the transaction to

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31. *Rundle*, 379 F.2d at 112 (holding that land ceded from an unallotted reservation were “surplus lands”).
32. Memorandum from Edmund T. Fritz, Deputy Solicitor to Comm'r of Indian Affairs, Interior Sol. Op. No. M-36510, Status of Title to Lands Reserved for School and Agency Purposes on Former Kiowa, Comanche and Apache Indian Reservation, Western Oklahoma, 67 I.D. 10, reprinted in 2 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974 at 1866 (January 15, 1960). The Kiowa, Comanche, and Apache reservation was allotted by act of Congress, and the lands remaining after allotment were eventually opened for white settlement except those lands reserved for school and agency purposes. The lands at issue here were reserved for those purposes prior to their restoration.
34. Indian Reorganization Act § 4, 48 Stat. 984, 985. This section was originally inapplicable to Indian Tribes in Oklahoma. *Id.* at §13, 48 Stat. at 986.
35. *Id.*
the extent that they are conveying trust or restricted lands in the
transaction.

The first paragraph of section 5 of the IRA authorizes the Secretary
of the Interior, at his discretion, to acquire land or interests in lands for
the purpose of providing lands to Indians. The second paragraph of
that section authorizes an annual appropriation so that the Secretary
will have funds with which to purchase lands for Indians. The third
paragraph makes any monies appropriated pursuant to that section
available until expended.

Section 17 of the IRA authorizes the Secretary of the Interior, upon
tribal request, to issue a charter of incorporation to Indian tribes.
In such charters, Congress specifically authorized the Secretary of the
Interior to grant federally incorporated tribes the authority to acquire,
manage, and dispose of lands and other property:

Such charter may convey to the incorporated tribe the power to
purchase, take by gift, or bequest, or otherwise, own, hold,
manage, operate, and dispose of property of every description,
real and personal, including the power to purchase restricted
Indian lands and to issue in exchange therefor interests in
corporate property, and such further powers as may be
incidental to the conduct of corporate business, not inconsistent
with law, but no authority shall be granted to sell, mortgage, or
lease for a period exceeding twenty-five years any trust or
restricted lands included in the limits of the reservation.

Thus, when the Secretary grants a tribe such authority in a
charter, the tribe is not acting unilaterally, but rather is acting with the
express consent, approval, and delegated power of both the legislative
branch and the executive branch of the Government of the United
States. Moreover, as Commissioner Collier and others took pains to

40. Id. Appropriations for various purposes were authorized by sections 5, 9, 10,
and 11 of the IRA.
41. Indian Reorganization Act, 576, § 17, 48 Stat. 988. Originally, this section
required that the charter be approved by a referendum vote of the tribe. As amended by the
Act of May 24, 1990, Pub. L. No. 101-301, § 3(c), 104 Stat. 207, the charter is ratified by the
governing body of the tribe. This section was originally inapplicable to Indian tribes in
42. Indian Reorganization Act § 17, 25 U.S.C. § 477. The original act limited the
leasing authority of incorporated tribes to ten years. May 24, 1990, Pub. L. No. 101-301, §
3(c), 104 Stat. 207.
43. See U.S. CONST. art. I, § 8, cl. 3; United States v. Mazurie, 419 U.S. 544 (1975)
(approving similar delegations of power to Indian tribes in the past in the exercise of the
Congressional power to regulate commerce with the Indian tribes).
44. See Readjustment of Indian Affairs: Hearing on H.R. 7902 Before the H. Comm.
on Indian Affairs, 73rd Cong. 15-28, 43, 67-68 (1934) (statement of Hon. John Collier,
Commissioner of Indian Affairs and statement of Mr. Siegel).
repeat, the tribe acts as a federal agency or instrumentality. However, such action is a tribal, not a federal, action.

The reason for these repeated statements in the record can best be attributed to the governmental immunity doctrine, which was then the constitutional law of the land. According to this doctrine, federal instrumentalities were constitutionally immune from state taxation and, at the time of the enactment of the IRA, this was still the law. It was not until after the enactment of the IRA and OIWA that the Supreme Court, in a series of cases, questioned and then reversed the constitutional concept that those working for the federal government on a federal project were immune from state taxes. Therefore, it is reasonable to assume that these references were intended to clarify the tax immunity of incorporated tribes and their property.

Thus, it is apparent that Sections 3, 4, 5, and 17 of the IRA each authorize differing entities to acquire or take title to land for Indians or Indian tribes. The IRA, in the fourth paragraph of Section 5, provides instructions about how all such lands are to be held:

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended 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.

The question, of course, is who (what entity) “takes” the title to land “in the name of the United States in trust for the Indian tribe or individual for which the land is acquired?” The Court has blithely pronounced in dicta that this section authorizes the Secretary to take land into trust for Indians. The difficulty is that this is not what this

45. Id.
46. Id.
47. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
48. Gillespie v. Oklahoma, 257 U.S. 501 (1922) (denying Oklahoma the right to tax the income of a lessee of an oil and gas lease covering an Indian trust allotment with respect to the oil and gas produced therefrom.)
50. See generally Okla. Tax Comm'n v. Tex. Co., 336 U.S. 342 (1949) (holding that the non-Indian lessees' shares of gas and oil produced on Indian lands are subject to state and local taxes); Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938) (holding a person operating property under a government contract is not subject to tax exemption).
52. Id.
section actually says. The first paragraph of Section 5 authorizes the Secretary to acquire lands for the purpose of providing lands for Indians. The second paragraph authorizes an appropriation so that the Secretary will have money to use to acquire lands for Indians. The third paragraph states that all appropriations “pursuant to this section shall remain available until expended,” and the fourth paragraph of that section requires that all lands or rights acquired “pursuant to this Act” shall be taken into trust status and be exempt from taxation.

Unambiguous statutory language is enforced according to its terms using the ordinary meaning of the words. When Congress changes the words used in different provisions of the statute, the Court will assume that Congress “acted intentionally and purposefully” to change the meaning with a view toward changing the application of the provision at issue. Thus, when Congress changed “pursuant to this Section” in the third paragraph of section 465 to “pursuant to this Act” in the fourth paragraph of section 465, the standard rules of statutory construction would indicate that Congress meant to change the scope of those two paragraphs so that only the funds appropriated pursuant to the second paragraph of that Section would remain “available until expended,” while all lands or rights acquired through the operation of any provision of the IRA would be required to be taken in the name of the United States in trust and “shall be exempt from State and local taxation.”

This would mean that lands restored to tribal ownership pursuant to section 3 of the IRA must be taken in the name of the United States in trust for the tribe, and this has been the practice. Additionally, lands acquired by an incorporated tribe pursuant to the authority of section 17 of the IRA must be taken in the name of the United States in


55. Id.
56. Id. (emphasis added).
59. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 439-40 (2002); see also Russello v. United States, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion of exclusion.”) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (6th Cir. 1972)).
trust for the tribe.\textsuperscript{62} It would seem that it would be the entity having authority to acquire the land which would be the entity to accept the deed in the name of the United States in trust for the tribe or individual Indian. At least one of the most modern charters issued pursuant to 25 U.S.C. § 477\textsuperscript{63} expressly requires compliance with these provisions of the IRA, as follows:

The incorporated Nation shall have the following powers as provided by Section 17 of the Act of June 18, 1934, (48 Stat. 984), as amended, and other applicable federal law:

\begin{itemize}
  \item H. To purchase, take by gift, bequest, eminent domain, or otherwise, own, hold, manage, operate, and dispose of property of every description, real, personal, or mixed, including the power to purchase trust or restricted Indian lands, and to issue in exchange therefor bonds, scrip, notes, tribal instruments of title, or interests in corporate property pursuant to the laws of the Sac and Fox Nation; \textit{provided}, that title to any lands or rights so acquired shall be taken by the incorporated Nation in the name of the United States in trust for the Sac and Fox Nation or individual for which the land is acquired, and such lands or rights shall be exempt from federal, State, and local taxation, \textit{and provided further}, that this charter shall not be construed as granting authority to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation.\textsuperscript{64}
\end{itemize}

Since the incorporated tribe is authorized to "purchase, take, own, hold, manage, operate, and dispose of" land subject to the three restrictions stated, it is clear that the United States, as nominal title holder and protector against state taxation, would not incur a trust liability for the use of such lands by the tribe.\textsuperscript{65} Such liability should


\textsuperscript{64} Sac and Fox Nation Res. SF-08-185 (filed May 13, 2008) (petitioning the Secretary of the Interior to issue a federal corporate charter to the Sac and Fox Nation pursuant to section 17 of the Indian Reorganization Act as approved and issued by the Assistant Secretary—Indian Affairs.). Section 17 of the IRA is applicable to all tribes except the Osage, since 25 U.S.C. § 478–1 applies it to tribes which rejected the IRA, and 25 U.S.C. § 503 applies it to other tribes in Oklahoma excepted from this provision by section 13 of the IRA. Section 9 of the Oklahoma Indian Welfare Act (25 U.S.C. § 509) repeals all Acts inconsistent with that authority. \textit{Id.; see also} Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988).

attach only if the United States failed to enforce the three restrictions applicable to the tribe's on-reservation acquisitions, allowed taxation of lands so acquired by a state, or took over active management and control of such land by authority of Congress. Since the incorporated tribe would be acting within the delegated authority of Congress, authority which Congress clearly has under the Indian Commerce Clause and other Constitutional provisions, BIA administrative policy as well as state law must yield to the Congressional plan.

