

# Resolving a Perilous Uncertainty: The Right of Tribes to Convey Fee Simple Lands

By Brian Pierson



GRAN QUIVERA, SALINAS PUEBLO MISSIONS NATIONAL MONUMENT, NEW MEXICO. BY LAWRENCE R. BACA.

**If an Indian tribe purchases land on the open market, without any federal involvement, and holds it fee simple absolute title, should the tribe be forced to obtain an act of Congress to sell it? The proposition seems offensively paternalistic from a tribal perspective and senseless from Congress' perspective. Why should some argue that an ancient federal statute limits tribes' right to engage in routine real estate transactions relating to their lands. A careful examination of this statute, however, reveals that it was never intended to apply to lands held by tribes in fee simple absolute title.**

In 1834, in an era when the federal government's policy was to relocate Indian tribes to a vast Indian country west of the Mississippi River,<sup>1</sup> Congress enacted a "bill to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers"<sup>2</sup> (hereafter referred to as the Nonintercourse Act). Section 12 of the act, now codified at 25 U.S.C. § 177, provides, in part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."<sup>3</sup>

Today, a perilous uncertainty surrounds the applicability of § 177 to lands that tribes purchase on the open market and hold in simple absolute title<sup>4</sup>—transactions that Congress could hardly imagine in 1834.<sup>5</sup> The courts have over-

whelmingly declined to apply the restrictions contained in § 177 to these lands and the Bureau of Indian Affairs (BIA) exercises no supervision over them. Tribes routinely convey these lands by sale, lease, or mortgage without consulting the federal government. Yet doubt about the provisions of the act remains. The plain language of § 177 seems broad. Title companies sometimes challenge tribes' authority to sell their fee simple absolute properties.<sup>6</sup> Tribes have periodically obtained special acts of Congress to remove any perceived impediment to the sale of their fee simple lands.<sup>7</sup> Two largely ignored BIA rules appear to restrict lands purchased by tribes anywhere in the world.<sup>8</sup> A memorandum opinion issued by the solicitor of the Department of the Interior on Jan. 18, 2009, adds to the confusion, suggesting, without clearly stating, that tribes may convey lands held in fee simple absolute title off-reservation but must seek

congressional approval for conveyances within reservation boundaries.<sup>9</sup>

This article argues that (1) the continuing uncertainty surrounding § 177 poses serious risks for Indian country; (2) application of standard tools of statutory construction demonstrates that Congress did not intend § 177 to apply to lands held by tribes in fee simple absolute title; (3) the overwhelming weight of judicial authority supports this conclusion; and (4) a formal statement by the Department of Interior consistent with the judicial authorities would support tribal self-determination and remove a cloud over numerous transactions relating to tribal fee simple lands.

### Application of § 177 to Fee Simple Lands Threatens Tribal Interests

Asserting that land automatically becomes inalienable upon purchase by a tribe had a strategic purpose when it seemed the law might protect newly purchased land from state property taxes. In 1998, however, the Supreme Court held that lands owned by tribes in fee simple are taxable and that tribes seeking to make their lands nontaxable should have them placed in trust pursuant to the Indian Reorganization Act.<sup>10</sup>

Many tribes own extensive tracts of land in fee simple absolute title within their own boundaries and rent these properties for commercial or residential purposes.<sup>11</sup> Pledges of tribal fee lands to secure credit lines are common.<sup>12</sup> In addition, tribes do not always purchase land with the intention of having it put into a trust. Tribes have leased or conveyed fee land within reservation boundaries to tribal corporations, joint ventures, or third parties for business purposes. Federal statutes and regulations, however, require the Bureau of Indian Affairs to approve leases, encumbrances, and other transactions relating to trust and “restricted” Indian lands.<sup>13</sup> If § 177 applies to fee simple absolute tribal lands, then they are “restricted” and, as a consequence, all the transactions listed above would require retroactive BIA approval, imposing enormous new burdens on tribes as well as the BIA.<sup>14</sup> Because Congress has not delegated to the secretary of interior the authority to approve transfers of restricted land by sale or gift,<sup>15</sup> acts of Congress would be required for these transactions, imposing significant legal and other costs on tribes.

