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## Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?

Mark A. Jarboe and Daniel B. Watts<sup>1</sup>

“This Court has never determined whether the Indian Nonintercourse Act, which was enacted in 1834, applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe.”<sup>2</sup>

### I. The Issue

A few years ago, an Indian tribe in the Pacific Northwest desired to purchase a hotel located on a parcel of land owned in fee by a non-Indian party and to finance the acquisition with a bank loan. The bank was willing to make the loan on terms acceptable to the tribe, including a requirement that the loan be secured by a mortgage on the hotel and site. The structuring and documentation of the loan overcame the normal hurdles and challenges until it hit an unforeseen obstacle: Could the tribe legally grant the required mortgage to the bank?

What caused the concern was one of the oldest federal statutes still in effect: 25 U.S.C. §177, referred to as the “Indian Nonintercourse Act” (the “INIA” or the “Act”). The INIA states:

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

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<sup>2</sup> Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 n.5 (1998).

Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.<sup>3</sup>

Although most tribal land holdings consist of trust land,<sup>4</sup> the land at issue in this transaction was not. Rather, it was non-Indian owned fee land that the tribe was purchasing directly from a non-Indian owner.<sup>5</sup> The question that the tribe and its lender faced was: Does the INIA apply to land acquired by a tribe in fee?

### **A. Confusion in the Authorities**

Our examination of the INIA revealed several conflicting lines of authority. However, while there is considerable divergence in the discussion of the scope and reach of the Act,<sup>6</sup> there is surprisingly little divergence as to its scope and reach in practice. We have not found any case in which a final decision has applied the INIA to land acquired and held by a tribe in fee<sup>7</sup> so as to prevent a sale, transfer, or encumbrance. Nevertheless, judicial, congressional, and administrative authorities often speak as though the Act does apply to fee lands, with those authorities both ignoring each other and failing to consider the context in which the INIA arose.<sup>8</sup> This has resulted in confusion and uncertainty for tribes and their business partners. We believe that the only practical way to eliminate that uncertainty is through a congressional enactment settling the issue.

### **B. Effects on the Tribes**

As a policy matter, application of the INIA to tribally owned fee lands would be beneficial to tribes under certain circumstances and detrimental under others.

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<sup>3</sup> The INIA was first enacted in 1790, was amended and extended in 1793, 1796, 1799, 1802, and 1834. It was given its present form in 1875. Each of the first four enactments was in effect for three years at a time, thus triggering the periodic reenactments. Act of July 22, 1790, Pub. L. No. 1–33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, Pub. L. No. 2–19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, Pub. L. No. 4–30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, Pub. L. No. 5–46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, Pub. L. No. 7–13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, Pub. L. No. 23–161, § 12, 4 Stat. 729, 730.

<sup>4</sup> See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 98 (3d ed. 2002).

<sup>5</sup> Fee title to trust land is held by the United States of America in trust for the beneficial interest of the tribe. There are also individual trust lands held similarly for the benefit of individual Indians; those lands are not within the scope of this paper. Trust land cannot be encumbered or sold by the tribe without the approval of the federal government—the tribe doesn't hold the fee title to trust land and, as a fundamental principal of property law, only the fee owner of a parcel of land can transfer or encumber it—and the INIA is irrelevant to trust land as a result. Trust land is also not subject to state or local property taxation because it is property of the United States of America.

<sup>6</sup> For example, Felix S. Cohen's Handbook, the bible of federal Indian law, states on the subject: "If land is purchased by tribes without federal involvement ... the express terms of the statute seem to apply, but its application is uncertain owing to a series of tax decisions." FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 15.06[4] (2005) (citations omitted) [hereinafter COHEN].

<sup>7</sup> Other than in the case of the former Spanish Pueblos, as discussed below in Section IV.A.

<sup>8</sup> See § IV. C, *infra*.

Restriction of tribally owned fee lands from transfer would reduce the chance of their removal from tribal ownership and control through involuntary means (for example, property taxation and execution on a judgment). However, that same restriction would prevent voluntary transfers and encumbrances, thereby reducing—or eliminating—a tribe’s ability to derive economic benefit from the land by obtaining a mortgage for the purpose of acquiring the land or using the land as collateral for a loan to finance the construction of improvements.<sup>9</sup> A clarification of the INIA’s original purpose and a limitation of the Act to its original scope would, likewise, be beneficial to tribes under some circumstances and detrimental under others. Tribes would be unrestricted in their ability to transfer and encumber fee lands voluntarily but they would also be vulnerable to the involuntary loss of fee land.