Neither Cass County nor City of Sherrill require a different result. In Cass County, the Minnesota Chippewa Tribe sought, and Congress approved, a revocation of the section 477 Charter of the Minnesota Chippewa Tribe. Since the Leech Lake Band of Chippewa is part of the Minnesota Chippewa Tribe, it thereafter had no authority to acquire lands under 25 U.S.C. § 477. The Oneida Nation of New York had apparently voted against the application of the IRA, and no charter under 25 U.S.C. § 477 for the Oneida Indian Nation of New York has been revealed by research. There does not appear in either case a claim to tax immunity under 25 U.S.C. §§ 465 and 477. On the other hand, when such claim was properly made, a unanimous Court agreed that the land and the property which the tribe had attached to the land pursuant to this provision was tax exempt, even though it was outside the boundaries of the reservation, and even though the business operated upon that land was subject to state taxation because this provision did not exempt off-reservation personal property from state taxation.

69. See 25 C.F.R. pt 151 (1999) (providing detailed regulations setting out the Secretary's policy concerning Secretarial acquisition of lands for Indians pursuant to the Indian Reorganization Act, Oklahoma Indian Welfare Act, and other relevant statutes). Given the prohibition against Secretarial revocation of such charters contained in 25 U.S.C. section 477, it seems clear that the Secretary, via regulation, cannot restrict or revoke tribal land acquisition authority contained in the charter of an incorporated tribe. Id.
70. U.S. CONST. art. VI, cl. 2; see also Oneida Indian Nation of N.Y. State v. County of Oneida, 414 U.S. 661, 667 (1974) (“Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law.”).
74. See THEODORE H. HAAS, CHIEF COUNSEL, UNITED STATES INDIAN SERVICE, TEN YEARS OF TRIBAL GOVERNMENT UNDER I. R. A., Table 13 A. (1947); available at http://madison.law.ou.edu/IRA/IRAbook/tribalgovpt1tblA.htm (indicating that no Six Nations (Iroquois) reservation in New York had accepted the IRA).
THE INDIAN REORGANIZATION ACT, THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, AND A PROPOSED CARCIERI "FIX": UPDATING THE TRUST LAND ACQUISITION PROCESS

What would be the effect of a wholesale implementation of this statutory authority through the recognition, amendment, and granting of charters containing this authority by the Secretary, and by the Indian tribes through requesting and ratifying such charters, and then implementing that land acquisition authority? It would seem that doing so would provide the tribes and the Interior Department a powerful tool to consolidate fractionated Indian lands into usable parcels as championed by Commissioner Collier in his testimony on the IRA, and would allow the tribes to further regain and consolidate ownership of their reservations. Given the holding in Mescalero v. Jones, these provisions would allow tribes to acquire off-reservation properties, but the state would retain jurisdiction over activities thereon unless the Secretary of the Interior exercised his authority under section 7 of the IRA to add those lands to the tribe's reservation. This would also appear to preclude a tribe from gaming upon lands acquired outside the boundaries of their reservation unless gaming was allowed by one of the exceptions to this general rule found in 25 U.S.C. § 2719. Given these facts, and the ultimate control over the process that would remain in Congress, it would seem that there would be no need for the federal courts to continue to ignore the current self-determination and self-governance goals of Congress and the President in favor of continuing the outmoded, assimilationist views that grant power to the states to

76. Id.
77. "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations." 25 U.S.C. § 467 (2006) (relating to Declaration of New Indian Reservations and Addition of Lands to Existing Reservations).
78. A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes, 74th Cong., 1st Sess. 27 (April 9, 1935). (remarks of Commissioner Collier regarding the OIWA's self-governance provisions at Sen. Comm. on Indian Affairs) (noting also that under the current law, the Secretary of the Interior retains authority to negotiate with the tribe regarding any limitations that might be appropriate with respect to off-reservation acquisitions).
the detriment of the tribes.\textsuperscript{80} It is the Tribes, after all, to whom all of the federal government, including the Courts, owe a trust responsibility.\textsuperscript{81} 
While there has been some improvement under the IRA, the amount of lands acquired has not significantly exceeded the lands that continue to be lost. The following chart shows the state of Indian land holdings within the United States in the 1990s:

\textbf{Area Comparison of Indian Land Holdings}\textsuperscript{82}

<table>
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<tr>
<th>Area</th>
<th>Tribal Land</th>
<th>Individual Land</th>
<th>Total Per Capita Acres</th>
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<td>Anadarko</td>
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<td>Billings</td>
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<td>3,969,261</td>
<td>248.78</td>
</tr>
<tr>
<td>Muskogee</td>
<td>68,324</td>
<td>589,783</td>
<td>3.32</td>
</tr>
<tr>
<td>Navajo</td>
<td>14,753,252</td>
<td>717,077</td>
<td>83.33</td>
</tr>
<tr>
<td>Eastern</td>
<td>516,861</td>
<td>0</td>
<td>15.79</td>
</tr>
<tr>
<td>Minneapolis</td>
<td>1,135,196</td>
<td>139,959</td>
<td>23.46</td>
</tr>
<tr>
<td>Phoenix</td>
<td>12,296,598</td>
<td>273,010</td>
<td>146.81</td>
</tr>
<tr>
<td>Portland</td>
<td>3,787,256</td>
<td>930,138</td>
<td>67.57</td>
</tr>
<tr>
<td>Sacramento</td>
<td>405,172</td>
<td>58,065</td>
<td>17.30</td>
</tr>
</tbody>
</table>

\textsuperscript{80} See, e.g., City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). This case holds, in essence, that the State stole the tribe's lands fair and square, and the Court would not hear the tribe's complaint although for most of the intervening period the tribe was precluded by federal law from bringing it's claim without federal consent and supervision, and even though the State took the land in direct violation of the federal law and the federal trust responsibility to prevent such takings. Id.

\textsuperscript{81} Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

\textsuperscript{82} CAROLE GOLDBERG & DUANE CHAMPAGNE, A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES ch. IV (1996), available at http://www.aisc.ucla.edu/ca/Tribes4.htm. This report was prepared by the UCLA American Studies Center for the Advisory Council on California Indian Policy, The Community Service / Governance / Census Task Force Report, March 27, 1996. Id. The authors of the report explain their methodology as follows:

The total per capita acres is calculated by adding tribal land and individual land and dividing by the 1989 BIA Indian Service Population and Labor Force Estimates. Here only the estimated service populations for each area office are used. The total individual land ownership in 1990 was 9,862,661 acres, while 46,327,469 acres were in tribal hands. The total BIA service population for 1990 was 949,075 with individual and tribal land totaling 56,190,130, which figures yield a national per capita Indian land holding of 59.2 acres.

\textit{Id.} It appears that this data may not include in the calculation of per capita land holdings those Indians who have moved away from their tribal areas as a result of having no place to live, no available employment, or who simply chose to live elsewhere, meaning that these per capita numbers may be inflated compared to the total number of tribal members who would want to use land. The Bureau of Indian Affairs has since “reorganized” itself, and now calls the former Area Offices “Regional Offices.”

<table>
<thead>
<tr>
<th>Juneau</th>
<th>86,773</th>
<th>884,100</th>
<th>10.83</th>
</tr>
</thead>
<tbody>
<tr>
<td>Totals</td>
<td>46,327,468</td>
<td>10,788,481</td>
<td>56,190,130</td>
</tr>
</tbody>
</table>

It is instructive to compare these numbers against general farm and ranch acreage available just within the State of Montana:

There are 60 million acres in farm and ranch land in Montana, making it number two in the nation. The average farm/ranch size in Montana is 2,210 acres, ranking it number four in farm/ranch size in the nation. The average farm size in the U.S. is 411 acres. Montana can boast 28,300 farms and ranches.83

In other words, there remains, after allotment and the benign neglect of the Bureau of Indian Affairs’ land acquisition program, not a single Regional Office where the average Indian can make a living farming or ranching his lands or have a farm that approaches in size the average farm that non-Indians need to make a living.84 The amount of land available to Indians in Oklahoma (Anadarko and Muskogee), Alaska (Juneau), and California (Sacramento) is simply shameful.85

III. THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 2007, in its 61st Session, the General Assembly of the United Nations adopted its latest Human Rights instrument, the United Nations Declaration on the Rights of Indigenous Peoples.86 Only the countries that are composed of former English settler colonies, namely the United States, Canada, Australia, and New Zealand, voted against its adoption, and it was approved by a vote of 144 in favor, 4 against, and 11 abstentions.87 Article 43 of this Declaration states the Human

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84. GOLDBERG & CHAMPAGNE, supra note 82.
85. Id.
Rights that the Declaration recognizes as existing in Indigenous communities and individuals “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”

As did Commissioner Collier and historically various federal officials, the Declaration recognizes the suffering and historic injustices visited upon Indigenous peoples, communities, and individuals through their colonization and the loss of the lands, territories, and resources needed to sustain them as viable communities and peoples, and their spiritual, cultural, economic, political, and other ties to those lands. Commissioner Collier, federal officials, and the Declaration believed that Indigenous control over development affecting lands, territories and resources was required for maintenance and strengthening of Indigenous “institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”

Thus, both the IRA and the Declaration can be said to contain a kernel of thought that can, perhaps, best be summarized by the American ideal that every family is entitled to a home of its own, that no one is entitled to steal or forcibly take the home of another, or to swindle them out of their home, and that when such a thing happens, proper redress is in order. The Declaration contains provisions calling upon States to prevent and redress any action dispossessing Indigenous peoples of their lands, territories, or resources, to refrain from forcible removals and relocations of Indigenous peoples without their free, prior, and informed consent, and to refrain from military activities upon Indigenous lands absent the consent of the Indigenous people concerned.

