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NOTES

INDIAN LAND REFORM: JUSTICE FOR ALL? AN EXAMINATION OF PROPERTY LAWS PERTAINING TO THE FIVE TRIBES INDIANS AND A NEW CALL FOR REFORM

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I. INTRODUCTION

Imagine the story of two American Indians living in the state of Oklahoma. Bill is a descendant of full-blood Ponca Indians. Bill's ancestors were horticulturalists who also hunted buffalo in Nebraska and South Dakota.¹ The Ponca Nation was a peaceful one that never waged

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1. Mark Van de Logt, *Ponca*, OKLAHOMA HISTORICAL SOCIETY'S ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/P/PO007.html> (last visited Feb. 4, 2014) ("In the 1700s the Ponca Indians separated from the Omaha tribe and established villages along the Niobrara River and Ponca Creek in present Nebraska and South Dakota. There they subsisted on horticulture and bison hunts.").

war with the United States; instead they traded parts of their homelands to the United States federal government in exchange for its protection from the Ponca Nation's enemies.² Even though the Ponca cooperated, the government betrayed the Ponca during the government's attempts to tame the Sioux, a neighboring tribe.³ In 1877, after granting Ponca lands to the Sioux, the government forced the Ponca's relocation to Oklahoma.⁴ Bill's ancestors accompanied the tribe as it marched south to its new lands, where tragedy befell it almost immediately. Since relocation began in winter, by the time they arrived in Indian Territory it was too late to plant crops for the next year.⁵ Further, the government had failed to provide facilities or supplies to aid the group in transition;⁶ as a result of these factors, nearly one-third of the tribe succumbed to the elements.⁷ Fortunately, however, Bill's ancestors survived. They continued to practice their customary way of life with the other tribe members who had survived, and they attempted to maintain a lifestyle as similar as possible to the life they had known in the North.⁸

The tribe's customs and way of life came under siege, however, as more white settlers began to move into the area. The settlers desired to move into new land and continually pressured the government to open up the Ponca land for sale.⁹ Finally, the government responded by allotting the communally held tribal lands to the tribe's individual members.¹⁰ The government made any lands that remained at the end of this allotment process available to the public, which caused the loss of thousands of acres of tribal land.¹¹ Bill's ancestors received an individual allotment of 160 acres, and the United States held title to this land in trust. Through this protective measure, the government intended to ensure that the allotted land did not pass out of Indian ownership and into the hands of scheming settlers or miners while the Indians became accustomed to the

2. *Id.*

3. *See id.*

4. *Id.*

5. THOMAS WITT, SEAN DOYLE & JASON MARMOR, SWCA ENVTL. CONSULTANTS, NEBRASKA HISTORIC RESOURCES INTENSIVE SURVEY OF NORTHERN PONCA AND SANTEE SIOUX ALLOTMENT PROPERTIES 7-8 (2010), available at www.nebraskahistory.org/histpres/reports/Northern_Ponca_Santee_Sioux.pdf.

6. Van de Logt, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

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system of private land ownership. When Bill's ancestors died, they left their allotments to Bill's parents. Unlike many other Indians,¹² Bill's ancestors created a will, and the Secretary of the Interior probated the matter.

The land passed without issue to Bill's parents, and now Bill's parents have left the land to him. Bill is only seven-sixteenths degree Indian blood; however, the amount of his Indian blood is of no concern. Because he is Indian, he received the land with the trust status intact. The Secretary of the Interior probated the estate, so Bill did not have to worry about gathering the funds for court costs, attorney fees, or other expenses in order to ensure that the matter was probated. Bill also does not have to pay taxes on the land since the government holds the title in trust for him. This is fortunate because the economic assistance from the government is an essential part of his family's livelihood and ability to survive. The inheritance of the family land will enable him and his family to continue to live and prosper on their property without fear of losing it. Bill's story is not unique. Fortunately, because the land is able to pass among generations without losing its protected status, the tribe itself is able to enjoy a fairly consistent land base. This steady base supports the tribe's sovereignty and jurisdiction and helps preserve its cultural heritage.

In contrast, we have the story of Joe—a descendant of full-blood Cherokee Indians. Joe's ancestors practiced agriculture, hunting, and warfare; women tended the garden, cooked meals, and raised children, while the men hunted to support the needs of the tribe.¹³ The tribe was well established throughout much of the southeastern region of the United States well before the 1500s.¹⁴ Personal relationships within tribes—in the forms of family, clan, larger community, and council—have provided a coherent basis for the tribe's identity as a whole.¹⁵ Over time, various independent communities forged themselves into a strong,

12. See *Five Nations Citizens Land Reform Act: Hearing on H.R. 2880 Before the S. Comm. on Indian Affairs*, 107th Cong. 64 (2002) [hereinafter *Hearings*] (statement of Greg Pyle), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg83005/pdf/CHRG-107shrg83005.pdf> (“Since most Indians die without a will, the situation has been made worse.”).

13. Rennard Strickland, *Cherokee*, OKLAHOMA HISTORICAL SOCIETY'S ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/C/CH014.html> (last visited Feb. 4, 2014).

14. See *id.*

15. *Id.*

cohesive unit.¹⁶ The tribe created its own syllabary and written language, developed a democratic-style government with a written constitution, and published its own newspapers.¹⁷ However, the discovery of gold signaled the beginning of the end of the tribe's residence in its ancestral homeland.¹⁸ Recognition of the tribe as one of the most culturally advanced tribes in the United States was not enough to override the clamoring of settlers and miners.¹⁹

Like Bill's ancestors, Joe's ancestors were forced to move with the tribe from their homelands. At bayonet point they marched over 1,000 miles, from Georgia to Indian Territory, during the depths of winter.²⁰ Thousands died along the way;²¹ fortunately, Joe's ancestors survived. The federal government promised the Cherokee that they would live without state-government molestation in the new Indian Territory.²² Despite promises of undisturbed sovereignty, white settlers began moving into the area seeking fertile soil and valuable minerals, demanding that the federal government open Cherokee lands for sale and desiring statehood.²³ Finally, as with the Ponca, the government succeeded in forcing an agreement with the Cherokee Nation, an agreement that resulted in the allotment of the tribe's land to its individual members in 110-acre parcels.²⁴ Like Bill's ancestors, Joe's ancestors received an allotment; however, Joe's ancestors received fee title subject to restrictions against alienation.²⁵ As with the trust allotments, the government intended to protect the Cherokee Indians from losing their land at the hands of shrewd settlers while the Cherokee adjusted to the system of individual ownership.²⁶

As with Bill, Joe's ancestors left their allotment to Joe's parents. Joe's parents raised him on the allotment and Joe spent his childhood fishing in the rivers that ran through it. His family never had much

16. *Id.*

17. *Id.*; *Our History*, CHEROKEE NATION, <http://cherokee.org/AboutTheNation/History/Facts/ourHistory> (last visited Feb. 4, 2014).

18. *Our History*, *supra* note 17.

19. *See id.*

20. *Id.*

21. *Id.*

22. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 5* (4th Princeton Paperback Prtg. 1991).

23. *See id.* at 4–16, 159.

24. *See id.* at 50.

25. *See id.* at 88–91.

26. *Id.* at 36, 90–91, 114.

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money, but they always found a way to make it work on the land. Recently, Joe's parents passed and left the allotment to Joe in their will. Unlike Bill, however, Joe had to scrape together the funds to probate his parents' estate in the state courts, and the process nearly broke him financially. Like Bill, Joe also has only seven-sixteenths degree of Indian blood. For Joe, this meant that when he inherited the land, the restrictions against alienation—that had remained with Joe's family's land since allotment—were removed. Consequently, the property became subject to county ad valorem taxes;²⁷ because Joe had spent everything he had to probate the matter, he did not have the money required to pay these taxes. As a result, the state acquired the land and sold it to the public at a tax auction. Joe no longer has the land he grew up on; he has no land on which to raise his own family, and he lost the means to purchase new land. Joe's story is not unique; many other Five Tribes²⁸ Indians have lost their land in a similar way, resulting in a shrinking tribal land base.²⁹

How is it that these two men with such similar ancestral stories could endure such strikingly different outcomes? This Note will examine the history of American Indian land law as it pertains to the American Indians of Oklahoma, the problems resulting from the current status of the federal law regarding the Five Civilized Tribes, and finally, will propose a remedy.

II. HISTORY AND SUMMARY OF THE LAW

A. A Brief History

In order to understand the complex scheme of Indian land ownership in Oklahoma and appreciate the pressing need for reform, one must first understand the history of the state's Indians. Rather than occupying lands once inhabited by their ancestors, the majority of Oklahoma's 38 federally recognized American Indian tribes³⁰ were forcibly removed to

27. *Hearings, supra* note 12, at 112 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

28. The Five Tribes, often referred to as the Five Civilized Tribes, is comprised of the Chickasaw, Choctaw, Cherokee, Seminole, and Creek Nations.

29. *Hearings, supra* note 12, at 58–59 (statement of Chadwick Smith, Principal Chief, Cherokee Nation); *see also* Betty Ridge, *Cherokee Tribal Land Allotment Issues Raise Many Questions*, TAHLEQUAH DAILY PRESS, Mar. 20, 2009, at 1A.

30. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

Oklahoma from their native lands.³¹ As a result of these tragic and unique circumstances, Oklahoma has developed a rich American Indian culture that has been and continues to be impacted by a complex web of federal and state laws. Specifically, the Five Civilized Tribes originally occupied land east of the Mississippi River in Georgia, Mississippi, Alabama, Tennessee, North and South Carolina, and Florida.³² After the Revolutionary War, a bevy of settlers moved into Five Tribes territory to search for gold.³³ As a result, states began to enact laws that encroached on tribal sovereignty.³⁴ Under agreements made pursuant to the Indian Removal Act of 1830,³⁵ the Five Tribes ceded their ancestral homelands east of the Mississippi to the United States for title in fee simple to designated lands west of the Mississippi—lands that would later become the state of Oklahoma.³⁶ These agreements contained “solemn guarantees” that no state would impose its government upon them without the consent of the tribe and that the Five Tribes land titles would be valid in perpetuity.³⁷

Over time, the federal government relocated additional American Indian tribes to Indian Territory under separate agreements.³⁸ Although the federal government originally intended the Territory to be a place for the Indians to live undisturbed by the growing country around them,³⁹ white settlers continued to move into and settle the area. Once again, the demand for more land to be opened up for settlement and development began to escalate.⁴⁰ In 1887, the United States Congress responded to the cries of settlers with the General Allotment Act.⁴¹ This Act parceled out communally held reservation lands into individual ownership.⁴² Lands

31. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[1][a], at 294 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

32. See Edward Davis, *Early Life Among the Five Civilized Tribes*, 15 CHRON. OKLA. 70, 70 (1937), available at <http://digital.library.okstate.edu/Chronicles/v015/v015p070.html>.

33. DEBO, *supra* note 22, at 4.

34. *Id.* at 4–5.

35. Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

36. See *Hearings*, *supra* note 12, at 58 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

37. DEBO, *supra* note 22, at 5.

38. See COHEN’S HANDBOOK, *supra* note 31, § 4.07[1][a], at 288–89.

39. See *id.*

40. DEBO, *supra* note 22, at 28.

41. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–333 (repealed 2000), 334, 339, 341–342, 348, 349, 354, 381 (2012)).

42. *Id.*

that remained unassigned after each tribe member had received his or her allotment were considered surplus and could be purchased by the government to be sold to the public.⁴³ Indians who had either received an allotment under the General Allotment Act or inherited land from ancestors who had received such an allotment would hold “trust patents” to the land.⁴⁴ Under this arrangement, the United States holds fee simple title to the land with the patent holders as the beneficiaries.⁴⁵ Although Congress initially set the trust period to last only 25 years, it indefinitely extended this period such that the land remains in trust status until Congress proclaims otherwise.⁴⁶

The Five Tribes were exempted from the General Allotment Act, at least in part because the United States government did not hold title to their land; the tribes themselves held fee simple title as a result of the treaties each tribe signed upon Removal.⁴⁷ Unfortunately, however, exemption from allotment was not to last. Although the General Allotment Act opened up over 60-million acres of land to settlement,⁴⁸ the federal government made little of the fertile, oil-rich land in eastern Oklahoma actually available to settlers. The settlers continued to demand more, and later, other voices joined in the fray.⁴⁹ Oil was first discovered in Cherokee Territory near Chelsea, Oklahoma, in 1889.⁵⁰ By the early 1900s, economically significant quantities were being discovered in a section of the Creek Nation.⁵¹ The Glenn Pool, located near Tulsa, “bec[a]me one of the most spectacular producing pools in the world.”⁵² In fact by 1907, more than 4,000 oil and gas leases were in effect.⁵³

43. DEBO, *supra* note 22, at 23 (footnote omitted).

44. Tim Vollmann & M. Sharon Blackwell, “*Fatally Flawed*”: *State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 TULSA L.J. 1, 8 (1989) (footnote omitted).

45. *Id.* (footnotes omitted).

46. Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (2012)).

47. *Hearings*, *supra* note 12, at 58 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

48. *History of Allotment*, INDIAN LAND TENURE FOUNDATION, <http://www.iltf.org/resources/land-tenure-history/allotment> (last visited Aug. 24, 2013).

49. *See* DEBO, *supra* note 22, at 93.

50. Donna Casity McSpadden, *Chelsea*, OKLAHOMA HISTORICAL SOCIETY’S ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/C/CH013.html> (last visited Aug. 24, 2013); *see also* DEBO, *supra* note 22, at 86.

51. DEBO, *supra* note 22, at 86.

52. *Id.* at 87.

53. *Id.*

Prospectors wishing to develop the mineral potential of the Five Tribes land joined the settlers' demands for access.⁵⁴ As a result, Congress experienced increasing pressure from both settlers and prospectors to change the way lands were held and divided in Indian Territory.⁵⁵

With the passage of the Curtis Act in 1898, Congress essentially forced the Five Tribes to agree to an allotment of their lands.⁵⁶ Each of the individual tribes crafted its own agreement with Congress; the terms of the individual treaties provided for slightly different quantities of land for each individual, but the nature of each allotment was the same.⁵⁷ Under these allotment agreements, the principal chief of each tribe conveyed allotments to members of the tribe; recipients of these allotments received a fee simple title to the land that was subject to restrictions against alienation and encumbrances, or a "restricted patent."⁵⁸ Each allotment consisted of two categories of land: a homestead portion and a surplus portion.⁵⁹ Homesteads were restricted against alienation for a period of 21 years while surplus portions generally remained restricted for only 5 years.⁶⁰ Once the restricted period expired, the restrictions would be removed and the owner of the land would retain a fee simple title to the land.⁶¹ Any lands that remained after allotments had been granted to all members of the tribes were once again considered "surplus"; these lands could then be purchased from the tribes by the federal government to be opened up for white settlement.⁶²

Soon after the allotment agreements had been reached, voices from the non-Indian community began to demand the removal of all restrictions as the community's desire for statehood grew⁶³ and the potential for great oil discovery became apparent.⁶⁴ Supporters of the removal of the restrictions claimed that the removal would be in the Indians' best interest because it would place the Indians "in the position of ordinary citizens" and allow them the same rights to title as American

54. *Id.* at 93.

55. *Id.*

56. *See generally* Curtis Act, ch. 517, 30 Stat. 495 (1898).

57. *See* DEBO, *supra* note 22, at 32–34; Curtis Act, ch. 517, §§ 29–30, 30 Stat. 495, 505–19 (1898).

58. Vollmann & Blackwell, *supra* note 44, at 8.

59. *Id.* at 9.

60. *Id.* (footnote omitted).

61. *See* COHEN'S HANDBOOK, *supra* note 31, § 4.07[1][c][ii], at 298–99.

62. Act of Apr. 26, 1906, ch. 1876, § 16, 34 Stat. 137, 143.

63. Vollmann & Blackwell, *supra* note 44, at 9.

64. DEBO, *supra* note 22, at 86–88.

citizens, namely the right to sell their land as they saw fit.⁶⁵ This idea suited the contemporaneous policy⁶⁶ of assimilation, which was promulgated by the federal government and well received by Congress.

Beginning with the Act of April 21, 1904,⁶⁷ and culminating with the Act of August 4, 1947,⁶⁸ Congress proceeded to create an impenetrable tangle of laws, ever reducing the number of restricted allotments in response to Oklahoma citizens' demands for easier access to the Five Tribes' lands and swallowing the guarantees once solemnly promised to the Tribes in the Removal treaties.⁶⁹ This web of regulations has resulted in disparate treatment between the tribes in the western half of the state who received their land as trust allotments and the Five Tribes of eastern Oklahoma who hold a fee subject to restrictions.⁷⁰ The federal government acknowledges the same fiduciary duty towards all of the nation's American Indians.⁷¹ However, the trust-patent Indians enjoy robust protection against the loss of their land, while the Five Tribes incongruently enjoy only minimal protection. Consequently, Five Tribes' land bases continue to shrink at an alarming rate,⁷² threatening the vigor of the tribes themselves and perpetuating the loss of native lands at the hands of the "white men."⁷³

B. A Summary of the Law as It Applies Today

Almost as soon as Congress ratified the allotment agreements, various groups noted their dissatisfaction with the terms.⁷⁴ In response,

65. *Id.* at 137–38 (internal quotation marks omitted); *see also* Vollmann & Blackwell, *supra* note 44, at 9.

66. COHEN'S HANDBOOK, *supra* note 31, § 1.04, at 71 (noting a "new era in Native American policy" as well as what some referred to as "the second founding of the Republic").

67. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 204.

68. Act of Aug. 4, 1947, ch. 458, § 7, 61 Stat. 731, 734.

69. *See generally* Vollmann & Blackwell, *supra* note 44, at 2–23 (providing historical background of the various acts surrounding tribal land allotment in the early 20th century).

70. *See Hearings, supra* note 12, at 58–59 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

71. *See* COHEN'S HANDBOOK, *supra* note 31, § 5.04[3][a], at 412–14.

72. *See Hearings, supra* note 12, at 59, 62 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

73. *Id.* at 94 (statement of Aurene M. Martin, Deputy Assistant Secretary, Bureau of Indian Affairs).