Congress enacted the Indian Reorganization Act in 1934<sup>16</sup> to protect the land base of tribes. Section 5<sup>17</sup> of the IRA permits the secretary of the interior to take land into trust pursuant to an optional application process initiated by tribes.<sup>18</sup> If 25 U.S.C. § 177 applies automatically to any land purchased by a tribe, then federal control becomes mandatory. The notion that, alone among owners of fee simple land in the United States, tribes need the federal government’s permission to engage in routine real estate transactions is patronizing and contrary to federal policy promoting tribal self-determination.<sup>19</sup>

### Congressional Intent Behind § 177

It is axiomatic that congressional intent controls the meaning to be assigned to a statute. According to the U.S. Supreme Court, “On a pure question of statutory construc-

tion, our first job is to try to determine congressional intent, using traditional tools of statutory construction. Our starting point is the language of the statute, but in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”<sup>20</sup> The judiciary, of course, “is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.... If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”<sup>21</sup>

Section 177 was originally enacted as § 12 of the 1834 Nonintercourse Act. An examination of the entire 1834 act, court decisions construing it, and subsequent congressional legislation demonstrates that Congress did not intend § 177 to apply to lands that tribes hold in fee simple absolute. The origins of § 177 lie in the “discovery doctrine,” which Justice Marshall summarized in his famous opinion in *Worcester v. Georgia*:<sup>22</sup>

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

In its 1985 decision in *County of Oneida v. Oneida Indian Nation (Oneida II)*, the Supreme Court made explicit the obvious connection between the discovery doctrine and the restrictions on alienation of Indian lands contained in § 177: “It was accepted that Indian nations held ‘aboriginal title’ to lands they had inhabited from time immemorial. ... The ‘doctrine of discovery’ provided, however, that discovering nations held fee title to these lands, subject to the Indians’ right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.”<sup>23</sup> The Nonintercourse Act, the Court explained, “simply put in statutory form what was or came to be the accepted rule—that extinguishment of *Indian title* required the consent of the United States.”<sup>24</sup> (Emphasis added.)

Section 1 of the Nonintercourse Act of 1834 provided that “all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the *Indian title has not been extinguished*, for the

purposes of this Act, be taken and deemed to be the Indian Country.”<sup>25</sup> (Emphasis added.) It is reasonable to infer that the phrase “for the purposes of this Act” includes the purposes of § 12 our current § 177. Section 1 is important, because it expresses Congress’ intent that § 177’s restrictions apply only to lands with respect to which the *Indian title* had not been extinguished. Indian title, of course, refers to the tribes’ right of occupancy based on aboriginal possession.

The Mexican War, the opening of the Sante Fe and Oregon Trails, completion of the transcontinental railroad, and other developments in the mid-19th century soon rendered obsolete the 1834 concept of an expansive Indian country west of the Mississippi. When the act was codified in 1874 as part of the revised statutes, § 12 (now § 177) was retained, but § 1 was dropped.<sup>26</sup> Nonetheless, in a decision handed down in *Bates v. Clark* in 1877,<sup>27</sup> the Supreme Court recognized the underlying principle that the protections of § 177 should extend only to lands over which the government has an independent fiduciary duty—either as the holder of fee title in aboriginal lands to which tribes held Indian title or as the guarantor of lands set aside for tribes:

The simple criterion is, that, as to all the lands thus described, it was Indian Country whenever the Indian title had not been extinguished, and it continued to be Indian Country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian Country without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.<sup>28</sup>

. . . It follows from this that all the country described by the Act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be Indian Country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.<sup>29</sup>

The *Bates* holding is a fair interpretation of the congressional intent behind the 1834 enactment of what is now § 177 and provides a workable rule by which to construe § 177 in the modern era: After the extinguishment of Indian title, § 177 no longer applies in the absence of a “different rule” of Congress—that is, a specific treaty or act indicating congressional intent to maintain federal protection. Congress did, of course, bring other lands within the protection of § 177 by numerous treaties and acts establishing reservations from land ceded by tribes as well as by legislation authorizing the President to establish reservations by executive order.<sup>30</sup> Under the allotment acts, however, Congress also provided for the removal of all restrictions by the issuance of fee simple patents to Indian allottees<sup>31</sup> and to non-Indian purchasers of “surplus” lands under the General Allotment Act or other allotment acts.<sup>32</sup>