Likewise, a number of articles of the Declaration speak to the rights of Indigenous peoples to own, hold, use, occupy, control, and maintain their spiritual, cultural, economic, and political ties to their lands. Article 29 requires the “conservation and protection of the

http://www.un.org/esa/socdev/unpfii/en/declaration.html. While it is unfortunate that those four countries chose to vote no, those who believe in democratic principles should conform their conduct to the principles of the Declaration, even if they voted against it.

88. Declaration, supra note 86, at 14. To emphasize that this Declaration constitutes the “minimum standard” the Declaration’s Article 45 provides that “[n]othing in the Declaration may be construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future.” Id.

89. Id. at 2.
90. Id.
91. Id.
92. Declaration, supra note 86, at 1. In this context, the term “State” refers not to the constituent states of the United States, but to the federal government of the United States, and the governments of other countries (States) around the world.
93. Id. at 4.
94. Id. art. 10. This article also provides for “just and fair compensation and, where possible . . . the option of return.” Id.
95. Id. art. 30.
96. Id. art. 25 & 26.
environment and the productive capacity” of Indigenous lands,97 and Article 32 recognizes in Indigenous people the right to determine their own developmental priorities and strategies with respect to their lands and resources.98

Finally, the Declaration recognizes in Indigenous peoples the international right to self-determination,99 including the exercise of that right through governmental autonomy within their territorial areas,100 and the “recognition, observance and enforcement of treaties, agreements and other constructive arrangements” with the national government.101 All of this is meaningless, however, without the right of redress. The Declaration takes this right into account in Article 27, which calls upon states to establish an independent, impartial, open and transparent process in which Indigenous peoples participate to resolve and adjudicate claims to their lands, territories, and resources.102 It is suggested that unless the United States is willing to submit the meaning of a treaty, agreement, or other constructive arrangement with a tribe to the courts of that tribe and abide and be bound by the result, it is unfair and illogical to assume that the tribe should be bound by a court or other adjudicatory body within the political system of the United States. It is axiomatic that no man is an impartial adjudicator of his own rights, and it is submitted that neither is any government with respect to its own rights vis-à-vis another government. It is not that any particular judge in any particular forum could be said to be biased or not, but rather the problem noted here is systemic. Whether settled by agreement or by adjudication in an appropriate systemically impartial forum, Indigenous peoples are entitled to just redress, including restitution where possible, of their traditional lands or other lands owned, occupied, or used by them “which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”103

It might be suspected that the right of redress was one of the prime reasons the United States chose to vote against the adoption of the Declaration. Yet coupling the right of redress to a process rather than an event might provide a mechanism that would be fair, just, and

97. Id. art. 29.
98. Id. art. 32.
99. Id. art. 3. Unlike the domestic Indian Self-Determination Act, 25 U.S.C. § 450 (2006), a glorified program management tool, the international right to self-determination assumes independent rights of action, and the right to “freely determine their political status and freely pursue . . . economic, social and cultural development.” Id.
100. Id. art. 4.
101. Id. art. 37.
102. Id. art. 27.
103. Id. art. 28.
acceptable to all. Should the United States, either administratively or legislatively, choose to implement the process of trust land acquisition through 25 U.S.C. § 477 and other federally recognized charters for Indians, as suggested herein, the issue of redress, as well as most issues with respect to tribal land bases might be amicably resolved without need for significant litigation. This action would make tribal land acquisition a tribal choice, continue the tribal ability to generate tribal revenues to allow land acquisitions by gaming and other ventures, and eliminate external burdens upon the economic development capacity of Indian tribes and individuals.

The principles supporting this end are relatively simple, but seem to be too often forgotten in the heat of litigation and political positioning. These principles include:

1. Every federally recognized tribe is entitled to a home (territorial area) within which they may determine their own form of government and freely pursue their social, cultural, and economic development—in other words, to have a place to live and bring up their children within their own culture on their own terms. For most tribes, their homeland will be their reservation, or former reservation, within the state or states where the tribe is still located.

2. If a tribe has no reservation as set forth above, then the United States should acknowledge or negotiate a suitable territory within which the tribe can acquire lands within its cultural or historical area that, when acquired, would be recognized as a reservation or homeland for that tribe. The Indian Land Consolidation Act's land consolidation area provisions could be used as a vehicle for such action.

3. Within or adjacent to those homeland areas, the decision concerning whether to acquire a particular tract of property in trust, at least from willing sellers, or through exercise of normal eminent domain procedures, should be solely with the tribe concerned.

4. Once acquired, the lands would be held in the name of the United States, but subject to complete tribal control with the exception that the tribe could not sell the lands, mortgage the lands (other than for the purchase money), or lease the lands for a period exceeding twenty-five years in any manner that would be cognizable in a state or federal court unless expressly authorized by statute. Such lands and the economic activities of Indians and their families located thereon should be exempt from federal and state taxation.

IV. CARCIERI v. SALAZAR

[T]he fee to trust process [is] dysfunctional . . . .

The importance of having land taken into trust is twofold. First, as a matter of historical justice, there should be a simple and viable process by which it can be accomplished.

Secondly, when lands are held in trust by the United States, the United States holds legal title to that land while the beneficial title lies with the tribe or individual for whom it is held in trust. One of the effects of federal ownership is that state and local laws, for the most part, do not apply to that land. Thus, state ad valorem property taxes, land use and zoning laws and the like, cannot apply.\textsuperscript{106}

For years, anecdotal evidence from Indian country has been full of complaints regarding the inability or unwillingness of the Bureau of Indian Affairs to promptly process applications for trust land acquisition on behalf of tribes and their members.\textsuperscript{107} In its last term, the Supreme Court decided Carcieri \textit{v. Salazar},\textsuperscript{108} which interpreted the word “now” in the definition of “Indian” contained in section 19 of the IRA to mean the 1934 date of enactment of the Act,\textsuperscript{109} compounding the problem. That determination in itself was unfortunate, but perhaps not necessarily remarkable. The effect of that interpretation was to limit the definition of “Indian” as that term is used in the IRA to include only persons who are members of recognized tribes who were under federal jurisdiction in 1934, descendants of such members who were living on any Indian reservation in 1934, and persons having one-half or more Indian blood.\textsuperscript{110} However, the Court then limited the Secretary’s authority in 25 U.S.C. § 465 to acquire lands for the purpose of “providing land for Indians” to mean that the term “Indians” in that phrase meant only individual Indians so that the Secretary had no

\textsuperscript{106} Doug Nash, \textit{Fee-to-Trust: Fact or Fiction?, Part II INDIGENOUS LANDS REPORTER} 4 (Summer 2004), available at http://www.ilwg.org/documents/fee-to-trust (Nash).pdf. It appears that the reason the fee to trust process is dysfunctional may be that the attitude of federal administrative officials has been adverse to acquisition of additional trust lands for Indians after the filing of Cobell \textit{v. Norton}, 428 F.3d 1070 (D.C. Cir. 2005), attempting to obtain damages for breach of the government’s trust obligations to Indians, and local concerns regarding acquisition of lands for gaming purposes. \textit{See} 25 U.S.C. § 2719 (2006). Neither of these concerns, of course, should affect the judgment of a competent trustee.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} 129 S. Ct. 1058 (2009).

\textsuperscript{109} \textit{Id.} at 1064–65.

\textsuperscript{110} \textit{See} 25 U.S.C. § 479 (2006). Given the IRA’s plan to move away from individual land holdings under the allotment system, to recovery of lands on behalf of tribes thereby allowing individuals to live and work on tribal lands, this limitation may be understandable.
authority to acquire land for a tribe recognized and coming under federal jurisdiction after 1934.\textsuperscript{111}

This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net. Thus, it is clear that a congressional "fix" for this decision is both necessary and appropriate. Moreover, the necessity for this revision of the IRA, in order to protect the Indian land bases and provide a sensible means for future land acquisition, can be viewed as an opportunity to improve the dysfunctional Indian trust land acquisition process.