74. Vollman & Blackwell, *supra* note 44, at 9; *see also* DEBO, *supra* note 22, at 86–88.

Congress attempted multiple times to craft legislation that would remedy the situation and appease one group or another.⁷⁵ However, each new piece of legislation increased the disparity of treatment between trust Indians and restricted Indians. In the beginning, every Five Tribes allotment was subject to restrictions against alienation and encumbrances.⁷⁶ However, beginning with the Act of 1904,⁷⁷ the parcels of land entitled to restricted status have slowly been whittled away as statutes imposed or removed restrictions according to blood quantum.⁷⁸ The Act of 1904 provided for the removal of restrictions on the allotted lands of all non-Indian adults and granted permission to the Secretary of the Interior to remove restrictions on the surplus lands of all adult Indian allottees.⁷⁹ Only a couple years later, the Act of 1906 changed the restriction scheme again, removing some classes of restriction on inherited land⁸⁰ while reimposing unqualified restrictions for 25 years on all allotments held by full-blood allottees.⁸¹ Furthermore, the Act of 1906 gave the Secretary of the Interior the authority to approve the conveyance of inherited property by any adult full-blood tribal member.⁸² Under this Act, Congress granted only full-blood Five Tribes Indians protection from the United States government.

Those lands that would be awarded the protection of restricted status changed once again in 1908. The Act of 1908 affected both original allotments and inherited allotments: all restrictions on property belonging to Indians of less than half blood were removed, and all restrictions on the surplus portion of those in between half and three-quarters blood were also removed.⁸³ However, restrictions on the homestead portions of half-blood Indians and on all portions of land for three-quarter-blood

75. See generally Vollmann & Blackwell, *supra* note 44, at 2–23 (providing the history of acts that surround the early 20th-century tribal land allotment).

76. *Id.* at 8–9 (footnotes omitted).

77. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189.

78. See, e.g., *id.* at 204.

79. *Id.*; see also Vollmann & Blackwell, *supra* note 44, at 10.

80. LAWRENCE MILLS, THE LANDS OF THE FIVE CIVILIZED TRIBES §165 (1919). Under this Act, Congress released the restrictions on land belonging to adult heirs of less than full-blood status, and “[the heirs] were authorized thereafter to convey the fee or any lesser interest in their inherited lands.” *Id.* (footnote omitted).

81. *Id.* § 170; Act of Apr. 26, 1906, ch. 1876, § 19, 34 Stat. 137, 144; see also Vollmann & Blackwell, *supra* note 44, at 12 (footnote omitted).

82. Act of Apr. 26, 1906, ch. 1876, § 22, 34 Stat. 137, 145; see also MILLS, *supra* note 80, § 164.

83. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, 312; see also Vollmann & Blackwell, *supra* note 44, at 15 (footnote omitted).

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Indians were reimposed.⁸⁴ Later, an additional statute provided that “when the entire interest in restricted and tax exempt land was acquired by inheritance, devise, purchase, or gift,” the land would remain in restricted status as long as the conveyance was “by or for ‘restricted Indians.’”⁸⁵

By this point, nearly 20 years had passed since the Act of 1904, and a complicated scheme of determining whether restrictions applied was already in place. State courts had jurisdiction to determine heirs and probate matters regarding restricted allotments,⁸⁶ but the complex progression of the law resulted in much confusion. The state courts were to act as the federal instrumentality for protecting the Indians; however, the constant flux of the law made properly applying it extremely difficult for state courts.⁸⁷ Finally, in 1947 Congress issued a final statute that still determines how restricted status is applied today.⁸⁸ As the law currently stands, all inherited or allotted restricted lands held by members of the Five Tribes who are half blood or more are subject to restrictions against alienation and protected by the federal government.⁸⁹ Lands held by tribe members who are less than half blood are free of restriction and protection and may be conveyed at the discretion of the owner.⁹⁰ This contingency of the federal government’s protection upon the degree of blood quantum starkly contrasts with the treatment given to the rest of the Indians across the United States, who receive protection regardless of the amount of Indian blood they possess.⁹¹ However, members of the Five Tribes remain at risk of losing their land on account of their blood quantum solely because of the circumstances under which the law developed.

In addition to causing confusion over the restricted status of Five Tribes lands, the tangle of federal laws also muddled the understanding of which courts had proper jurisdiction to hear probate and other matters

84. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312, 312; *see also* Vollmann & Blackwell, *supra* note 44, at 15 (footnote omitted).

85. Vollmann & Blackwell, *supra* note 44, at 20 (citing Act of Jan. 27, 1933, ch. 23, § 1, 47 Stat. 777, 777).

86. Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573, 573; Act of May 27, 1908, ch. 199, §§ 6–9, 35 Stat. 312, 313–15.

87. Vollmann & Blackwell, *supra* note 44, at 17–20 (footnotes omitted).

88. *See* Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.

89. *Id.* § 1, 61 Stat. at 731; *see also* Vollmann & Blackwell, *supra* note 44, at 22.

90. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731, 731.

91. *Compare* 25 U.S.C. §§ 331–352 (2012), *with id.* §§ 353, 355, *and* Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.

involving interests in Five Tribes lands. Prior to allotment, tribal courts had handled probate matters within the tribe.⁹² However, as part of its drive to assimilate Indians, Congress essentially dissolved the tribal courts with the Curtis Act, removing the influence of the tribe over its own matters.⁹³ The Act of April 28, 1904, placed jurisdiction over settlement of estates in the federal territorial courts, paving the way for state court jurisdiction.⁹⁴ Once Oklahoma achieved statehood, additional legislation provided that Oklahoma's probate courts would have jurisdiction to approve all conveyances by full-blood heirs.⁹⁵ Furthermore, state courts were given "jurisdiction over the person and property of minor allottees."⁹⁶ This placed the state courts in the position of acting as a powerful federal instrumentality over the Indians—a position where they had jurisdiction over a "significant amount of Indian lands and inevitable future control" of all Five Tribes land in the state.⁹⁷ Two Acts in 1926 and 1933⁹⁸ further reinforced the role of the state as a federal instrumentality, affirming that county-court approval of a full-blood conveyance conclusively established jurisdiction and promulgating certain guidelines for conveyance proceedings in county courts.⁹⁹

However, a 1934 opinion by the Solicitor of the Department of the Interior¹⁰⁰ muddied the seemingly clear jurisdictional waters. The opinion interpreted the 1933 statute as indicating that the Secretary of the Interior had the authority to approve or disapprove conveyances by Indians of at least half-blood status,¹⁰¹ an idea later confirmed by the federal courts.¹⁰² Consequently, parties to a conveyance action were unsure about which body should approve the transaction, and this flung

92. Vollmann & Blackwell, *supra* note 44, at 10 (citing RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 96–102 (1975)).

93. *See id.*

94. Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573, 573; *see also* Vollmann & Blackwell, *supra* note 44, at 10 (footnotes omitted).

95. Vollmann & Blackwell, *supra* note 44, at 15 (citing Act of May 27, 1908, ch. 199, § 9, 35 Stat. 312, 312).

96. *Id.* at 16.

97. *Id.* at 15.

98. Act of Apr. 10, 1926, ch. 115, 44 Stat 239; Act of Jan. 27, 1933, ch. 23, 47 Stat. 777.

99. Vollmann & Blackwell, *supra* note 44, at 18–20 (footnotes omitted).

100. Restrictions Applicable to the Five Civilized Tribes, 54 Interior Dec. 382 (1934).

101. *Id.* at 385–87.

102. Vollmann & Blackwell, *supra* note 44, at 20 (citing Burgess v. Bosen, 31 F. Supp. 352, 353 (N.D. Okla. 1940)).

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the doors wide open for illegitimate property transactions.¹⁰³ Land-title validity was uncertain as courts interpreted the current law in a host of conflicting manners, and many people demanded reform.¹⁰⁴ Finally, the Act of 1947 clarified that county courts were the proper forum for the approval of all heirs' conveyances, the same location where jurisdiction stands today.¹⁰⁵ By contrast, the Secretary of the Interior retains jurisdiction over similar matters for trust Indians.¹⁰⁶

Unfortunately, state courts historically have not maintained a positive record of dutifully carrying out their protective role. For example, a 1912 report by M.L. Mott, attorney for the Muscogee (Creek) Nation in the early 1900s, indicated that, although the average cost for administering the estate of a white minor was less than 3% of the total estate, the average cost for administering the estate of an Indian minor was around 20%, even though both had been decided in the same jurisdiction and with the same laws.¹⁰⁷ Other reports documented numerous cases in which state courts had found adult Indians to be incompetent and therefore subject to court-appointed guardians whenever large oil and mineral deposits were found on Indian property.¹⁰⁸ Enormous land loss because of forced partition sales or the high cost of probate is additional evidence of failed state-court protection.¹⁰⁹ This indicates that the strongest motivation behind state-court decisions was more than likely its citizens' demands for available land and the ability to capitalize on newly discovered beds of wealth sitting beneath the lands of the Five Tribes than its responsibility as a federal instrumentality.

In addition to regulating which land is eligible for restricted status and which courts have jurisdiction over Five Tribes land matters, the federal web of regulations has also created several other special provisions. First, any restricted land of the Five Tribes is subject to the Oklahoma statute of limitations for any causes that may accrue against

103. *See id.*

104. *Id.*

105. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731, 731.

106. COHEN'S HANDBOOK, *supra* note 31, § 16.3[4][c], at 1083; *id.* § 16.05[2][g], at 1101–04.

107. L. Susan Work, *Remedies for a "National Blunder": Proposed Five Nations Citizens Land Reform Act—Probates, Guardianships, Quiet Titles and Involuntary Partitions*, in SOVEREIGNTY SYMPOSIUM XIV, at X-67 to X-68 (2001) (citing M.L. MOTT, A NATIONAL BLUNDER 3 (1924)).