Tribes that purchase land in the open market in the

modern era typically receive a warranty deed through a chain of title that originated with the issuance of a federal land patent, which the Supreme Court has described as “the most accredited type of conveyance known to our law,”<sup>33</sup> and which typically conveys fee simple absolute title to the patentee and his or her successors and assigns.<sup>34</sup> Section 177, properly construed in accordance with the *Bates* ruling, does not apply to lands purchased by tribes and held in fee simple absolute because their aboriginal title has been extinguished and Congress has taken no action to impose restrictions on the lands.

The opinion issued by the solicitor of the Department of the Interior relied in part on an amicus brief that the federal government filed in the *Cass County v. Leech Lake Band* case in 1998. The government had cited the modern statutory definition of Indian country—as found in 18 U.S.C. § 1151<sup>35</sup>—which encompasses “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent,”<sup>36</sup> to argue that § 177 barred taxation of fee lands owned by tribes within reservation boundaries.<sup>37</sup>

Using 18 U.S.C. § 1151 to identify land protected by 25 U.S.C. § 177 suffers from several fatal flaws. First, § 1151, which was added to the federal criminal code in 1948, sheds no light on what Congress intended in 1834, when it enacted what was to become § 177. The Supreme Court’s admonition that “subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress”<sup>38</sup> applies with special force when action by Congress in 1948 is used to construe the intent of a Congress 114 years earlier.

Second, there is no evidence that Congress, in revising criminal jurisdiction provisions in 1948, intended to restrict lands held by tribes in fee simple absolute. The placement of § 1151 within the federal criminal code reflects its obvious purpose of facilitating the federal government’s exercise of criminal jurisdiction over Indians residing on reservations that had become checkerboarded through the process of allotment under the General Allotment Act during the period from 1887 to 1934.<sup>39</sup> The “Historical and Revision Notes” to the 1948 act focus entirely on issues involving criminal jurisdiction and explain that the revision followed a recommendation “to insure certainty as to questions or jurisdiction, and punishment on conviction.”<sup>40</sup>

Finally, the definition of Indian country found in § 1151 encompasses not only fee simple land owned by Indian tribes but also fee simple land owned by individual Indians and non-Indians. It is inconsistent to assert, on the one hand, that § 1151 should control the scope of § 177 while declining, on the other hand, to apply § 177 to lands that fall within § 1151’s definition of Indian country.

The Indian Reorganization Act authorizes the secretary of the interior to restore to tribes any remaining land not already allotted or sold; prohibits the sale, devise, gift, exchange, or other transfer of *restricted* Indian lands; and authorizes the secretary to acquire land for tribes, provided that “[t]itle 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 such lands or rights shall be exempt from State and local taxation.”<sup>41</sup> The scheme of the IRA assumes the free alienability of fee simple lands in the absence of the secretary’s exercise of his or her authority to put the land into a trust. If restrictions against alienation automatically attached to any land purchased by a tribe on the open market, § 5 of the IRA would be redundant.

### Judicial Decisions Do Not Support Application of § 177 to Fee Simple Lands

Federal courts that have addressed the issue have overwhelmingly rejected any § 177 limitation on tribal authority over land owned in fee simple absolute title. In his 2009 memo, the solicitor of the Interior Department relied on a U.S. government brief in the case of *Cass County v. Leech Lake Band of Chippewa Indians*<sup>42</sup> as the source for his statement that it was the government’s “litigating position” that § 177 applies to land owned by tribes in fee simple absolute within, but not outside, reservation boundaries.<sup>43</sup>