This proposed Carcieri "fix" is two parts. The first section requires implementation of the original intent of the IRA in that lands acquired by federally incorporated tribes would be nontaxable Indian country when acquired within a reservation or former reservation at the behest of the tribes.\textsuperscript{112} In addition, the tribe, not the Secretary of the Interior, would have management and operational control over said properties subject only to the limited restrictions stated in the statutory language or those set out in the applicable charter with the consent of the tribe. Tribes, though their corporate powers, should be allowed to take advantage of additional authorities since the enactment of the IRA, such as the Indian Land Consolidation Act,\textsuperscript{113} allowing reservation lands to be sold or exchanged with secretarial approval. One significant change from current law would expressly allow tribes to purchase lands using purchase money notes and mortgages, and allow refinancing of such notes and mortgages. This would put incorporated tribes on an equal footing with other federally chartered corporations, such as the Tennessee Valley Authority,\textsuperscript{114} which may hold and manage lands in the name of the United States in trust for the corporate entity.\textsuperscript{115}

\textsuperscript{111} Carcieri, 129 S. Ct. at 1063–65.
\textsuperscript{112} In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court stated that lands leased by an incorporated tribe outside its reservation were nontaxable by virtue of section 5 of the IRA (25 U.S.C. § 465) and invalidated a state compensating use tax upon personally purchased out of state and incorporated into the land in construction of a ski resort and lodge. However, the Court allowed the collection of the state's nondiscriminatory gross receipts tax to the income of that tribally owned ski resort because it was located outside the reservation. This case seems to stand for the proposition that for lands outside the reservation, section 465 provides a tax exemption for the land so long as the tribe holds the title, but tribal activities thereon remain subject to some state tax and regulatory authority. On the other hand, both the land and the business conducted on lands acquired within a reservation should be exempt from state tax and regulatory authority. See Oklahoma Tax Comm'n. v. Sac & Fox Nation, 508 U.S. 114, 128 (1993).
\textsuperscript{113} 25 U.S.C. § 2201.
\textsuperscript{115} Id. § 831c.
Additional provisions have been suggested to specify that all lands so acquired within, or adjacent to, a reservation are to be considered Indian country subject to the exclusive jurisdiction of the United States and the tribe concerned pursuant to 18 U.S.C. § 1151(a). This language is inserted to save all parties the need and expense of litigating the Indian country issue, and the tribe's right to govern its territory in light of the plain language of 18 U.S.C. § 1151(a).\(^\text{116}\) Also, the application of section 7 of the IRA is expressly confirmed as to lands acquired by a tribe that are not within or adjacent to the reservation of the tribe for the same reason.\(^\text{117}\) Under section 7, the decision as to whether lands not within or adjacent to an existing reservation should be added to the existing tribal reservation would be within the sound discretion of the Secretary of the Interior.\(^\text{118}\)

The last sentence of subsection (b) of section 1 of the suggested draft improves the current tax exemptions respecting trust and restricted allotments and applies those improved exemptions exclusively to Indian residents of lands held and managed by the tribes pursuant to this Act. If tribes are to have the support of allotment owners and other tribal members for reduction in fractionated heirships, these owners and their successors must be in better economic condition after the tribe takes ownership of their fractionated heirship interests than before the transfer. Otherwise, the allotment owner will simply refuse to convey their interests, resulting in further fractionation of the trust title and more expensive administration required of the Department of the Interior. It is thought that by making the income and property of Indians residing on tribally held and managed land within the reservations exempt from taxation, except taxes imposed by the tribe, the allotment owners will be benefitted by conveying their title to the tribe and receiving back a tribal assignment of the same or alternative property under tribal law. They will, therefore, be more willing to make such conveyance, the tribe will eventually be able to develop a proper tax base for its support, and the government will be relieved of the large expense and administrative burden currently incurred to manage and account for the fractionated ownership interests in allotted lands.\(^\text{119}\)

\(^{116}\) See, e.g., Strate v. A-1 Contractors, 520 U.S. 438 (1997), for a decision wherein the Court limited a tribe's authority over persons committing torts on lands owned by the tribe because there was a right-of-way upon those lands, even though 18 U.S.C. § 1151 otherwise provides.


\(^{118}\) Id.

\(^{119}\) It might be useful to mandate that the Secretary be required to consent to such a transfer requested by an Indian owner after consulting with that owner concerning the appraised value of their property. However, given the tribal ability to exercise eminent domain with respect to such properties, that particular mandate may not be needed.
Finally, there is an express statement that this corporate organization, and the trust land acquisition authority which it contains, will be applicable to all tribes. The IRA excluded two sets of tribes from the operation of this section. First, those tribes who voted to reject the act under the provisions of section 18 of the IRA were excluded. Congress has remedied this initial exclusion and made this section available to those tribes. In addition to those tribes, section 13 of the Act initially denied most tribes in Oklahoma access to this form of organization, but 25 U.S.C. §§ 503 and 509 provide a vehicle for all tribes in Oklahoma except the Osages to obtain such charters although the Interior Department has historically been resistant to acknowledging those rights in tribes within Oklahoma. There does not appear to be any rational justification for the continuance of these exclusions from a provision that is wholly voluntary.

Section 2 of the suggested draft cleans up problematic language currently contained primarily in 25 U.S.C. § 479 by using more modern statutory definitions as models, suggesting that perhaps indigenous Hawaiians should be included, using language to define “tribe” that is more consistent with current usage, changing the age of adulthood to 18 unless the tribe desires to set their age of majority at a different age, and adding a definition of “reservation” in the expectation that every federally recognized tribe will have one under this language.

124. See Indian Reorganization Act § 13, 25 U.S.C. § 473. However, the Thomas-Rodgers Oklahoma Indian Welfare Act authorized both a corporate form of organization, and the vesting in tribes in Oklahoma of the “rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934,” 25 U.S.C. § 503, but this authorization has not been well implemented by the Interior Department. See, e.g., Sac and Fox Nation v. Norton, 585 F. Supp. 2d 1293, 1996–97 (N.D. Okla. 2006). The hearing reports of the Thomas-Rodgers Oklahoma Indian Welfare Act of 1936 generally indicate that Senator Thomas, the driving force behind the exclusion of tribes in Oklahoma from certain provisions of the IRA, thereafter met with the tribes in Oklahoma, and came to support the extension of these provisions to tribes in Oklahoma. Hearing on H.R. 6234: House Comm. on Indian Affairs, 74th Cong. 11-13 (1935) (statement of Commissioner Collier).
127. In fact, Congress has amended section 16 of the IRA to add a subsection (f) which provides, “Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.” 25 U.S.C. § 476 (2006). The difficulty is that this provision itself is in a section of the IRA which is not directly applicable to tribes which rejected the IRA, tribes in Oklahoma who have not organized under 25 U.S.C. § 503 and obtained the benefit of this section, and tribes recognized after 1934 under the Carcerieri decision.
There are a number of statutes which define the term "Indian" to mean any individual person who is a member of any Indian tribe. The term usually includes persons defined as Alaska Natives under the Alaska Native Claims Settlement Act. Other statutes include tribal membership as a sufficient, though not necessary, part of a multiple-part definition of the term "Indian." In addition to tribal members, some statutes include as Indians those eligible for tribal membership, or persons who are descendants of tribal members. In such cases, of course, it is important to pay attention to the definition of "Indian tribe" or "tribe" to determine whether Alaska Natives and Native Hawaiians are included in the definition.

Other statutes include within the term "Indian" those persons who are acknowledged or recognized as being Indian or Alaska Native by political entities such as an Indian tribe, the federal government, a state government, or some designated official of one of those governments, either generally, or for some specific purpose. In addition, some
statutes include within the term “Indian” persons who are members of
terminated tribes or bands, or state recognized tribes or bands. Finally, one statute includes within the definition of “Indian” any person who would be subject to the jurisdiction of the United States as an Indian under 18 U.S.C. § 1153, if that person were to commit an offense “listed in that section in Indian country to which that section applies.”

A further point that should be considered in this context is the adoption by the General Assembly of the United Nations of the Declaration on the Rights of Indigenous peoples. Article 9 of that Declaration states: “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.”

And Article 33 of the Declaration states:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

The Declaration also establishes as a principal, to which the federal government should aspire, that Indians have a right to be free from forced assimilation, integration, or other action that would have the effect of “depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.” Any update to the Indian Reorganization Act should take into account, and be consistent with, these principals.

Thus, it would appear reasonable in crafting a more modern replacement for the definition of the term “Indian” for incorporation

misrepresentation of Indian produced goods); id. § 1603(c) (relating to Indian health care); id. § 2201(2) (relating to Indian land consolidation).

133. 20 U.S.C. § 7491(3) (relating to Indian, Native Hawaiian, and Alaska Native education); 25 U.S.C. § 1603(c) (relating to Indian health care).

134. Commonly referred to as “The Major Crimes Act.”

135. 25 U.S.C. § 1301(4) (relating to constitutional rights of Indians). At least one special purpose statute also requires trust or restricted land ownership to qualify as an Indian for purposes of that statute. Id. § 2101(1) (relating to development of tribal mineral resources).

136. Declaration, supra note 86.

137. Id. art. 33.

138. Id. art. 8.

139. If it is desired to include Native Hawaiians, one definition which might provide a partial model is found at 20 U.S.C. § 4402(6) (2006) (relating to American Indian, Alaska Native, and Native Hawaiian culture and art development). “The term ‘Native Hawaiian’ means any descendent of a person who, prior to 1778, was a native of the Hawaiian Islands.”
into the Indian Reorganization Act,\textsuperscript{140} that the definition might include one or more of the following factors in some reasonable combination:

1. Membership in an Indian tribe;\textsuperscript{141}

2. Eligibility for membership in an Indian tribe;

3. Being a descendant of a member of an Indian tribe, with or without specification of a particular degree of separation from the tribal member;

4. Acknowledgement or recognition as Indian or Alaska Native by political entities such as an Indian tribe, the federal government, a state government, or some designated official of one of those governments;\textsuperscript{142}

5. And finally, of course, the race of the individual as an Indian, Alaska Native, or other Indigenous person.\textsuperscript{143}

\textit{Id.} No attempt has been made to present a representative survey of statutes defining this term.