108. *Id.* at X-68 (citing M.L. MOTT, A NATIONAL BLUNDER 7–8 (1924)).

109. *Id.* at X-68 to X-70.

it.¹¹⁰ The United States must be given notice of any pending action wherein restricted land is at issue and a restricted Indian is named as a party.¹¹¹ Upon notice, the United States may appear in, or petition for removal of, the case to federal court within 20 days.¹¹² The presence of a government probate attorney is required at any conveyance proceeding, and the attorneys may appeal an action of a county court that approves an Indian conveyance.¹¹³ Moreover, government probate attorneys may represent any restricted member in state court for any interest in that member's property.¹¹⁴ In 1955, Congress extended the period of restriction on an interest of property that is conveyed to a Five Tribes member of one-half blood or more for the life of the heir or devisee.¹¹⁵

III. THE CURRENT CRISIS

A. Implications of the Law as It Is Applied Today

Since the inception of its disastrous allotment policy, the United States federal government has failed to stop the bleeding of Indian land from the hands of the Indians themselves into those of the proverbial white settlers. Each piece of legislation that followed the original allotment agreements released substantial amounts of land from restricted status,¹¹⁶ whereupon the owner often quickly sold the land in exchange for quick cash.¹¹⁷ The loss of land from Indian ownership is not merely a problem of the past, as many might be inclined to think. Rather, the bleed-out continues at a swift pace today; for example, during the 20 years between 1978 and 1998, the Secretary of the Interior removed restricted status from nearly 12,000 acres of the Five Tribes' lands.¹¹⁸

110. Act of Apr. 10, 1926, ch. 115, § 2, 44 Stat. 239, 240.

111. *Id.* § 3, 44 Stat. at 240.

112. *Id.* § 3, 44 Stat. at 241.

113. Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 (funding for employment of attorneys to assist in "probate matters affecting individual allottees of the Five Civilized Tribes"); Act of Jan. 27, 1933, ch. 23, § 8, 47 Stat. 777, 779.

114. Act of Aug. 4, 1947, ch. 458, § 4, 61 Stat. 731, 733.

115. Act of Aug. 11, 1955, ch. 786, § 1, 69 Stat. 666, 666-67.

116. For example, the Act of 1904 resulted in the removal of restrictions from the allotments of around 6,000 Five Tribes Indians, and the Act of 1908 resulted in over 12 million acres losing restricted status. Vollmann & Blackwell, *supra* note 44, at 10, 15 (citing Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 204; DEBO, *supra* note 22, at 90, 179-80).

117. DEBO, *supra* note 22, at 114-15 (footnotes omitted).

118. See *Hearings*, *supra* note 12, at 62 (statement of R. Perry Beaver, Principal Chief,

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Most of these acres probably passed entirely out of Indian hands.¹¹⁹ By 2002, existing Cherokee restricted allotments numbered a meager “one-third of one percent” of the total number of allotments originally granted.¹²⁰

Although holders of *trust* allotments receive much protection from the federal government against the loss of their land, owners of *restricted* allotments risk losing land in a myriad of ways. Even if owners of restricted allotments did not initially lose their lands, they may face the removal of restrictions from their lands, an action with consequences that affect not only the individual but reverberate throughout the tribe as a whole. For example, the loss of restricted status signifies the loss of tax-exempt status for the individual¹²¹ and the loss of representation by an attorney from the Department of the Interior for any matter regarding an interest in the individual’s restricted property.¹²² From a broader tribal standpoint, as land belonging to Five Tribes members loses restricted status, it ceases to be considered “Indian Country.”¹²³ As Indian Country shrinks, tribal governments lose jurisdictional power and their sovereignty becomes increasingly difficult to maintain in a meaningful manner.¹²⁴ Furthermore, and perhaps more importantly, a tribal government’s influence wanes as its jurisdictional territory disappears, threatening to take along with it the rich cultural heritage and influence of that tribe.¹²⁵ Therefore, continued deterioration of the land base threatens the cultural survival of the tribe itself.

In testimony before the Senate Committee on Indian Affairs regarding the proposed Five Nations Citizens Land Reform Act (Five Nations Act),¹²⁶ the Principal Chief of the Muscogee (Creek) Nation, R.

Muscogee (Creek) Nation).

119. *Id.*

120. *Hearings, supra* note 12, at 59 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

121. COHEN’S HANDBOOK, *supra* note 31, § 4.07[1][c][ii], at 299. An allottee’s restricted land may be tax exempt up to 160 acres for the period that the land is inalienable. Taxes on mineral production royalties are permitted. *Id.* (footnotes omitted).

122. 25 C.F.R. § 16.3 (2013).

123. 18 U.S.C. § 1151 (2012); *see also* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1385–86 (10th Cir. 1996) (holding that restricted allotments of Indian land constitute “Indian Country”).

124. *See* Enlow v. Moore, 134 F.3d 993, 996 (10th Cir. 1998) (holding that where a dispute took place on Indian land, the Muscogee tribal court had proper jurisdiction).

125. *Hearings, supra* note 12, at 92–94 (statement of Aurene M. Martin, Deputy Assistant Secretary, Bureau of Indian Affairs).

126. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. (2002).

Perry Beaver, discussed five major complications facing individual owners of restricted allotments today.¹²⁷ First, state-court jurisdiction over Five Tribes Indian probate matters presents an often financially insurmountable obstacle for heirs to have an estate probated.¹²⁸ By contrast, the Department of the Interior possesses jurisdiction over probate matters for trust allotments;¹²⁹ when a trust allottee requires a probate matter to be settled, the matter will be decided by the Secretary of the Interior without the cost of attorney fees or filing fees inherent with the state-court process.¹³⁰ For a Five Tribes member, the equivalent state-court probate process can be very expensive and even cost prohibitive, often costing somewhere between four to ten percent of the estate.¹³¹

When heirs lack the funds to execute the probate, one of two results will likely occur. In the first case, the estate will remain unprobated, meaning that the decedent's heirs never receive title to the restricted land. For example, Chief Beaver testified that within his tribe, the accumulation of estates that needed to be probated was so far behind that the tribe had completely ceased taking action on the probates.¹³² Similarly, the Principal Chief of the Choctaw Nation testified at the same hearing that the number of estates waiting to be probated in his tribe numbered around 5,000 in the late 1990s.¹³³

In the second case, state courts will authorize the sale of the restricted allotment to cover the cost of the probate.¹³⁴ Under the current system, rather than selling only as much as is necessary so that the sale produces sufficient funds to cover the expense of probate, the entire allotment is typically sold without necessity or reason.¹³⁵ Therefore, even if the probate is achieved, the land is still lost and the ramifications are

127. *Hearings, supra* note 12, at 60 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

128. *Id.*

129. 25 U.S.C. §§ 372–373 (2012).

130. *See* 25 C.F.R. § 15.11 (2013).

131. Eileen St. Pierre, *Wills and Trusts Fact Sheet*, OKLA. COOP. EXTENSION SERV., <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-7078/T-4155web2012.pdf> (last modified May 2012).

132. *Hearings, supra* note 12, at 66 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

133. *Id.* at 67 (statement of Greg Pyle, Principal Chief, Choctaw Nation).

134. Work, *supra* note 107, at X-67.

135. *Hearings, supra* note 12, at 64 (statement of Greg Pyle, Principal Chief, Choctaw Nation); *see also* Work, *supra* note 107, at X-67.

felt by both the individual and the tribe. According to Chief Beaver, “countless acres” of restricted allotments have been lost in this manner.¹³⁶

Next, landowners of restricted allotments may lose title to their land through the doctrine of adverse possession. Unlike trust allotments, which may not be acquired by means of adverse possession,¹³⁷ restricted allotments are subject to Oklahoma’s statute of limitations.¹³⁸ The consequence is that a person may enter and occupy the land and eventually gain title that is good against the original owner if the person meets certain requirements of the Oklahoma adverse possession statute.¹³⁹ This law presents special problems for the typical restricted-allotment holder; owning a full 160-acre allotment that is completely located on one site has often been the exception rather than the rule.¹⁴⁰ For example, the federal government often granted an allottee 120 acres in one county with the remaining 40 in a separate county.¹⁴¹ With more than 100 years having passed since the original allotment, heirs of restricted landowners are even more likely to own separate parcels of land in multiple counties.¹⁴² Since many allottees pass without a will¹⁴³

136. *Hearings, supra* note 12, at 60 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

137. 25 U.S.C. § 347 (2012); *see also id.* § 462. The Act of May 31, 1902, applies the state statute of limitations to allotments created by treaties; however, the statute of limitations does not begin to run as long as the land remains in trust status. Since Congress has extended the trust period indefinitely, the statute of limitations period will likely never run on these lands. As the Oklahoma Supreme Court explained in *McLish v. White*, “the statute of limitations does not run in favor of conveyances executed in violation of federal restrictions and during the existence of federal restrictions.” *McLish v. White*, 223 P. 348, 350 (1924); *see also* 25 U.S.C. § 347 (2012); *id.* § 462; COHEN’S HANDBOOK, *supra* note 31, § 16.03[4][e][iii], at 1085.