The tribe in *Leech Lake* argued that the general prohibition against Indians in Indian country should apply to land formerly patented in fee simple under the Nelson Act<sup>44</sup> and later reacquired by the tribe on the open market. The Supreme Court disagreed, holding that “when Congress makes reservation lands freely alienable, it is ‘unmistakably clear’ that Congress intends that land to be taxable by state and local governments, unless a contrary intent is ‘clearly manifested.’”<sup>45</sup> Even though the Court refused to address the argument that § 177 rendered the lands inalienable because the issue had not been raised in the lower court,<sup>46</sup> the justices’ observation relative to the IRA is highly pertinent: “In § 465, therefore, Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt. It would render this procedure unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land.”<sup>47</sup> The *Leech Lake* decision cannot be reconciled with the imposition of § 177 restrictions to lands held in fee simple absolute title.

In its 2005 decision in *City of Sherrill v. Oneida Nation of New York*,<sup>48</sup> the Supreme Court held that Oneida Nation’s lands, which had been lost in the early 19th century through sales in violation of the 1802 precursor to the 1834 Nonintercourse Act but purchased by the tribe on the open market in 1998 and 1999 and held in fee simple title, were subject to state property taxes. Although the Court acknowledged that the newly acquired lands were within the tribe’s aboriginal territory and had never been validly conveyed, the Court refused to apply § 177 restrictions against alienation because of the “disruptive practical consequences” that would purportedly flow from a reassertion of tribal control after 200 years. Echoing its observation in *Leech Lake*, the Court referred to § 5 of the IRA as the “proper avenue for [the tribe] to reestablish sovereign authority.”<sup>49</sup> There are obvious differences between the facts in *Sherrill* and a tribe’s purchase of fee simple land within a well-defined, continuously occupied reservation. The Court’s refusal to apply § 177’s restrictions to tribal fee lands whose aboriginal Indian title had never been legally extinguished,

however, suggests the Court’s likely unwillingness to apply § 177 to lands that were legally patented in fee simple absolute under the allotment statutes.

In *Lummi Indian Tribe v. Whatcom County*,<sup>50</sup> the Ninth Circuit Court of Appeals squarely rejected the tribe’s argument that lands it had acquired in fee simple absolute title were not subject to property tax because they were inalienable under § 177:

No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply. ... Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable.

We hold that the parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act. Because the parcels are alienable, they are also taxable.<sup>51</sup>

At least five other federal court decisions have reached the same conclusion as the Ninth Circuit. See *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*,<sup>52</sup> *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*,<sup>53</sup> *Bay Mills Indian Community v. State of Michigan*,<sup>54</sup> *Mashpee Tribe v. Watt*,<sup>55</sup> *Cass County Joint Water Resource District v. 1.43 Acres of Land*.<sup>56</sup>

The First Circuit’s decision in *Penobscot Indian Nation v. Key Bank*<sup>57</sup> involved the issue of whether 25 U.S.C. § 81, which requires federal approval of any agreement “relative to ... [tribal] lands,” applied to a contract relating to lands owned by a tribe in fee simple and acquired by the tribe after Congress had lifted any restrictions against alienation. The court’s reasoning with respect to § 81 applies equally to § 177: “Were we to hold that the second Settlement Agreement required the Secretary’s approval pursuant to § 81 despite the fact that it relates only to Indian fee lands purchased for business reasons, we would force the Secretary to exercise a trust responsibility with respect to lands over which Congress specifically disavowed any further trust obligation.”<sup>58</sup>

On closer examination, court decisions suggesting that § 177 applies to tribally owned reservation lands held in fee simple absolute typically involve circumstances supporting a federal trust of some sort. In *United States v. Candelaria*,<sup>59</sup> the Supreme Court held that § 177<sup>60</sup> applied to Laguna Pueblo lands held in fee simple absolute. The land at issue in the *Candelaria* case, however, had been subject to restriction under Spain and Mexico and, as the Court observed, “Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.”<sup>61</sup> Moreover, the Pueblo Indians had occupied their lands for centuries and could also claim aboriginal Indian title.