\textsuperscript{141} There is a policy issue here as whether, and to what extent, individual persons who are members of terminated tribes who were formerly recognized by the federal government, and members of tribes recognized only by the state should be considered Indians for federal purposes. See 20 U.S.C. § 7491(3) (2006); 25 U.S.C. § 1603(c) (2006). Clearly, circumstances exist where the Court has held that such persons still have "Indian rights" even though they are members of a terminated tribe. Menominee Tribe v. United States, 391 U.S. 404, 411 (1968).

\textsuperscript{142} The judges of the courts, of course, could be one such "designated official." It seems strange to consider the circumstance where a person could be held criminally liable for a violation of the Indian Major Crimes Act, 18 U.S.C. § 1153 (2006), and yet be ineligible for basic Indian trust services such as education, health care, and general assistance, yet that result may be obtainable under existing law. 25 U.S.C. § 1301(4); Scrivner v. Tanay, 68 F.3d 1234, 1241 (10th Cir. 1995) (holding that jurisdiction over a person under the Major Crimes Act requires some Indian blood and "recognition" as an Indian by a tribe or the federal government); see also United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979); Davis v. United States, 32 F.2d 860 (9th Cir. 1929); Ex parte Pero, 99 F.2d 28 (7th Cir. 1938) Whether such decisions should be left to the courts or clarified by statute is, of course, a policy issue.

\textsuperscript{143} See United States v. Antelope, 430 U.S. 641, 645 & n.6 (1977) (stating that Article I, Section 8, Clause 3 of the United States Constitution (the Indian Commerce Clause) authorizes legislation expressly applicable to "Indians"); Morton v. Mancari, 417 U.S. 535, 550-52 (1974), (upholding the Indian preference in employment provisions found in section 12 of the IRA, acknowledging that Article I, Section 8, Clause 3 of the United States Constitution “singles Indians out as a proper subject for separate legislation,” and acknowledging that Article II, Section 2, Clause 2 of the Constitution has been a source of federal power to deal with Indians as a separate people and as separate entities); U.S. CONST. amend. XIV, § 1–2 (providing in section 1, “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” and in section 2 of that same amendment once
Apart from special provisions focused upon limiting grants or other support to those tribes that exercise specific authorities that are the subject of the specific statute, the term "tribe" or "Indian tribe" has generally been defined to mean any Indian tribe, band, pueblo, nation, or other organized group or community, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Some


146. 12 U.S.C. § 1715z-13(i) (2006) (relating to single family mortgage insurance on Indian reservations); id. § 1715z-13a(I)(8) (2006) (relating to loan guarantees for Indian housing); id. § 4702(12) (relating to community development banking and financial institutions); 15 U.S.C. § 2229a(h)(2) (2006) (relating to fire prevention and control); 16 U.S.C. § 470w(4) (2006) (relating to national historic preservation); 16 U.S.C. § 470bb(5) (2006) (relating to archaeological resources protection); id. § 1722(7) (relating to Youth Conservation Corps and Public Lands Corps); id. § 4302(4) (relating to federal cave resources protection); 16 U.S.C. § 4702(9) (relating to aquatic nuisance prevention and control); 20 U.S.C. § 4402(5) (2006) (relating to American Indian, Alaska Native, and Native Hawaiian culture and art development); id. § 7011(7) (relating to language instruction for limited English proficient and immigrant students); id. § 9101(4) (relating to museum and library services); 25 U.S.C. § 450b(e) (2006) (relating to Indian self-determination and education assistance); id. § 1452(c) (relating to financing economic development of Indians and Indian organizations); id. § 1603(d) (relating to Indian health care); id. § 1801(a)(2) (relating to tribally controlled colleges and universities assistance); id. § 1903(8) (relating to Indian child welfare); id. § 2021(20) (relating to Bureau of Indian Affairs programs); id. § 2403(3) (relating to Indian alcohol and Substance abuse prevention and treatment); id. § 2511(4) (relating to Tribally Controlled School Grants); id. § 3001(7) (relating to Native American graves protection and repatriation); id. § 3103(11) (relating to national Indian forest resources management); id. § 3602(3) (relating to Indian tribal justice support); id. § 3703(10) (relating to American Indian agricultural resource management); id. § 3802(4) (relating to Indian dams safety); id. § 4001(2) (relating to American Indian trust fund management reform); 26 U.S.C. § 45A(c)(6) (2006) (relating to business related tax credits); id. § 7871(c)(3)(E)(ii) (relating to treating Indian tribal governments as states for certain purposes, but not specifically including Alaska Native entities); 31 U.S.C. § 7501(a)(9) (2006) (relating to requirements for single audits); 38 U.S.C. § 3115(c) (2006) (relating to training and rehabilitation for veterans with service-connected disabilities); 42 U.S.C. § 247b-14(d) (2006) (relating to oral health promotion and disease prevention); id. § 290bb-25(n)(3) (relating to grants for services for children of substance abusers); id. § 1471(b)(6) (relating to financial assistance by the Secretary of Agriculture); id. § 1490p-2(r)(4) (relating to loan guarantees for multifamily rental housing in rural areas); id. § 1996a(c)(2) (relating to
federal statutes go further and extend recognition for certain federal programs or statutory purposes to those tribes recognized by the State in which the tribe, band, nation, rancheria, pueblo, group, or community resides, while some using the primary definition without the addition of state-recognized tribes specifically exclude some Alaska Native entities from the definition of Indian tribe. Other specialized definitions add the requirement that the tribe be recognized as possessing or in fact exercising powers of self-government, and at least one statute requires governmental authority to be exercised over an Indian reservation (apparently without regard to whether the tribe exercises authority over other Indian country) in order for a tribe to qualify for treatment as an Indian tribe pursuant to that statute.

In addition to the generic definition set out above, some statutory authority accepts as sufficient various forms of federal recognition,
including simply being a “federally recognized Indian tribe” or Alaska
Native organization,\textsuperscript{151} or being on the list published in the Federal
Register by the Secretary of the Interior as required by 25 U.S.C. §
479a-1.\textsuperscript{152}

C. “INDIAN RESERVATION” DEFINED

Originally, the term “Indian reservation” referred to lands reserved
by a tribe out of a cession of lands to the United States, but later came
to be used to describe any lands set aside for tribal use and occupancy
whether set aside by treaty, congressional action, or executive order,
and regardless of whether those lands were within the aboriginal
territories of the tribe.\textsuperscript{153} The Court has also indicated that the taking of
land into trust status for a tribe pursuant to congressional authority
creates reservation lands,\textsuperscript{154} and that reservations are Indian country
pursuant to 18 U.S.C. §1151(a) whether they be formal or informal
reservations.\textsuperscript{155} These historical considerations are likely the source of
language found in some statutes to the effect that the term “reservation”
or the term “Indian reservation” is to mean “Indian reservations
established pursuant to treaties, Acts of Congress or Executive Orders,
public domain Indian allotments, and former Indian reservations in
Oklahoma.”\textsuperscript{156} The language of 18 U.S.C. § 1151(a) including the term
“Indian reservation” within the term of art “Indian country,” is reflected
in a number of statutory formulary for the term “reservation” or “Indian
land.” This language states: “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 . . . .”\textsuperscript{157}

While this statement—like some other definitions of “reservation,”
or its closely analogous term “Indian land”—is somewhat circular in
logic, when considered in its true historical context it provides a useful

\begin{itemize}
\item \textsuperscript{151} 42 U.S.C. § 5603(18) (relating to juvenile justice and delinquency prevention).
\item \textsuperscript{152} FED. R. CRIM. P. 6(i) (defining “Indian tribe” as a tribe recognized by the
cooperation authority and specifically mentioning Alaska Natives); id. § 479a(2) (relating to
protection of Indians and conservation of resources); 30 U.S.C. § 1291(10) (2000) (relating to
surface mining control and reclamation).
\item \textsuperscript{153} See generally FELIX S. COHEN ET AL., COHEN’S HANDBOOK ON FEDERAL INDIAN
LAW, § 16.03[2][c] at 1042–43 (Nell Jessup Newton et. al., eds. 2005 ed.) (1941) (describing
reservations and Indian Country). This historical understanding is incorporated into a least
management and defining “reservation” to include: “Indian reservations established
pursuant to treaties, Acts of Congress or Executive Orders, public domain Indian allotments,
and former Indian reservations in Oklahoma”).
\item \textsuperscript{154} Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505,
\item \textsuperscript{155} Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993).
\item \textsuperscript{156} 25 U.S.C. § 3103(12) (relating to national Indian forest resources management).
reservation).
\end{itemize}
measure to determine whether a particular tract of land is within its terms. Note that this definition includes all lands within the reservation boundaries regardless of whether a patent has been issued or whether a right-of-way has been granted. There are two additional statutory definitions of the term "Indian reservation" which are used regularly in other statutes to define, at least in part, the territorial extent of their application. These include the definition of reservation found in the Indian Financing Act stating that the term Indian reservations "includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act" and the definition of "reservation" found in the Indian Child Welfare Act which has also been repeatedly used to define the term for the purpose of other statutes. The definitional section of the Indian Child Welfare Act includes not only all Indian country but also additional lands:

"[R]eservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation . . . .

Thus the categories of lands which have been statutorily defined as an Indian reservation for some purpose include:

159. See COHEN ET AL., supra note 153, § 3.04(2)[c][ii], at 189.
162. Id. § 1903(10) (relating to Indian child welfare). A number of statutes also adopt this definition of the term "reservation." 12 U.S.C. § 4702(11) (relating to Community Development Banking and Financial Institutions); 25 U.S.C. § 3653(2) (relating to Indian Tribal Justice Technical and Legal Assistance); 26 U.S.C. § 168(j)(6) (relating to Itemized Deductions for Individuals and Corporations).
1. All lands reserved for the use of a tribe or tribes pursuant to the authority of a treaty, Act of Congress, or Executive Order;\textsuperscript{163}

2. Public domain Indian allotments;\textsuperscript{164}
3. Former Indian reservations in Oklahoma;\textsuperscript{165}

4. Land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act;\textsuperscript{166}

5. Any lands title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;\textsuperscript{167}

6. Any area where the Secretary is required to provide special assistance or consideration of a tribe's acquisition of land or interests in land.\textsuperscript{168}

While “Indian country” has been incorporated into the definition of “reservation” in certain statutes, note that this again creates a problem of circular definition that is best avoided, since the term “reservation” is

\textsuperscript{163} It may be useful to emphasize that “Executive Order” would include lands declared to be added to a reservation or created as a new reservation by the Secretary of Interior pursuant to the authority of 25 U.S.C. § 467. Cohen et al., supra note 153, § 3.04[2][e][ii], at 189; 25 U.S.C. § 3103(12) (relating to National Indian Forest Resources Management); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993).


used to define the broader term “Indian country.” However, it is useful to consider that when including reservation areas in the definition of “Indian country,” Congress has explicitly included within the term “reservation” all patented lands and rights-of-way that may have been granted within the reservation.\(^{169}\)

Closely analogous to the term “reservation” are the definitions of “Indian lands” found within a number of federal statutes.\(^{170}\) In defining the meaning of “Indian lands,” Congress has often included:

1. Lands within the limits of any Indian reservation,\(^{171}\) including any former Indian reservation in the State of Oklahoma;\(^{172}\)

2. Lands held in trust by the United States for the benefit of an Indian tribe or individual Indian, or held by an Indian tribe or individual Indian subject to a restriction against alienation imposed by the United States,\(^{173}\) sometimes it must also be land over which a tribe exercises governmental power;\(^{174}\)


\(^{170}\) Usually the term “Indian country” is used to describe the territorial area within which federal and tribal laws operate to the general exclusion of state law. COHEN ET AL., supra note 153, § 3.04[1], at 182–83. The current statutory definition was enacted in 1948, and generally includes reservations, dependent Indian communities, and allotments. Id. § 3.04[2][c][i], at 188; 18 U.S.C. §1151 (2006).

\(^{171}\) See 16 U.S.C. § 1722(6) (2006) (relating to Public Lands Corps); 18 U.S.C. § 1151(a) (2006) (including Indian reservations within the definition of “Indian country”); 25 U.S.C. § 1452(d) (2006) (defining “reservation” for the purposes of the Indian Financing Act); id. § 1903(10) (defining “reservation” for the purposes of the Indian Child Welfare Act); id. § 1680n(b) (relating to Priority for facility location on Indian reservations); id. § 2703(4) (relating to Indian Gaming Regulation); id. § 3501(2) (or within pueblo or rancheria) (relating to Indian Energy); id. § 3653(2) (relating to Indian Tribal Justice Technical and Legal Assistance); id. § 3902(3) (relating to Indian Lands Open Dump Cleanup); id. § 4302(4) (relating to Native American Business Development, Trade Promotion, and Tourism); 30 U.S.C. § 1291(9) (2006) (relating to Surface Mining Control and Reclamation).


\(^{174}\) 25 U.S.C. § 1680n(b) (2006) (relating to priority for facility location on Indian reservations); id. §2703(4) (relating to Indian Gaming Regulation).
3. Lands held by a dependent Indian community 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;\textsuperscript{176}

4. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments;\textsuperscript{176}

5. Land held by incorporated Native groups, regional corporations, and village corporations under the Alaska Native Claims Settlement Act\textsuperscript{177} and any land owned by an Indian tribe.\textsuperscript{178}

At least one statute is interesting in that it requires the consent of the Indian owners before their property will be included in the definition of “Indian lands” pursuant to that statute.\textsuperscript{179} Another interesting conceptual issue is presented by the definition of “Indian lands” as found within the Indian Gaming Regulatory Act (IGRA).\textsuperscript{180} The definition of “Indian lands” within the IGRA states:

The term “Indian lands” means —

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.\textsuperscript{181}


\textsuperscript{179} See 16 U.S.C. § 583f (2006) (“Whenever used in this subchapter, the term federally owned or administered forest land shall be construed to . . . include trust or restricted Indian land, whether tribal or allotted, except that such land shall not be included \textit{without the consent of the Indians concerned.}”)(emphasis added).


\textsuperscript{181} \textit{Id.} § 2703(4).
When combined with the general congressional prohibition against gaming on lands acquired after the date of the act, unless such lands were located within or contiguous to the tribe’s reservation, this bias became rather extreme. Effectively, tribes having reservations can create gaming facilities anywhere within their reservations without regard to land ownership. Tribes who never had a reservation or whose reservation has been disestablished, would have been limited to gaming on the lands held by them on the date of enactment of the IGRA, had this inequality remained unaddressed.

In order to level the playing field, Congress adopted additional provisions, which in substance granted tribes without existing reservations, but with identifiable former reservations within which they were still generally located, the same land acquisition flexibility that tribes within existing reservations enjoyed. These provisions allowed tribes in Oklahoma and elsewhere with a former “reservation within the State or States in which such Tribe is currently located” to acquire lands within those former reservations as if they were within the limits of an existing reservation for gaming purposes. In pertinent part, these provisions stated that those lands would be eligible to be used for gaming purposes if the Indian tribe had no reservation on the date of enactment of the IGRA, and met the following requirements:

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe’s last recognized reservation within the State or States within which such Indian tribe is presently located.

Likewise, the IGRA contained language that authorized gaming on lands acquired after the date of that Act as a settlement of a land claim, the initial reservation of a newly recognized tribe, and lands restored to a tribe with restoration of their status as a federally recognized tribe.
It is thought that this conceptual approach could also provide a fair basis to provide for Indian land acquisitions.

V. THE DRAFT LANGUAGE

The following draft language is presented in order to provide a working conceptual framework within which to further consider the implementation of Section 17 of the IRA, the intent of its drafters, and to achieve a basic level of compliance with at least some of the standards set out in the Draft Declaration with respect to the rights of Indigenous peoples to land, territory, and resources. It does not attempt to resolve all issues, but rather attempts to surpass a very basic Carcieri “fix” in order to further improve the lives and rights of Indian people and Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Section 17 of the Act of June 18, 1934, ch. 576, § 17, 48 Stat. 988, as amended, is further amended to read:

(a) Notwithstanding any other provision of law, the Secretary of the Interior shall, upon petition by any tribe, issue a charter of incorporation to such tribe; Provided that such charter shall not become operative until ratified by the governing body of such tribe. Such charter shall convey, at the request of the incorporated tribe, the power to purchase, take by gift, bequest, eminent domain, or otherwise, and to own, hold, manage, operate, assign, and dispose of property of every description, real, personal, or mixed, including the power to purchase trust or restricted Indian lands, and to issue in exchange therefor bonds, scrip, notes, interests in corporate property, or a title pursuant to the laws of the tribe, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; Provided that title to any lands, property, or rights so acquired shall be taken by the incorporated tribe in the name of the United States in trust for the Indian tribe, corporation, or individual for which the land is acquired, and such lands, property, and rights shall be exempt from federal, state, and local taxation; Provided further that such charter shall not be construed as granting authority to sell, mortgage, or lease for a period exceeding twenty-five years any lands included in the limits of the reservation absent the consent of the Secretary of the Interior pursuant to applicable statutory authority; Provided further that the incorporated tribe

187. This initial clause will not be necessary if the fourth section of this draft is enacted. It should be noted that the substance of this section requiring incorporated tribes to acquire their lands in trust status is the current statutory law. The changes in this section simply require the Secretary to implement that law.
may make purchase money notes, mortgages, contracts for sale, deeds of trust, or other proper instruments allowing the incorporated tribe to finance the acquisition of new land, and may refinance such instruments. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

(b) All lands acquired pursuant to the authority of this Act that are within or contiguous to any Indian reservation shall be Indian country as defined in Section 1151(a) of Title 18 of the United States Code, and shall be subject to the exclusive jurisdiction of the United States and the tribe except as otherwise expressly provided by statute. The property and income of any Indian residing upon lands acquired by an incorporated tribe pursuant to this Act shall be exempt from federal, state, and local taxation.