138. Act of Apr. 10, 1926, ch. 115, § 2, 44 Stat. 239, 240.

139. OKLA. STAT. tit. 60, § 333 (OSCN through 2014 Leg. Sess.) (“Occupancy for the period prescribed by civil procedure, or any law of this state as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all.”). OKLA. STAT. tit. 12, § 93(4) (OSCN through 2014 Leg. Sess.) (establishing the time period to be 15 years). *See Sears v. State* for elements of adverse possession. *Sears v. State*, 1976 OK 56, ¶ 1, 549 P.2d 1211, 1213 (citations omitted).

140. *Ridge, supra* note 29.

141. *Id.*

142. One prominent example of this is the former Principal Chief of the Muscogee (Creek) Nation, R. Perry Beaver. *Hearings, supra* note 12, at 66 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

143. COHEN’S HANDBOOK, *supra* note 31, § 16.05[2][b], at 1095.

and the cost of probate is often prohibitive even where a will exists,¹⁴⁴ heirs may not even be aware that the land is theirs to protect. This type of arrangement makes it simple for non-Indians to encroach on Indian land without the knowledge of the owner, facilitating further loss of restricted lands.

Another assault on landowners of restricted allotments made possible by the impenetrable knot of current federal law comes in the form of an involuntary partition. The Act of June 14, 1918, applies Oklahoma law to partitions of restricted land.¹⁴⁵ Under Oklahoma law, the owner of an undivided interest in property, regardless of either the size of the interest or whether the owner's portion is unrestricted, may force the sale of the entire parcel of property.¹⁴⁶ The law provides that a purchaser of the forced partition is permitted to simply pay the Indian two-thirds of the appraised market value of the Indian's interest, and the cost of the partition and attorney fees are to be taken from the proceeds of the sale before the property owner receives any money.¹⁴⁷ If one owner of an undivided property interest wishes to partition and the remaining owner or owners cannot afford to buy him out, the remaining owners have no option but to sell their interest and lose the property.¹⁴⁸ By contrast, partition of trust allotments is subject to the Secretary of the Interior's jurisdiction,¹⁴⁹ a provision that affords increased protection against loss of the land. Further, partitioning federal trust lands does not carry the same implications as partitioning property under Oklahoma law; instead, it means only that all interest holders except for one are removed while the original allotment boundaries remain intact.¹⁵⁰

Finally, one of the most pressing complications of the current federal scheme is the blood-quantum requirement for restricted status. Only land that belongs to Indians of one-half or more Indian blood remains in

144. *Hearings, supra* note 12, at 60 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

145. Act of June 14, 1918, ch. 101, § 2, 40 Stat. 606; *see also* Work, *supra* note 107, at X-74.

146. *Id.* (citations omitted).

147. *Id.* (citing OKLA. STAT. tit. 12, § 1513 (OSCN through 2014 Leg. Sess.)); *see also* OKLA. STAT. tit. 12, §§ 1501-17 (OSCN through 2014 Leg. Sess.).

148. *See Hearings, supra* note 12, at 65-66 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

149. *Id.* at 61; 25 U.S.C. § 378 (2012).

150. Cecelia E. Burke, *Potential Impacts of AIPRA—One Client's Story: With a Legal Overview of AIPRA Provisions 7-8*, in A PRIMER ON THE NEW AMERICAN INDIAN PROBATE REFORM ACT (2005).

restricted status because of the series of congressional acts enacted after allotment.¹⁵¹ Therefore, once land passes through probate or some other conveyance and into the possession of someone with less than the required blood quantum, the restriction is removed along with all of the protections inherent in the restriction.¹⁵² A key consequence of the removal of restrictions is that the land becomes subjected to county ad valorem taxes.¹⁵³ While property retains its restricted status, the county may not impose taxes on it.¹⁵⁴ However, once the restriction is lifted, the property owner retains a fee simple title to the land and the land becomes subject to all relevant state and county taxes.¹⁵⁵ Historically, this shift in taxation status has had dramatic consequences; for example, landowners whose property became subject to ad valorem taxes often lost the land because of the inability to pay the new property taxes.¹⁵⁶ When this happened, the land not only lost its identity as Indian Country but often fell out of Indian ownership altogether.¹⁵⁷

An additional consequence of removing restricted status is that a government probate attorney is no longer required to appear at any conveyance proceedings. Under the current statute, the interest of an absent restricted Indian landowner may not be conveyed in court unless the government trial attorney consents and the attorney has the reserved right to appeal any resulting order.¹⁵⁸ The purpose of this provision is to safeguard the federal protections that are inherent with restricted status.¹⁵⁹ Once the restrictions are lifted, protection is no longer available. Under this scheme, an Indian who has less than one-half Indian blood loses all protection from the federal government, even though the federal government professes to have a trust relationship with *all* Indians.¹⁶⁰ In comparison, those Indians holding trust allotments

151. See *supra* notes 88–90 and accompanying text.

152. Act of Jan. 27, 1933, ch. 23, § 1, 47 Stat. 777.

153. See *id.*

154. *Id.*; Act of May 10, 1928, ch. 517, § 4, 45 Stat. 495, 496; Act of Aug. 4, 1947, ch. 458, § 6, 61 Stat. 731, 733; see also *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 610–11 (1943).

155. Act of Aug. 4, 1947, ch. 458, § 6, 61 Stat. 731, 733.

156. Ridge, *supra* note 29.

157. *Hearings*, *supra* note 12, at 62 (statement of R. Perry Beaver, Principal Chief, Muscogee (Creek) Nation).

158. Vollmann & Blackwell, *supra* note 44, at 22 (citing Act of Aug. 4, 1947, ch. 458, §§ 3–4, 61 Stat. 731, 732–33).

159. See *id.*

160. According to Cohen's Handbook, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between

retain the protection of the federal government regardless of the degree of their Indian blood.¹⁶¹ The Indians of the Five Tribes are simply not given the same protections against the loss of their land as every other Indian tribe within the United States.¹⁶²

As more and more land in eastern Oklahoma falls out of restricted status or even out of Indian hands altogether, the impact extends far beyond that felt by the individual landowner. Despite the federal government's best efforts to eradicate tribal governments in Oklahoma during the period leading up to and directly after statehood,¹⁶³ the governments of the Five Tribes persisted. Eventually, the federal government finally surrendered its policy of assimilation and eradication, instead settling on a policy of self-determination and self-governance.¹⁶⁴ This policy is premised on the idea that the Indian tribe is the "basic governmental unit of Indian policy," and the general government trend has been to encourage the development of tribal governments and the practice of inherent tribal sovereign powers.¹⁶⁵ However, the mess of laws governing the Five Tribes is inconsistent with this policy. Rather than strengthening the development of tribal self-determination and self-governance, these laws weaken tribal governments by diminishing their land base and jurisdiction, and thus their sovereignty.

Territorial jurisdiction—whether a certain criminal act or civil cause of action arose in Indian Country—will largely determine tribal jurisdiction. Indian Country is defined, in pertinent part, by statute as "all Indian allotments,¹⁶⁶ the Indian titles to which have not been extinguished."¹⁶⁷ It is a legal term used to describe the boundaries of jurisdiction within which tribal laws, norms, or federal Indian laws will apply.¹⁶⁸ For example, if the conflict in question arose between Indians in

tribes and the federal government." COHEN'S HANDBOOK, *supra* note 31, § 5.04[3][a], at 414 (footnote omitted).

161. Compare 25 U.S.C. §§ 331–352 (2012), with *id.* §§ 353, 355, and Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.

162. *Hearings*, *supra* note 12, at 64 (statement of Greg Pyle, Principal Chief, Choctaw Nation).

163. See DEBO, *supra* note 22, at 63–64.

164. COHEN'S HANDBOOK, *supra* note 31, § 1.07, at 93.

165. *Id.* § 1.07, at 94. See generally *id.* § 1.07, at 93–108 (discussing the history and development of the self-determination and self-governance era).

166. An Indian Allotment is defined as "land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." *Id.* § 3.04[2][c][iv], at 197 (footnote omitted); see also 18 U.S.C. § 1151 (2012).

167. 18 U.S.C. § 1151 (2012).

168. COHEN'S HANDBOOK, *supra* note 31, § 3.04[1], at 183 (footnote omitted).

Indian Country, the state's jurisdiction is limited and most of the jurisdictional powers and responsibilities are left entirely to the tribe or the federal government.¹⁶⁹ However, if the act occurred outside of Indian Country, jurisdiction typically will lie with the state government.¹⁷⁰ When land loses its restricted status, it is no longer considered Indian Country; in Oklahoma, the resulting checkerboard of jurisdiction often creates a quagmire of confusion.¹⁷¹ Rather than a complete area within which tribal governments may exercise power, law enforcement officers and judges often need maps to help them determine which body has jurisdiction.¹⁷²

Jurisdiction is immeasurably important for the self-determination of a tribal government. Where the tribe has jurisdiction, it may "break free from the bonds of American law" and use tribal customs or traditions where appropriate to decide the cases before it, ensuring the perseverance of each tribe's unique approach to its own governance.¹⁷³ There is little that is more important to the assertion of sovereignty than the power of territorial jurisdiction; without jurisdiction, governmental authority has limited meaning. Further, when the status of the land and consequently the correct governing body becomes unclear, police protection and the provision of other services may be delayed or lacking altogether.¹⁷⁴ As allotments lose restricted status, and along with it the designation of Indian Country, tribal governments' ability to efficiently care for their people and enforce codified tribal values diminishes. Rather than strengthening a tribe's presence, as is consistent with the currently professed federal policy, the checkerboard status of tribal jurisdiction significantly reduces tribal government authority. Unless federal law is reformed, the situation will only continue to worsen.