In *Alonzo v. United States*,<sup>62</sup> the Tenth Circuit Court of Appeals applied § 177 to several thousands of acres purchased by the Pueblo Indians in the 1930s and held by them in fee simple absolute title. The lands in question, however, were part of a large tract that had been confirmed as given to the Pueblo by an act of Congress in 1860 but later awarded to claimants by a federal commission formed under the Pueblo Lands Board Act of 1924.<sup>63</sup> Moreover, the court relied alternatively on a provision of the 1924 act that expressly required the approval of the secretary of the interior for any conveyance of land. Finally, it seems unlikely that a modern court would adopt the *Alonzo* court's paternalistic and demeaning rationale: "The purpose of restrictions is to protect the Indians, a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races against the loss of their lands by improvident disposition or through overreaching by members of other races."<sup>64</sup>

In *Tuscarora Nation v. Power Authority of New York*,<sup>65</sup> the Second Circuit Court of Appeals held that land owned in fee simple by the Tuscarora Nation was subject to the restrictions found in § 177, but the circumstances of that case clearly supported a federal trust. The tribe acquired the lands next to its existing treaty reservation in New York in 1804 from the Holland Land Company "through the good offices of the Secretary of War of the United States." The purchase was made with proceeds from the sale of North Carolina lands that the tribe could no longer hold against incursion by non-Indians and were tax-exempt.<sup>66</sup> The Second Circuit's decision was later reversed on other grounds.<sup>67</sup>

In *United States v. 7,405.3 Acres of Land*,<sup>68</sup> the Fourth Circuit applied § 177 to lands purchased for the Eastern Cherokee Nation and conveyed to them by the commissioner of Indian affairs by a deed with an express reservation of the commissioner's supervisory authority over the tribe, its property, and its contracts. In *Jicarilla Apache Tribe v. Board of Commissioners*,<sup>69</sup> the New Mexico Supreme Court relied on the 1982 edition of *Cohen's Handbook of Federal Indian Law*<sup>70</sup> for the broad proposition that "lands acquired by a tribe by purchase are subject to federal restraints against alienation." Cohen, in turn, had relied solely on the *United States v. 7,405.3 Acres of Land* ruling, which, as discussed, does not support the broad interpretation adopted by New Mexico's Supreme Court.

## Conclusion

Applying § 177 to lands held by tribes in fee simple absolute title would compromise tribes' right of self-government, stifle economic development, impose heavy new administrative burdens on the Department of Interior, vex Congress with requests for special legislation, and cloud hundreds of leases and titles that have already been conveyed. Construing the scope of the 1834 restrictions, now found in § 177, in light of the jurisdictional definition of Indian country that was added to the criminal code in 1948 is an error. The legislative history behind § 177 supports the conclusion of the majority of courts that § 177 does not apply to lands held by tribes in fee simple absolute title.

A clarification from the Department of the Interior on this issue would be welcome. **TFL**

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## Endnotes

<sup>1</sup>The Act of May 28, 1830, 4 Stat. 411, authorized the President to relocate tribes within existing states or territories west of the Mississippi. President Andrew Jackson notoriously exercised that power to force the removal of the Cherokee Nation.

<sup>2</sup>4 Stat. 729–735.

<sup>3</sup>25 U.S.C. § 177, in its entirety, provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

<sup>4</sup>This article sometimes uses "fee simple absolute" as a means of denoting the fullest possible title. See BLACK'S LAW DICTIONARY 648 (8th ed. 2004). The term is also a convenient way to distinguish unrestricted title from title that the courts have called "fee simple" but found to be subject to a restraints on alienation. See *U.S. v. Candelaria*, 271 U.S. 432 (1926).

<sup>5</sup>The removal policy was replaced by a series of successive and contradictory federal policies designed to establish tribes on reservations, turn communal reservations into private property and assimilate Indians, reconstitute Indian tribes and support tribal culture, terminate tribes and assimilate Indians (again), and, under current federal policy, promote tribal sovereignty and self-determination. Indian country today, the product of these fluctuations in policy, is a jumble of land owned by the United States in trust for tribes, land owned by the United States in trust for individual Indians, land owned in fee simple title by individual Indians, and tribes and land owned in fee simple by non-Indians.