(c) (1) Within one hundred and eighty days after the receipt of a request for issuance of a new charter; or within ninety days after receipt of a request for issuance of an amendment to any charter, the Secretary shall issue such charters or amendment as required by subsection (a) of this section, or by the Act of June 26, 1936, c. 831, 49 Stat. 1967 unless he determines that any provision therein is contrary to applicable federal law.

(2) During the applicable time periods, the Secretary shall provide such technical advice and assistance as may be requested or as the Secretary determines may be needed; and review the final draft of the charter, or amendments thereto, to determine whether any provision therein is contrary to applicable federal laws.

(3) At least thirty days prior to the expiration of the applicable time period, the Secretary shall notify the proponents of the charter, in writing, whether and in what manner the Secretary has found the proposed charter or proposed amendments to be contrary to applicable federal laws.

(d) If the Secretary does not issue or disapprove the proposed charter or the proposed amendments in writing within the time period allowed for his review by paragraph (c) of this Section, the charter or amendment shall be considered as issued. Actions to enforce the provisions of this section or to challenge a Secretarial determination that a proposed charter provision violates applicable federal law may be brought in the appropriate Federal district court.
Sec. 2. Section 19 of the Act of June 18, 1934, ch. 576, § 19, 48 Stat. 988 is amended to read:

(a) The term "Indian" as used in this Act shall include all persons who are:

(1) members or citizens of any tribe,
(2) eligible for membership or citizenship in any tribe,
(3) descendants in the first degree of a member or citizen of a tribe,
(4) recognized pursuant to federal or tribal law as an Indian for any purpose, and
(5) shall further include all other persons of one-quarter or more Indian blood.

For the purposes of this Act, the Indigenous peoples of Alaska\footnote{188} shall be considered Indians.

(b) The term "tribe" or "Indian tribe" means any Indian tribe, band, pueblo, nation, or other organized group or community, the Indians residing on any reservation, and any Alaska Native village or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) The term "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of eighteen years unless a different age of majority has been established by the laws of the tribe concerned.

(d) The term "reservation" means any Indian reservation subject to the jurisdiction of the United States, including former Indian reservations in Oklahoma, and, for any tribe without a reservation as so defined, that tribe's last former reservation within the state or states within which such Indian tribe is presently located, whether created by treaty, executive order, or act of Congress, or, if none, the tribe's land consolidation area, or service area as approved or acknowledged by the Secretary of the Interior.

Sec. 3. All acquisitions of land by the Secretary of the Interior under the claimed authority of section 5 of the Act of June 18, 1934, ch. 576, § 5, 48 Stat. 985, are hereby confirmed.

\footnote{188. Native Hawaiians, of course, could be included here if desired by adding "and Hawaii."}
Sec. 4. The phrase “Provided, That sections 4, 7, 16, 17, and 18” in Section 13 of the Act of June 18, 1934, ch. 576, § 5, 48 Stat. 986 is repealed, and the phrase “Provided, That section 18” is inserted in lieu thereof.

A. Section-By-Section Analysis

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 17 of the Act of June 18, 1934, ch. 576, § 17, 48 Stat. 988, as amended,\(^\text{189}\) is further amended to read:

(a) Notwithstanding any other provision of law,\(^\text{190}\) the Secretary of the Interior shall, upon petition by any tribe, issue a charter of incorporation to such tribe; Provided That such charter shall not become operative until ratified by the governing body of such tribe. Such charter shall convey, at the request of the incorporated tribe, the power to purchase, take by gift, bequest, eminent domain, or otherwise, and to own, hold, manage, operate, assign, and dispose of property of every description, real, personal, or mixed, including the power to purchase trust or restricted Indian lands, and to issue in exchange therefor bonds, scrip, notes, interests in corporate property, or a title pursuant to the laws of the tribe, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; Provided that title to any lands, property, or rights so acquired shall be taken by the incorporated tribe in the name of the United States in trust for the Indian tribe, corporation, or individual for which the land is acquired, and such lands, property, and rights shall be exempt from federal, state, and local taxation; Provided further that such charter shall not be construed as granting authority to sell, mortgage, or lease for a period exceeding twenty-five years any lands included in the limits of the reservation absent the consent of the Secretary of the Interior pursuant to applicable statutory authority, Provided further that the incorporated tribe may make purchase money notes, mortgages, contracts for sale, deeds of trust, or other proper instruments allowing the incorporated tribe to finance the acquisition of new land, and


\(^{190}\) This initial clause will not be necessary if the fourth section of this proposed draft is enacted.
may refinance such instruments. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

**Analysis:** The net changes here:

1. Makes this section applicable to all federally recognized tribes, and requires the Secretary to issue a charter containing this explicit trust land acquisition authority upon request of a tribe;

2. Makes explicit the implicit current law which requires incorporated tribes to take lands they purchase in the name of the United States in trust, and renders such lands exempt from taxation;¹⁹¹

3. Takes account of the Indian Mineral Leasing Act of 1938,¹⁹² Indian Land Consolidation Act,¹⁹³ and similar statutory authority enacted after the IRA which may allow the sale, mortgaging, or leasing of tribal lands for periods exceeding 25 years, subject to stated terms or conditions which would be applicable to such action; and

4. Makes provision for a tribe, corporation, or individual for whom the tribe will accept title to finance the acquisition of such property. The debtor in such cases may also refinance the debt to take advantage of reductions in interest rates or other advantageous situations.

This revision is intended to put a tribe, at its request, in operational control of its own lands, to streamline tribal land acquisition authority so that Secretarial approval is clearly not required for the tribe to acquire nontaxable trust lands under section 477, and to limit the administrative authority and potential liability of the Secretary with respect to such land while continuing to protect said lands against long term alienation and taxation.¹⁹⁴ Nothing here would prevent the Secretary from exercising his own independent authority to acquire lands for Indians pursuant to section 465.¹⁹⁵

Except as provided in subsection (b) of this section, land outside the reservation would be nontaxable so long as the title is held in the name of the United States but would be alienable by the tribe at its discretion.

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and remain within state jurisdiction absent Secretarial action under section 7 of the IRA.

Lands within or contiguous to the reservation would be nontaxable, inalienable, and not subject to lease by the authority of the incorporated tribe for a term longer than 25 years absent compliance with a federal statute authorizing such actions. In the event that the incorporated tribe acted ultra vires, authorizing, for instance, a sale or mortgage of lands within its reservation under state or federal law not authorized by a separate federal law, the duty and trust responsibility of the Secretary of the Interior would be to sue in federal court to cancel the deed, mortgage, or invalid lease.

Within these limitations, the tribe will be free to control its own lands and the use of those lands pursuant to tribal law, including freedom under tribal law to provide permanent or semipermanent rights of use, ownership, or other rights enforceable exclusively in the courts of the tribe, and which would not be cognizable in federal or state court.

(b) All lands acquired pursuant to the authority of this Act that are within or contiguous to any Indian reservation shall be Indian country as defined in section 1151(a) of Title 18 of the United States Code, and shall be subject to the exclusive jurisdiction of the United States and the tribe except as otherwise expressly provided by statute. The property and income of any Indian residing upon lands acquired by an incorporated tribe pursuant to this Act shall be exempt from federal, state, and local taxation.

Analysis: This provision:

1. explicitly makes land acquisitions by incorporated tribes within or contiguous to their reservations under 18 U.S.C. § 1151(a) Indian country subject to exclusive tribal and federal jurisdiction. Lands acquired by a tribal corporation elsewhere would, under the rule of Mescalero Apache Tribe v. Jones, be tax exempt but otherwise remain subject to state jurisdiction unless the Secretary exercises his authority under section 7 of the IRA. It is assumed that the provisions of section 20 of the Indian Gaming Regulatory Act would be applicable to the

197. Except upon failure to pay a purchase money mortgage, or compliance with other express federal statutory authority.
determination of whether lands acquired outside any reservation are eligible for use for gaming purposes; and

2. renders Indian property and income non-taxable for those Indians residing on such lands in order to create an economic incentive for owners of fractionated heirship lands to voluntarily deed or trade those lands to the tribe.

(c) (1) Within one hundred and eighty days after the receipt of a request for issuance of a new charter; or within ninety days after receipt of a request for issuance of an amendment to any charter, the Secretary shall issue such charters or amendment as required by subsection (a) of this section, or by the Act of June 26, 1936, c. 831, 49 Stat. 1967 unless he determines that any provision therein is contrary to applicable federal law.

(2) During the applicable time periods, the Secretary shall provide such technical advice and assistance as may be requested or as the Secretary determines may be needed; and review the final draft of the charter, or amendments thereto to determine whether any provision therein is contrary to applicable federal laws.

(3) At least thirty days prior to the expiration of the applicable time period, the Secretary shall notify the proponents of the charter, in writing, whether and in what manner the Secretary has found the proposed charter or proposed amendments to be contrary to applicable federal laws.