The blood-quantum requirement again enters the picture here as a significant culprit contributing to the checkerboard status of tribal jurisdiction and the diminution of tribal sovereignty. As we continue to move further away from the original allotment period and beyond the

169. K. Bliss Adams, *Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes*, 24 TULSA L.J. 89, 90 (1988) (footnotes omitted).

170. *See id.*

171. *Id.* at 89–90.

172. *Id.* at 89; *see also* Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 ST. THOMAS L. REV. 445, 457 (1995).

173. Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 47 (1994) (footnotes omitted).

174. Ferrell, *supra* note 172, at 457.

modern age, it is not difficult to fathom that the number of Indians with half-blood status or more will continue to decrease. It is certainly possible that an exceedingly vigilant tribe, individual, or state-court judge may prevent loss of land due to adverse possession, the cost of probate, or even partition. However, there is little apart from a change in the law that can be done to stay the bleeding of land because of the removal of restrictions on the basis of blood quantum.

When the restricted status of land is removed or a tribe acquires new land, only one remedy currently exists that may allow the land to assume trust status and regain protection. Section 5 of the Indian Reorganization Act of 1934 contains a provision that authorizes the Secretary of the Interior to convert fee simple land into trust upon application by a tribe.¹⁷⁵ Through the process outlined in title 25 of the Code of Federal Regulations, part 151, “[t]he Secretary converts fee land to trust status by accepting legal title to the land in the name of the United States in trust for a tribe or individual Indian” that has applied.¹⁷⁶ While this process enables the tribes to place some of the land they lose back under federal protection, converting fee into trust is a lengthy process. In order for the process to be completed, the Secretary of the Interior must satisfy not only the regulations directly regarding this process but must also comply with the National Environmental Policy Act, Hazardous Substances Determinations requirements, the National Historical Preservation Act, and the Department of Justice Title Standards, as well as any other applicable federal laws.¹⁷⁷ In addition to the Bureau of Indian Affairs, many other federal agencies, title and escrow companies, environmental contractors, state and local governments, and state courts must organize their efforts to ensure that the conversion is proper.¹⁷⁸ Finally, three 30-day periods for filing appeals must be granted following the completion

175. Indian Reorganization Act of 1934, ch. 576, § 5, 48 Stat. 984, 985 (codified at 25 U.S.C. §§ 461–462, 463, 464, 465, 466–470, 471–472, 473, 474–475, 476, 478, 479 (2012)). While the Secretary is authorized to convert fee land into trust for an individual, the Secretary may only do so if the land is within the boundaries of a reservation or when the land is already in trust or restricted status. As there are no Indian reservations in Oklahoma, conversion of land into trust will most likely be done at the request of a tribe. 25 C.F.R. § 151.3(b) (2013).

176. COHEN’S HANDBOOK, *supra* note 31, § 15.07[1][b], at 1041.

177. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE 54 (2008), available at <http://ailc-inc.org/PDF%20files/FeeToTrustHandbook1.0.pdf>.

178. *Id.*

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of specific portions of the process.¹⁷⁹ As a result of the time inherently required to finalize such a complicated task, tribes are unable to replace land in trust at the rate that they are losing restricted-status land.¹⁸⁰

B. An Attempt at Reform

The Five Tribes have requested legislative reform within the last decade to address these issues and prevent further diminishment of their land base. A proposed bill, known as the Five Nations Citizens Land Reform Act (Five Nations Act), passed quickly through the House of Representatives in the fall of 2002.¹⁸¹ However, before the Five Nations Act could be presented to the full Senate, a few Oklahoma interest groups raised concerns, causing one of the Senate sponsors to set it aside until the groups could reach a compromise.¹⁸² The Five Nations Act would have made several important improvements to the laws governing the Five Tribes land. First, it would have made all land currently in restricted status subject to future restrictions against alienation regardless of the blood quantum of the individual Indian who owned the property.¹⁸³ This period of restriction would have been extended until Congress determined otherwise notwithstanding the individual's blood quantum,¹⁸⁴ which would have been identical to the indefinite trust duration for trust Indians.¹⁸⁵ In addition, jurisdiction over the approval of all conveyances, leases, voluntary partition of restricted property, probate, and the determination of heirs would have ceased to reside in the state district courts. Instead, the Secretary of the Interior would have had exclusive jurisdiction over these matters, as it already has over the same matters for the Indians in the western portion of the state.¹⁸⁶ Finally, approval for all

179. *Id.*

180. In fact, only around 8% of the 90,000,000 acres of tribal land that had been lost because of the federal government's allotment policy has been reacquired in the 65 years that the fee-to-trust process has existed. *American Indian Probate Reform Act: Hearing on S. 550 Before the S. Comm. on Indian Affairs*, 108th Cong. 76–77 (2003) (statement of Tex G. Hall, President, National Congress of American Indians).

181. Chris Casteel, *Senate Kills 2 Measures Tied to State*, SUNDAY OKLAHOMAN, Nov. 17, 2002, at 1-A [hereinafter *Senate Kills 2 Measures*].

182. Press Release, Cherokee Nation, *Indian Land Reform Act Stalls in Congress* (Oct. 21, 2001), <http://www.cherokee.org/News/Stories/21784.aspx>.

183. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. § 101(a) (2002).

184. *Id.* at § 104.

185. COHEN'S HANDBOOK, *supra* note 31, § 16.03[4][b][ii], at 1080 (footnotes omitted).

186. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. §§ 201, 204,

oil and gas leases on restricted Five Tribes lands would have been administered by the Secretary of the Interior rather than in the state courts.¹⁸⁷

Unfortunately, some groups in the state did not see this measure in a positive light. To the oil and gas industry, the lifeblood of the Oklahoma economy, the removal of restricted status on a piece of property is a blessing. When the restrictions are in place, a company wishing to drill for oil or gas must have its attorney or other representative seek the agreement of the landowner and obtain the landowner's signature on a lease; this by itself is a process no different than what is needed for any other lease.¹⁸⁸ However, in addition to this, the company must also gain district court approval of the lease.¹⁸⁹ Under current law, the restricted Indian landowner must sign the petition for approval, upon which the prospective lessee's attorney will file the petition with the court and serve notice upon the government attorney.¹⁹⁰ Next, the landowner must attend the approval hearing along with the government attorney, unless he waives his appearance.¹⁹¹ "The court must be satisfied that consideration is paid and that the conveyance is in the best interest of the Indian," and the lessee must pay all of the costs inherent with the transaction.¹⁹² Thus, if restrictions are removed, the company is saved both the cost of pursuing approval in the district court and the time involved in any proceeding that must pass through the courts.

It is not difficult, therefore, to see why the oil and gas industry may have expressed concern about a law that would ensure that Five Tribes lands currently enjoying restricted status might never become free from the extra burdens such restrictions place on it. However, because the land base of the Five Tribes has already dwindled to the "last 0.2% of one percent of the land . . . originally allotted," and any reform would affect only about 100 out of 106,000 oil and gas leases in the state per year, the

206, 301, 302 (2002).

187. *Id.* § 206.

188. Vollmann & Blackwell, *supra* note 44, at 30.

189. *Id.* (footnote omitted).

190. *Id.* at 31 (footnote omitted).

191. D. Faith Orłowski & Robbie Emery Burke, *Oklahoma Indian Titles*, 29 TULSA L.J. 361, 366 (1993). The Act of 1947 provides that the landowner must be present unless the client and the attorney consent in writing that the hearing may be had in the client's absence. The Act leaves this decision to the discretion of the government attorney. Vollmann & Blackwell, *supra* note 44, at 36.

192. Orłowski & Burke, *supra* note 191, at 366.

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urgency of the industry's concerns is less apparent.¹⁹³ The executive vice-president of the Oklahoma Independent Petroleum Association claimed that the changes included in the Act "would effectively shut down oil and gas exploration on [Five Tribes] land because of the [new] bureaucratic hassles involved."¹⁹⁴ However, the Act was intended to effect the same treatment on the Five Tribes as is given to trust Indians;¹⁹⁵ any new bureaucratic requirements on Five Tribes lands would therefore be no different than those that the oil and gas industry is already accustomed to dealing with in the western portion of the state. Notwithstanding this fact, the Tribes removed the provisions in the Act that would have affected oil and gas in an attempt to resolve the industry's concerns.¹⁹⁶ Despite the Tribes' efforts to reach a compromise, the Five Nations Act failed to progress out of Committee.¹⁹⁷ No additional attempts at reform have been successful.¹⁹⁸

IV. A PROPOSED SOLUTION

The Five Tribes have been experiencing the reverberations of forced allotment and its subsequent legislation for nearly 100 years. Over the course of the century, the Tribes' lands have been reduced to only a fraction of one percent of their original holdings, despite the promise that the land they had bartered for during Removal would belong to them forever.¹⁹⁹ Further, the loss of restricted status on land has injurious implications that extend beyond the welfare of the individual into the vibrancy of the tribe as a whole.²⁰⁰ Thus, it is imperative that the United States government act promptly to remedy this ongoing problem. The current United States policy in its dealings with Indian Nations is to

193. Press Release, *supra* note 182 (noting statistics as of 2002).

194. Chris Casteel, *Oil Group Criticizes Cherokees*, OKLAHOMAN, Oct. 15, 2002, at 1-A [hereinafter *Oil Group Criticizes Cherokees*].