<sup>6</sup>The author has personally encountered resistance to issuance of title policies because of title companies' concerns about § 177.

<sup>7</sup>See, e.g., Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199, 25 U.S.C. 635(b) (congressional authorization of sale of Navajo fee simple lands); Pub. L. No. 101-630, § 102, 104 Stat. 4531 (authorization of sale of fee simple lands, which were located 125 miles from the tribe's reservation, by the Rumsey Indians); Pub. L. No. 102-497, § 4, 106 Stat. 3255 (congressional authorization of sale of fee simple lands by the Mississippi Choctaw Indians); Public Law 110-76 (an act to "authorize the Saginaw Chippewa Tribe of Indians of the State of Michigan to convey land and interests in land owned by the Tribe"); Public Law 110-175 (an act to "authorize the Coquille Indian Tribe of the State of Oregon to convey land and interests in land owned by the Tribe").

<sup>8</sup>In contradiction to standard regulatory definitions limiting federal oversight to lands held in trust or subject to a restriction against alienation, two regulations adopted in 1973—38 F.R. 10080, 25 C.F.R. § 152.22(b), and 1981, 46 F.R. 47538, 25 C.F.R. § 150.2, relating to the sale of Indian lands and BIA land records, respectively—define tribal lands more to include fee simple lands. These regulations, which BIA apparently does not follow, would apply to land owned by a tribe anywhere in the world.

<sup>9</sup>Op. Sol. M-37023, Jan. 18, 2009, p. 7. Relying on an amicus brief filed by the federal government in 1998, the solicitor opined as follows: "The qualifying language in the brief, 'on a reservation,' where the Act serves to protect the land base, appears to signify that the 'litigating position' of the United States is that the Non-Intercourse Act's Federal protections against alienation do not extend to off-reservation lands owned by a tribe in fee unless some extenuating circumstances exist."

<sup>10</sup>*Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

<sup>11</sup>The extent of these transactions nationwide is unknown. The author is aware of transactions relating to thousands of acres.

<sup>12</sup>Per telephone conversation between the author and a lender with multiple tribal customers.

<sup>13</sup>See, e.g., 25 U.S.C. § 81, which restricts encumbrances of land "which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." 25 U.S.C. § 415 requires secretarial approval of all leases of trust land or land subject to a restriction against alienation; 25 C.F.R. § 169.1 (federal Indian rights of way); 25 C.F.R. § 166.4(4) (grazing permits); 25 C.F.R. § 211.3 (leasing of tribal lands for mineral development); 25 C.F.R. § 225.3 (oil, gas, geothermal, and solid minerals agreements). The Indian Tribal Energy and Self-Determination Act of 2005, 25 U.S.C. § 3501(12), is characteristic of these laws in defining "tribal land" to include "any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States." For two regulatory definitions that deviate from the norm, see *supra* note 8.

<sup>14</sup>BIA's Ashland Agency, which is responsible for 10 of Wisconsin's 11 tribes, has affirmed its lack of authority

over tribal lands on multiple occasions. The agency provided one of the author's clients with a letter, written in early 2009, expressly disclaiming any authority over a proposed mortgage of reservation land owned by the tribe in fee simple absolute title. In June 2009, a tribal client in Wisconsin confirmed to the author that it routinely issues long-term leases of land owned by the tribe in fee simple absolute and that the BIA has never asserted any authority to approve these leases, as it would be required to do pursuant to 25 U.S.C. § 415 if such land were held under a "restricted" title by operation of § 177.

<sup>15</sup>Section 4 of the IRA, 25 U.S.C. § 464, provides a narrow exception for transfers to tribes and tribal members or exchanges of land.

<sup>16</sup>25 U.S.C. §§ 461 et seq.

<sup>17</sup>25 U.S.C. § 465.

<sup>18</sup>26 C.F.R. Part 151.