Analysis: Paragraphs (c) and (d) of Section 1 of the proposal incorporate, with slight modifications, the time limits imposed upon Secretarial approval of tribal constitutions found in 25 U.S.C. § 476. These provisions are included to preclude a "pocket veto" of charter requests by the Secretary, and to provide immediate judicial review of the validity of requested charters and amendments if the Secretary fails to act within the time allowed, or rejects a charter provision without lawful cause.

Sec. 2. Section 19 of the Indian Reorganization Act of 1934201 is amended to read:

(a) The term "Indian" as used in this Act shall include all persons who are:

(1) members or citizens of any tribe,

(2) eligible for membership or citizenship in any tribe,

(3) descendants in the first degree of a member or citizen of a tribe,

(4) recognized pursuant to federal or tribal law as an Indian for any purpose, and

(5) shall further include all other persons of one-quarter or more Indian blood.

For the purposes of this Act, the Indigenous peoples of Alaska shall be considered Indians.

Analysis: This provision is based upon the commonly found statutory language referenced in the body of this paper and constitutes a complete revision of the definition of "Indian" currently found in section 19 of the IRA. The first three subsections should be non-controversial, and include tribal members, persons eligible for membership, and the children of members not eligible for enrollment. The fourth subsection is designed to include, for instance, those who might be subjected to the criminal jurisdiction of the United States Courts as "Indians" though not enrolled, eligible, or a child of tribal members. The fifth subsection would change the "default" blood degree from the current 1/2 to 1/4 degree of total combined Indian blood, which seems to be the more commonly accepted figure today, although some tribes require more and some require less for admission to tribal membership or citizenship, and some do not base membership or citizenship on blood degree at all, choosing, instead, some more traditional and customary membership requirement or requirements.

(b) The term "tribe" or "Indian tribe" means any Indian tribe, band, pueblo, nation, or other organized group or community, the Indians residing on any reservation, and any Alaska Native village or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
Analysis: This provision is based upon the most common modern statutory definition referenced in the body of this paper, and constitutes a complete revision of the definition of “tribe” currently found in section 19 of the IRA.

(c) The term “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of eighteen years unless a different age of majority has been established by the laws of the tribe concerned.

Analysis: This provision changes the age of majority currently found in section 19 of the IRA to the more modern eighteen years of age, while leaving room in the spirit of self-determination for a tribe to set a different age of majority for the purpose of allowing participation in the political life of the tribe and for other tribal purposes. For instance, some tribes still limit voting and other rights under tribal law to those who have attained the age of twenty-one years, and other tribes may wish to allow those younger than eighteen to vote and otherwise participate in whole or in part in the political and legal life of the tribe. This should be a tribal choice, and this subsection so provides.

(d) The term “reservation” means any Indian reservation subject to the jurisdiction of the United States, including former Indian reservations in Oklahoma, and, for any tribe without a reservation as so defined, that tribe’s last former reservation within the state or states within which such Indian tribe is presently located, whether created by treaty, executive order, or act of Congress, or, if none, the tribe’s land consolidation area, or political branches of the government. Baker v. Carr, 369 U.S. 186, 215–17 (1962). The court, in giving examples of categories of issues which were generally political questions stated,

The status of Indian tribes: This Court’s deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions, also has a unique element in that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. . . . (The Indians are) domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.” Yet, here too, there is no blanket rule.

While “It is for (Congress) . . ., and not for the courts, to determine when the true interests of the Indian require his release from (the) condition of tutelage . . ., it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . ..” Able to discern what is “distinctly Indian,” the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

Id. (citations omitted). It could be asserted that the only method of determining what is “distinctly Indian” without reliance upon a legal recognition or political relationship, each being a methodology which appears to be committed to the political departments of the government, would be a classification based upon race—a classification apparently not prohibited by the Fourteenth Amendment.
service area as approved or acknowledged by the Secretary of the Interior.

**Analysis:** Although the term “reservation” is used extensively in the IRA, it is undefined in the current text of the statute. The proposed language is taken from the most commonly used statutory language defining the term for various federal purposes. It is based upon the premise that every federally recognized tribe is entitled to a homeland or territory in which the tribe and its members may freely pursue their cultural, social, and economic development. For most tribes, this will be either their current reservation, or their most current “former” reservation in a state or states where they continue to reside. For tribes that have never had a reservation, it is intended that the Secretary will approve a land consolidation plan for the tribe or acknowledge a service area for the tribe either in their present location, or within an area that the tribe has traditionally or historically occupied or used, and that such area will be of such size and have resources sufficient to allow the tribe to eventually acquire an area sufficient for their self-support and development.

Sec. 3. All acquisitions of land by the Secretary of the Interior under the claimed authority of section 5 of the Act of June 18, 1934, ch. 576, § 5, 48 Stat. 985, are hereby confirmed.

**Analysis:** The purpose of this section is to confirm all prior acquisitions of land by the Secretary of the Interior in which the Secretary acted under the belief, assumption, or understanding that his action was authorized by section 5 of the IRA, including all acquisitions wherein he referenced that section as authority for his action where the trust title to such land for the Indian individual or Indian tribal beneficiary might have been clouded by the decision in Carcieri v. Salazar. 207 It would, of course, apply to all federally recognized tribes and their members.

Sec. 4. The phrase “Provided, That sections 4, 7, 16, 17, and 18” in section 13 of the Act of June 18, 1934, ch. 576, § 5, 48 Stat. 986 is repealed, and the phrase “Provided, That section 18” is inserted in lieu thereof.

**Analysis:** There is no reason in the modern era for the Secretary to continue to deny to tribes in Oklahoma the opportunity to take advantage of these provisions and ignore the language of 25 U.S.C. §509 repealing these limitations, but the Department of the Interior has historically failed to apply these Sections to tribes in Oklahoma who are

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207. 129 S. Ct. 1058 (2009).
organized and chartered under 25 U.S.C. § 03. Although one Assistant Secretary, after a lawsuit, determined that tribes in Oklahoma were entitled to the benefits of these provisions through adopting an IRA Section 477 charter, the next official may choose to refuse issuance of similar charters, requiring additional litigation for the tribes to attain their rights under these provisions. It would be much more efficient and expedient to amend this provision as proposed. Each of the provisions of the IRA that would become applicable is permissive, not mandatory, so no tribe would be prejudiced by this proposed revision.

1. Section 4 of the IRA originally prohibited sales of individual trust lands and shares in tribal corporations except to the tribe or other Indians. By the Act of May 14, 1948, ch. 293, 62 Stat. 236, (current version at 25 U.S.C. § 483) Congress again authorized the issuance of patents in fee and sales of such lands to non-Indians. The net effect, therefore, of section 4 of the IRA is to prevent the sale of any individually held stock in a tribal corporation created pursuant to Section 17 of the IRA.

2. Section 7 authorizes the Secretary of the Interior to add to existing reservations, or proclaim new reservations, upon lands acquired pursuant to the IRA.

3. The net effect of applying section 16 to tribes in Oklahoma who chose to organize pursuant to this section or section 3 of the Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967, is to impose upon the Secretary the same time limitations and procedural requirements regarding the adoption and amendment of their constitutions as are now applicable to IRA tribes, to make explicit that the vested rights granted to IRA tribes by this section are applicable to organized tribes in Oklahoma, and to prohibit the Secretary from discriminating for or against an Oklahoma tribe in comparison to any other tribe or tribes.

4. Section 17 would simplify the land acquisition process for tribes in Oklahoma wishing to consolidate their tribal land base as it does for other tribes.

VI. CONCLUSION

Within the last twenty years tribes have obtained the legal knowledge and many tribes now have revenue streams sufficient to

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208. G. William Rice, Of Cold Steel and Blueprint: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney's Role in Developing Tribal Sovereignty, 7 KAN. J.L. & PUB. POL’LY 31 (Winter 1997) (describing these developments); see also American Indian Law Center, Inc. History, http://ailc-inc.org/History.htm (last visited April 28, 2009) (providing a timeline to show that Indian law attorneys first began appearing
engage in their own land acquisitions programs. An opportunity exists to implement a land consolidation and acquisition program within tribal reservations and former reservations operated by the tribes themselves. Such a program could provide a form of redress by tribal purchases of lands lost through the allotment process, and develop a land base within the allotted areas sufficient to allow for tribal and individual Indian subsistence through economic enterprise. A tribally driven land acquisition program could also have significant beneficial effects for the federal administration and individual Indians. Federal funds now devoted to probate, trust services, and accounting for fractionated heirship could be reprogrammed for education, health, law enforcement, and other needed programs and services within Indian country as the tribes recover and assume additional responsibility for management of their reservation lands. Allowing tribes to pursue the consolidation of lands within and adjacent to their reservations at their own pace and responsibility, while providing protection against long-term alienation, taxation, and intrusion by other governments, is consistent with the federal policies of self-determination and self-governance. Finally, implementing such a process of redress would fulfill the original vision of Commissioner Collier and move the United States once more into a leadership position in the development and implementation of human rights on a global scale. The time has come.

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209. Acquired mostly from revenues received from gaming facilities operated pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2901 (2006). These revenues, generally, represent the first revenues that have been available to tribes for over one hundred years which were neither committed to specific programs by the federal government, nor held by the federal government “in trust,” thereby controlled by federal administrators as to whether and when such funds could be expended.