As discussed below, in some jurisdictions courts have held that the INIA does not restrict the taxation, and subsequent involuntary loss, of tribal fee land but in those same jurisdictions there have been no assurances that the INIA does not restrict voluntary transfers or encumbrances of that same land. As a result, the tribes in those jurisdictions suffer both detrimental interpretations of the INIA.

### **C. Changes in the Nature of Tribal Land Holdings**

Although the core language of the INIA has changed little over the past 220 years, the world of tribal land ownership has changed much. In 1790, almost all of the land that now constitutes the United States was owned and possessed by the tribes.<sup>10</sup> Title to nearly all of this aboriginal land has since been ceded to the United States, patented and resold to non-Indians.<sup>11</sup> Reservations—areas set aside from an aboriginal land cession and reserved for the sole use of the ceding Indians—were established,

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<sup>9</sup> For example, while considering what eventually became Public Law 106-217, which authorized the Lower Sioux Community to sell or encumber its fee lands, Rep. Don Sherwood (R-PA) remarked that “[t]he Lower Sioux Community has found this law [the INIA] to be a major detriment to economic development. The law puts the tribe at a distinct disadvantage, because it finds that it cannot develop or use land which it has acquired to its full advantage.” CONG. REC., H521 (Feb. 29, 2000). Mr. Sherwood was followed by Rep. David Minge (D-MN) who stated:

I would like to suggest to the subcommittee that it consider legislation that deals with this type of situation because I expect that the Lower Sioux community is not the only Native American group in the United States that faces this type of obstacle to the disposition of land that it has purchased which has not been in trust status which is off of its reservation area.

CONG. REC., H521-H522 (Feb. 29, 2000).

Some commentators have argued that even the federal restrictions on encumbrances of trust lands should be revisited for these same reasons. *See, e.g., United States Senate Committee on Indian Affairs, Oversight Hearing on Economic Development*, May 10, 2006 (testimony of Mr. Lance Morgan, CEO of Ho-Chunk, Inc), *available at* [http://www.indian.senate.gov/public/\\_files/Morgan051006.pdf](http://www.indian.senate.gov/public/_files/Morgan051006.pdf).

<sup>10</sup> Felix Cohen, *Original Indian Title*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 278–279 (Lucy Kramer Cohen ed., 1970); *see also* *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

<sup>11</sup> *See* Indian Reservations in the Continental United States (map), *available at* <http://www.nps.gov/nagpra/DOCUMENTS/ResMap.htm>.

then broken up, allotted and sold, mostly to non-Indians. Some tribes are actively reacquiring land within their reservations or other historical areas, and other tribes are acquiring or reacquiring land outside of those areas. Contemporary tribal land ownership now includes trust and fee land both within and outside reservation boundaries. None of these situations were present—or even envisioned—at the time the INIA was enacted, but the language “[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” still remains.

#### **D. Outline of this Paper**

Part II of this paper provides the history and legal underpinnings of the INIA. Part III explores the few early interpretations of the INIA. Part IV explores 20<sup>th</sup> and 21<sup>st</sup> century judicial, congressional, and administrative interpretation of the INIA. Next, because the authors recognize that tribes and the business community will not be willing to rest the legitimacy of their transactions on the persuasiveness of even a well-written law journal article, Part V proposes the consideration of a Congressional enactment to confirm the original reach and scope of the INIA. Finally, Part VI offers a conclusion.

## **II. Underlying Legal Theory of the INIA – Aboriginal Title and the Doctrine of Preemption**

“Every schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia. . . . Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian landowners. . . . What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.”<sup>12</sup>

The INIA codifies one of the most important concepts of federal and tribal relations: the doctrine of aboriginal title, a doctrine older than the United States itself. This doctrine served as the foundation for both the original enactment of the INIA and its subsequent revisions and is implicit in the application of the Act.<sup>13</sup> The concept of

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<sup>12</sup> Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–35 (1947).