<sup>19</sup>President Richard Nixon formally declared tribal self-determination to be federal policy in his July 8, 1970, "Special Message to the Congress on Indian Affairs." In arguing for tribes' right to deal freely with the reservation lands that they have acquired and chosen to hold in fee simple, I do not suggest that these lands have no special status. Reservation lands owned by tribes are Indian country for jurisdictional purposes. 18 U.S.C. § 1151. That states have the right to tax these lands in rem does not mean that they have the right to otherwise regulate the tribe's activities within Indian country. For example, tribes, not counties or towns, have the right to zone lands that tribes, or their members, own in fee simple within reservation boundaries. *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) cert. denied 538 U.S. 908 (2003).

<sup>20</sup>*Dole v. United Steelworkers*, 494 U.S. 25, 35 (1990) (internal cites and quotations omitted).

<sup>21</sup>*Chevron U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n. 9 (1984).

<sup>22</sup>31 U.S. 515, 544 (1832).

<sup>23</sup>470 U.S. 226, 233–234 (1985).

<sup>24</sup>*Id.* at 240. The Court's references to "aboriginal title" and "Indian title" are variant terms for title deriving from aboriginal occupation. *Sac & Fox Tribe v. United States*, 383 F. 2d 991, 997 (1967) ("This right of use and occupancy by Indians came be known as 'Indian title.' It is sometimes called 'original title' or 'aboriginal title.'"). See also *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 233 (1985) (*Oneida II*) (applying the terms "aboriginal title" and "original Indian title" to "lands they had inhabited from time immemorial").

<sup>25</sup>4 Stat. 729.

<sup>26</sup>Revised Statutes, Title XXVIII, Ch. 4.

<sup>27</sup>95 U.S. 204 (1877).

<sup>28</sup>*Id.* at 208.

<sup>29</sup>*Id.* at 209.

<sup>30</sup>In *United States v. Donnelly*, 228 U.S. 243, 269 (1913), the Supreme Court held that federal criminal jurisdiction over Indian country applied to reservations established by executive order under authority granted by Congress, noting that "in our judgment, nothing can more appropriately be deemed 'Indian country,' within the meaning of those

provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.” In *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), the Court held that laws prohibiting the introduction of whiskey into the Indian country applied to the Reno Indian colony, land purchased by the United States under acts of Congress. In *U.S. v. Pelican*, 232 U.S. 442 (1914), the Court held that federal jurisdiction over murders committed in Indian country applied to allotments held by the government in trust for Indian allottees. In *Hallowell v. U.S.*, 221 U.S. 317 (1911), the Court held that laws prohibiting the introduction of whiskey into the Indian country applied to allotments held in trust for Indian allottees.

<sup>31</sup>Section 6 of the General Allotment Act, 25 U.S.C. § 349, provides that, when the secretary of the interior issues a patent in fee simple to an allottee, “thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .” Section 6 constitutes an explicit congressional authorization of conveyance of an allotment after issuance of a fee patent at any time “thereafter,” regardless of whether an Indian tribe happens to purchase the land. Section 177 cannot be applied to such land without contradicting the express language of § 349.

<sup>32</sup>Felix S. Cohen et al., *HANDBOOK OF FEDERAL INDIAN LAW* ed. by Rennard Strickland and Charles F. Wilkinson at 75–84 (2005).

<sup>33</sup>*United States v. Creek Nation*, 295 U.S. 103, 111 (1935).

<sup>34</sup>*Amoco Production Co. v. Southern Ute Indians*, 526 U.S. 865, 868 (1999).

3562 Stat. 757.

<sup>36</sup>18 U.S.C. § 1151(a) includes in the definition of Indian country “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.”

<sup>37</sup>Brief for the United States as Amicus Curiae, 1997 U.S. Briefs 174; 1998 U.S. S.Ct. Briefs LEXIS 45, 47, n.13.

<sup>38</sup>*Pension Benefit Guaranty Corporation v. Ltv Corp.*, 496 U.S. 633, 650, (1990).

<sup>39</sup>24 Stat. 388, known as the General Allotment Act, provided for the distribution of Indian reservation into 80- or 160-acre allotments to Indians and the sale of reservation “surplus” lands to non-Indians. By 1934, when the Indian Reorganization Act put an end to allotment, more than 90 million acres had passed out of tribal hands. See Cohen’s *HANDBOOK* § 1.04 at 75–84.