195. Press Release, *supra* note 182.

196. *Id.*

197. *Id.*

198. In 2004, Congress passed sweeping legislation to reform probate for Indian Nations. Although it appears that the initial version of a drafted bill would have included the Five Tribes, thus synchronizing their probate process with the rest of the Indian Nations, the final version of the bill included a provision to exclude the Five Tribes. Compare S. 550, 108th Cong. § 3(h) (2003) (representing the version of the bill that did not become law), with S. 1721, 108th Cong. § 3(h) (2004) (representing the version of the bill that eventually became law).

199. See *supra* notes 39, 118–19 and accompanying text.

200. See *supra* notes 72–73, 125 and accompanying text.

“encourage[] Indian self-determination and economic self-sufficiency,” but the treatment of Five Tribes’ affairs under current federal law is inconsistent with this stated policy.²⁰¹ Furthermore, the use of Oklahoma state courts as the federal instrumentality has been historically unsuccessful in fulfilling the federal-trust responsibility to the Indians.²⁰² It is time for the government to address this failed policy and fulfill its obligations to the Five Tribes.

The Five Nations Act proposed by the Five Tribes in 2002²⁰³ came very close to resolving the situation. The Five Nations Act was drafted with heavy input from the Five Tribes themselves and had the support of the chiefs of each tribe; in addition, the Tribes worked over a number of years to address the concerns of a variety of interest groups, making revisions as necessary.²⁰⁴ Yet the Five Nations Act never moved out of committee.²⁰⁵ However, the Five Nations Act as a whole is strong and would protect the most pressing concerns of the Tribes. With some modification and compromise, the Five Nations Act may yet prove to be the best solution.

A. Meeting the Needs of the Five Tribes

Each provision in the proposed Five Nations Act is an important piece in addressing the land-loss problem as a whole. However, more important than the inclusion of every piece of the Five Nations Act is its successful passage through both houses of Congress. In order to achieve this goal, several provisions of the Five Nations Act may need to be removed in an effort to appease the concerned groups. For example, the Tribes believe that jurisdiction over oil and gas leases should be with the Secretary of the Interior rather than the state courts, as reflected by the Five Nations Act.²⁰⁶ However, the probate provisions are the most important provisions in the Five Nations Act; in fact, the Tribes have said that the biggest advantage of the Act would come from gaining the

201. Five Nations Indian Land Reform Act, H.R. REP. NO. 107-499 § 2 (2002).

202. See *supra* notes 107–09 and accompanying text.

203. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. (2002).

204. Press Release, *supra* note 182.

205. *H.R. 2880 (107th): Five Nations Indian Land Reform Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/107/hr2880> (last visited Feb. 14, 2014) (tracking the Bill’s ultimate demise).

206. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. §§ 206–07 (2002).

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assistance of the Bureau of Indian Affairs in addressing unresolved probate cases.²⁰⁷ Further, the Principal Chief of the Muscogee Nation stated that “the Nation’s primary concern [was] to ease [the] citizen’s burden of lengthy probate procedures.”²⁰⁸ It would be difficult to resolve the problems suffered by the Five Tribes if the portions of the Five Nations Act relating to probate procedure, probate jurisdiction, and blood quantum were removed. These sections must therefore remain in the Five Nations Act if any meaningful reform is to be achieved. However, there are several other sections of the Five Nations Act that may be removed to address the concerns of the various interest groups involved without compromising these important measures that will be discussed in the following sections.

B. Addressing the Concerns of the Oil and Gas Industry

The major oil and gas industry group that voiced concerns about the Five Nations Act in 2002 was the Oklahoma Independent Petroleum Association (OIPA).²⁰⁹ At the time, the executive vice-president of the OIPA expressed concern that the Five Nations Act would seriously impede the operation of the oil and gas industry because of the new “bureaucratic hassles” he believed it would impose.²¹⁰ In fact, he claimed that the OIPA was perfectly satisfied with the current system of lease approval and did not see any reason for the laws to change.²¹¹ Specifically, two portions of the Five Nations Act likely caused the majority of the OIPA’s concern: §§ 206 and 207. Section 206 of the Five Nations Act required the Secretary of the Interior’s approval of any conveyance or creation of a mineral interest in restricted property.²¹² Section 207 provided for the implementation of the Federal Oil and Gas Royalty Management Act on restricted property where the Secretary approved an oil and gas lease.²¹³ These provisions would change the current process by removing the process from state courts and placing it under the jurisdiction of the Secretary of the Interior, no doubt resulting in different requirements for industry compliance.

207. *Senate Kills 2 Measures*, *supra* note 181, at 8-A.

208. Press Release, *supra* note 182.

209. *See Oil Group Criticizes Cherokees*, *supra* note 194, at 2-A.

210. *Id.*

211. Press Release, *supra* note 182.

212. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. § 206 (2002).

213. *Id.* § 207.

Although the transfer of jurisdiction is an important concern of the Five Tribes, given the historic inability of the state courts to successfully carry out their role as the federal instrumentality of federal trust responsibility,²¹⁴ this is an area in which the Tribes have expressed willingness to compromise. In 2002, attorneys representing the Tribes met with representatives of the largest member of the OIPA, a prominent gas company based out of Oklahoma City.²¹⁵ The parties in the meeting intended to revise the provisions in the Five Nations Act such that its impact on the industry would be minimized.²¹⁶ The oil and gas provisions were “gutted,” and after learning of the modifications, a number of oil and gas companies along with the State Chamber of Commerce withdrew their opposition to the Five Nations Act.²¹⁷ Therefore, removing §§ 206 and 207 from the Five Nations Act would likely address and resolve the concerns of the oil and gas industry. As there would be no alteration in the procedure for obtaining a mineral lease, and the remaining aspects of the Five Nations Act would likely not affect the oil and gas industry in any meaningful way.

C. *One Nation United*

One additional group with ties to Oklahoma’s oil and gas industry, One Nation United,²¹⁸ stands as a final potential obstacle to finding compromise between the oil and gas interests and the Five Tribes. The executive vice-president of the OIPA in 2002 co-founded One Nation in 2003 as a response to what he perceived to be “‘flawed state and federal Indian policies’ that [gave Indian] tribes . . . unfair competitive advantages over nontribal businesses.”²¹⁹ The group boasts two large oil and gas interest groups in its list of founding coalition members: OIPA and the Oklahoma Petroleum Marketers Association.²²⁰ Both on its

214. *See supra* p. 83 and accompanying notes.

215. Press Release, *supra* note 182.

216. *Id.*

217. *Id.*

218. The group has not had a strong presence in recent years. Not many press releases or newspaper stories are available after 2007, and the group’s website is no longer operational. However, there is no official publication suggesting that the group is no longer in existence.

219. *One Nation Merges with Larger Group*, OKLAHOMAN, Dec. 31, 2004, at 2B.

220. The group’s website is no longer operational. This information was taken from a version of the group’s website that is available through an archive website. ONE NATION UNITED (July 12, 2004), <http://web.archive.org/web/20040713024134/http://www>

website and in various press releases, One Nation described itself as being “pro-fairness” and “pro-economic growth,”²²¹ wishing to “focus on advocacy for property rights, tax fairness and regulatory certainty for all U.S. citizens.”²²² Although labeled by some to be “anti-Indian,”²²³ the group’s co-founders have expressly stated that they are “not anti-Indian, anti-sovereignty or anti-anything,” and clarify that they are not advocating the abolishment of tribal sovereignty.²²⁴ In 2004, One Nation merged with another group based in California called United Property Owners; the two groups shared the same interests and together created a nationwide coalition.²²⁵

As the membership of One Nation United includes two important oil and gas interest groups, reaching a compromise with this group may be the necessary remaining step in achieving a bill that would be supported by Oklahoma’s Congressmen. In various news stories featured in the local state newspaper, One Nation has enumerated several of its specific concerns, many of which would not be affected by the provisions in the Five Nations Act. For example, One Nation has been the most vocal about an issue that revolves around the State losing money for sales and excise taxes from tobacco sold on Indian land.²²⁶ The law permits Indian-owned tobacco shops to conduct tax-free sales of tobacco to tribal

.onenationok.com/mod.php?mod=userpage&menu=13&page_id=14 (accessed via the Internet Archive).

221. *Id.*

222. *One Nation Merges with Larger Group*, *supra* note 219.

223. See, e.g., PATRICIA R. POWERS, NATIVE AMERICANS AND THE PUBLIC: A HUMAN VALUES PERSPECTIVE 109–11 (2006–2007), available at http://fcnl.org/assets/na_mediasymp_report.pdf.

224. Mike Cantrell & Mickey Thompson, *State Group Isn’t Anti-Indian*, OKLAHOMAN, Apr. 14, 2004, at 15A [hereinafter *State Group Isn’t Anti-Indian*]. The group would be well advised to not oppose tribal sovereignty. Since the tribes have been able to take more control of their own endeavors, they have brought increasing benefits to Oklahoma. For example, although not required to do so, the Cherokee Nation donates 38% of its profits from sales of car tags to the public schools in the 14 counties that make up the Cherokee Nation. Another 20% of these funds are directed toward state roads. Furthermore, gaming casinos and other tribal businesses, such as hospitals, have provided sustained job growth to Oklahoma. Press Release, *Cherokee Nation, Oklahoma Enter into Car Tag Compact* (Oct. 2, 2002), http://www.cherokee.org/PressRoom/21758/Press_Article.aspx; David Qualls, *Tribal Gaming Creates Jobs, Boosts Revenue*, OKLAHOMAN, Aug. 11, 2012, at 9A.