<sup>40</sup>Historical and Revision Notes, 1948 Act at 18 U.S.C. §§ 1151, 1153 (2006 ed.)

<sup>41</sup>25 U.S.C. § 465.

<sup>42</sup>524 U.S. 103 (1998).

<sup>43</sup>The idea that federal policy should be driven by a position asserted in an unsuccessful 1998 brief seems dubious.

<sup>44</sup>25 Stat. 642.

<sup>45</sup>524 U.S. at 113, quoting *County of Yakima v. Confederated Tribes and Band of Yakima Nation*, 502 U.S. 251, 263

(1992).

<sup>46</sup>*Id.* at 115, n.5. 118 S. Ct. 1904, 1911 n.5, 141 L. Ed. 2d 90, 100 n.5. The United States Reports version of the decision erroneously splices a phrase from the first paragraph of note 5 into the second paragraph of the footnote, where it contradicts the meaning of the sentence. The error is corrected in the West’s Supreme Court Reporter and in LEXIS’ Lawyers’ Edition of the case.

<sup>47</sup>*Id.* at 114. It seems unlikely that the Court would dismiss the government’s § 177 argument in a footnote based on a technicality if the Court truly thought the argument had merit since, if correct, the argument would fatally undermine the Court’s holding.

<sup>48</sup>544 U.S. 197 (2005).

<sup>49</sup>*Id.* at 221.

<sup>50</sup>5 F.3d 1355 (9th Cir. 1993).

<sup>51</sup>*Id.* at 1359.

<sup>52</sup>542 F. Supp. 2d 908, 932 (E.D. Wis. 2008). The court was correct in its assessment of the relevance of § 177, but its holding that the Village had the authority to condemn fee land owned by the tribe within reservation boundaries, merely to effectuate the Village’s land use plans, ignored federal Indian law principles that protect tribes from state regulation within Indian country.

<sup>53</sup>929 P.2d 379 (Wash. 1996).

<sup>54</sup>626 N.W.2d 169 (Mich. App. 2001).

<sup>55</sup>542 F. Supp. 797, aff’d 707 F.2d 23 (1st Cir. 1983).

<sup>56</sup>643 N.W.2d 685 (N.D. 2002).

<sup>57</sup>112 F.3d 538 (1st Cir. 1997).

<sup>58</sup>*Id.* at 553.

<sup>59</sup>271 U.S. 432 (1925).

<sup>60</sup>Then known as § 2166 of the Revised Statutes, an earlier codification of federal law.

<sup>61</sup>271 U.S. at 442.

<sup>62</sup>249 F.2d 189 (10th Cir. 1957).

<sup>63</sup>43 Stat. 636.

<sup>64</sup>249 F.2d at 196; *Tonkawa Tribe v. Richards*, 75 F.3d 1030 (5th Cir. 1996), in which the Fifth Circuit Court of Appeals, in dicta, quoted the statement made by the Alonzo court that “[t]he Nonintercourse Act protects a tribe’s interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state.”

<sup>65</sup>257 F.2d 885 (2d Cir. 1958), reversed *Federal Power Commission v. Tuscarora Nation*, 362 U.S. 99 (1960).

<sup>66</sup>*Id.* at 887.

<sup>67</sup>On appeal, the Supreme Court reversed the decision, *Federal Power Commission v. Tuscarora Nation*, 362 U.S. 99 (1960), upholding condemnation of the tribe’s fee simple lands on the grounds that federal laws of general applicability apply to tribes. Although the Supreme Court did not contradict the Second Circuit’s decision, the Court held that § 177 does not apply to conveyances to, or condemnations by, the federal government. Therefore, a determination of the status of the lands in question was not necessary.

<sup>68</sup>97 F.2d 417 (4th Cir. 1938).

<sup>69</sup>883 P.2d 136, 140 (N.M. 1994).

<sup>70</sup>Felix S. Cohen et al., *HANDBOOK OF FEDERAL INDIAN LAW* at 484 (Rennard Strickland and Charles F. Wilkinson, eds. 1982).