225. *One Nation Merges with Larger Group*, *supra* note 219.

226. See Carmel Perez Snyder, *Tort Reform Proposal, Indian Talks Under Wraps*, OKLAHOMAN, May 15, 2003, at A7; *State Group Isn’t Anti-Indian*, *supra* note 224; Mickey Thompson, *Seeking a Level Playing Field*, OKLAHOMAN, Dec. 14, 2003, at 25A [hereinafter *Seeking a Level Playing Field*].

members, but prohibits the tax-free sale of tobacco to non-Indians.²²⁷ One Nation is concerned that this portion of the law is not being enforced, causing the State to lose “hundreds of millions of dollars a year” in taxes.²²⁸ In addition to the loss in tax revenue, One Nation believes that non-tribal businesses are placed at an economic disadvantage with these tribal groups because they must pay the taxes regardless of who purchases from them.²²⁹ While this is an understandable concern, many of the tribes have compacts with the state in which they make a payment in lieu of taxes, thus enabling the state to collect some income from tribal tobacco sales.²³⁰ Even if this were not the case, however, there is nothing in the Five Nations Act that would increase or decrease the tax revenue the state receives from tobacco sales. The Five Nations Act is not a bill that will significantly enlarge the land base of the Five Tribes; rather, it is a bill to protect the land base they currently possess.²³¹ Its passage would not largely increase the amount of land available for Indian-owned tobacco shops, and it would not diminish the state’s ability to enforce the laws currently in place.²³²

Another item on the group’s agenda is concern regarding the level of sovereign immunity enjoyed by the tribes. One Nation worries that tribe-operated businesses are immune from lawsuit and therefore cannot be held accountable for their actions,²³³ leaving non-tribal businesses or individuals unprotected in the event of injury. Further, the group wishes to end tribal exemption from campaign-contribution limits, which it believes allows the tribes an advantage over other corporations who are

227. *Seeking a Level Playing Field*, *supra* note 226.

228. *Id.*

229. *Id.*

230. Curtis Killman, *Oklahoma Tribal Cigarette Sales at Decade Low*, TULSA WORLD (Aug. 20, 2012, 2:23 AM), http://www.tulsaworld.com/news/local/oklahoma-tribal-cigarette-sales-at-decade-low/image_ee72dae6-84bb-5583-8f9a-f60851f36616.html.

231. *Hearings*, *supra* note 12, at 57, 59, 66 (statements of Lindsay G. Robertson, Chadwick Smith, and R. Perry Beaver).

232. It is also important to note that the land acquisition portion of the Five Nations Act is not wildly different from what is already allowed by the Indian Reorganization Act. While the Indian Reorganization Act allows tribes to transfer land to trust status, the Five Nations Act would simply allow a Five Nations individual to transfer land to restricted status, thus the implications of the Five Nations Act would ultimately work on a lesser scale than what is already currently seen with the IRA. *See infra* notes 241–43 and accompanying text.

233. Lornet Turnbull, *Indian Policy Comes Under Fire*, SEATTLE TIMES (Dec. 19, 2004, 12:00 AM), *available at* http://seattletimes.com/html/localnews/2002124284_indians19m.html.

limited in the amount of their contributions and required to report such contributions to an Ethics Commission.²³⁴ These are two issues that would not be affected by the Five Nations Act. However, tribal sovereign immunity would not be enlarged by any measures within the Five Nations Act, and it would not allow any additional campaign contribution benefits. In order to address these particular concerns, One Nation would need to focus on different legislation; it can rest assured that this particular bill would not amplify these issues.

Another concern touted by the group is the development of a “regulatory patchwork” across the state.²³⁵ Part of the basis for this concern stems from a federal law that allows tribes to apply for federal authority that would allow them to develop their own environmental regulations,²³⁶ but tribal authority can only extend over those lands that are considered Indian Country.²³⁷ One Nation is concerned that if these Tribes were granted such authority and were able to increase the amount of land in the state that is considered Indian Country, the subjugation of new lands to tribal regulations would result in uncertainty regarding the applicable law.²³⁸ One Nation fears that this uncertainty might drive away investors and deadlock economic growth.²³⁹ The Five Nations Act would not affect tribes’ ability to receive federal authority to develop environmental regulation.

There is, however, a provision in the Bill that may relate to the “regulatory patchwork” concern and tie directly into another issue central to the group: the ability of a tribe to buy land and apply to have it placed in trust status. Beyond the concern that placing new land into trust status contributes to the development of the regulatory patchwork, placement into trust status removes the land from county tax rolls.²⁴⁰ Under current federal law, tribes may have land converted into trust using the Indian Reorganization Act of 1934.²⁴¹ The Five Nations Act does not modify this; however, the Five Nations Act as proposed in 2002 contained a

234. *Seeking a Level Playing Field*, *supra* note 226.

235. *Seeking a Level Playing Field*, *supra* note 226; Chris Casteel, *Oil and Gas Producers Balk at Tribal Land Bill*, OKLAHOMAN, Oct. 2, 2002, at 2-A.

236. *See Seeking a Level Playing Field*, *supra* note 226.

237. *See supra* notes 123–24, 163–68 and accompanying text.

238. *Seeking a Level Playing Field*, *supra* note 226.

239. *Id.*

240. COHEN HANDBOOK, *supra* note 31, § 8.03[1][e], at 714 (noting that state taxes are prohibited on trust property).

241. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–462, 463, 464, 465, 466–470, 471–472, 473, 474–475, 476, 478, 479 (2012)).

section that would have allowed individual Indians to use money from a sale of restricted property to buy new land and have it placed into restricted status.²⁴² While this provision would not result in large plots of new land coming into restricted status, it would have the potential to remove additional land from county tax rolls. Newly restricted land would acquire status as Indian Country, thus also carrying the potential to add to a regulatory patchwork. State Representatives who testified in front of the Senate Indian Affairs Committee in 2002 stated that the Five Nations Act did not carry negative tax implications for the state, so it is likely that its passage as it stood would not exacerbate the tax concerns of One Nation.²⁴³ However, removing this provision from the Five Nations Act would certainly ensure that this Act would not add to the “regulatory patchwork” or increase the amount of land placed into tax-exempt status.

Most of the concerns central to One Nation would neither be resolved nor exacerbated by a bill like the Five Nations Act, and many of the issues on the group’s agenda do not directly affect the oil and gas industry. However, the group has been very active over the last decade in attempting to push back against a number of federal policies that it believes to be detrimental to Oklahoma and its leading industries.²⁴⁴ Therefore, it is likely that any attempt to pass a bill like the Five Nations Act would be met with resistance from One Nation. The only provision in the Five Nations Act that seems to venture into One Nation’s expressed areas of concern lies in the section granting individuals the ability to purchase land to be placed into restricted status. Accordingly, if this section were removed, One Nation and its oil and gas industry members should be appeased. With this final modification, the Bill should be removed from the shelves and swiftly passed, finally allowing the lands and peoples of the Five Tribes to receive the protection they are owed.

242. Five Nations Citizens Land Reform Act, H.R. 2880, 107th Cong. § 102 (2002).

243. See *Hearings*, *supra* note 12, at 57 (statement of Lindsay G. Robertson, Special Counsel on Indian Affairs to Governor Frank Keating).

244. See, e.g., Snyder, *supra* note 226; *Seeking Statehood: Tribes’ Requests Could Pose Headaches*, OKLAHOMAN, Oct. 6, 2003, at 4-A; Adam Wilmoth, *13 Tribes Seek Environment Regulatory Role*, OKLAHOMAN, Oct. 1, 2003, at 1-B; Tom Lindley, *Friction Increases Along with Economic Success for State’s Indian Tribes*, OKLAHOMAN, Nov. 28, 2003, at 1A; *One Nation United Supports Legislation to Cut Funding and Federal Recognition of Cherokee Nation*, FREE PRESS RELEASE (July 21, 2007), <http://www.free-press-release.com/news/print-1185055212.html?refer=news-print>.

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V. CONCLUSION

The Five Tribes have suffered time and time again from broken promises and failed protections over the last two centuries. In the decades since Congress passed the last federal bill addressing the lands of the Five Tribes, hundreds of thousands of acres of land have been lost and thousands of wills remain unprobated.²⁴⁵ Although the federal government espouses an Indian policy of self-determination and economic self-sufficiency, it has failed to extend this policy toward the Five Tribes.²⁴⁶ The fiduciary duty the United States owes to the Nations is a trust responsibility that equals the duty owed to the rest of the Indians across Oklahoma and the rest of the United States. However, the Five Tribes have been neglected with the government passing them by as it makes efforts to improve the protections it extends to the other tribes. It has now been a decade since the Five Tribes attempted reform. Undoubtedly, the land base of the tribe has diminished even further since the last congressional hearings were held. Until the federal government addresses this issue, stories like Bill's and Joe's will continue to dominate the Oklahoma landscape. Now is the time to act, lest we stand idly by and allow the land bases, culture, and vibrancy of these Tribes to disappear forever.

245. See *supra* notes 115–19, 125–35 and accompanying text.

246. See *supra* notes 150–51 and accompanying text.