<sup>13</sup> FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 139–144* (1970).

aboriginal title is entwined with the European doctrine of preemption; aboriginal title consists of a tribe's right to possession of its land subject to the preemptive right of the sovereign to acquire the land if and when the tribe decided to sell.<sup>14</sup>

The doctrine of preemption evolved as European nations, discovering more of the New World, sought a theory both to explain their relationship with the native occupiers of the land and to prevent competing nations from intruding in their respective areas of interest.<sup>15</sup> The theory, stated briefly, is that the discovering nation, by virtue of its discovery, obtained dominion and sovereignty over the land discovered.<sup>16</sup> The Indian tribes, as native occupiers of the land, continued to hold the right of possession to the land, but did so subject to the sovereignty of the discovering nation.<sup>17</sup> And the discovering nation—the sovereign—had the exclusive right to acquire the interests of the tribe in the land if and when the tribe decided to part with it.<sup>18</sup> As Chief Justice Marshall explained:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>19</sup>

When the United States became independent following the Revolution, the sovereignty over the land, and the right of preemption as to Indian lands, moved from

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<sup>14</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 572–584 (1823).

<sup>15</sup> PRUCHA, *supra* note 13, at 139–144.

<sup>16</sup> *Id.*

<sup>17</sup> See the extensive historical discussion by Chief Justice Marshall in *Johnson*, 21 U.S. at 572–584. One of the seminal decisions of federal Indian law, the case involved claims of title to aboriginal lands purported to be conveyed to private individuals by the chiefs of two tribes in 1773 and 1775, prior to the Revolution and prior to the enactment of the INIA. The Court held that the purported transfer was ineffective as it was in violation of the government's right of preemption.

<sup>18</sup> The right of pre-emption resided in the sovereign—the discovering nation—and not its individual subjects. Only the sovereign itself could acquire title from the aboriginal inhabitants. That principal was made clear, as to the English colonies of North America, in the Royal Proclamation of October 7, 1763.

<sup>19</sup> *Johnson*, 21 U.S. at 574.

the English Crown to the new government.<sup>20</sup> The first Congress enacted the first version of the INIA in the year following the adoption of the Constitution, thus confirming the federal government's position as to the successor to the Crown as holder of the right of preemption and its control over the acquisition of lands from the tribes as the new nation grew and expanded.

The history of its enactment leaves little question that the INIA was intended only to apply to the original acquisition of aboriginal title from the tribes. That is, the INIA was intended to protect the federal government's preemptive right to acquire aboriginal title from tribes, preventing other countries, the states, or individuals from doing so. As we shall see, however, as tribal land holdings expanded to include trust and fee lands the broad language of the INIA began to be applied—at least in word—to those lands as well.

### III. Early Authorities

There is little 19<sup>th</sup> century authority interpreting the INIA. The first authority specifically addressing the effect of the INIA on fee patented lands held by a tribe is a May 14, 1857 opinion of U.S. Attorney General Jeremiah Black.<sup>21</sup> In that matter, the 1854 treaty between the United States and the Delaware Indians, by which the Delaware ceded lands to the United States, contemplated the sale and patenting of certain of those lands to the “Christian Indians.”<sup>22</sup> The Christian Indians had settled within the aboriginal territory of the Delawares and had made improvements to the lands they occupied.<sup>23</sup> During the treaty making negotiations between the Delawares and the United States the parties contemplated a sale of the lands to the Christian Indians at \$2.50/acre.<sup>24</sup> The Secretary of the Interior posed several questions regarding the nature of the title that would be held by the Christian Indians to Attorney General Black, who provided the following opinion:

[A]fter these lands shall be confirmed to the Christian Indians by patent they will not hold them by the usual Indian title. The usual Indian title was in the Delawares. It was extinguished by the first article of the treaty, and an absolute title vested in the United States. The United States will convey their right to the Christian Indians by the patent, and

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<sup>20</sup> After a period of uncertainty under the Articles of Confederation, when there was disagreement as to whether that sovereignty and right flowed to the national government or to the individual states as successors to the former colonies, see COHEN at § 15.06[1], the issue was settled in the Constitution of 1789 which vested in the Congress the power “to regulate Commerce . . . with the Indian Tribes,” U.S. Const., art. I, § 8.

<sup>21</sup> Christian Indians, 9 Op. Att’y. Gen. 24 (1857).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 2–3.

they will hold, like any other purchaser, from the Government.<sup>25</sup>

The phrase “like any other purchaser” leaves little doubt that the Christian Indians took title to the lands in fee simple. Nevertheless, in the opinion of the Attorney General, the lands would be subject to the INIA and the Christian Indians would require federal approval to sell the lands freely:

I cannot think that it [the INIA] applies merely to those Indian tribes who hold their lands by the original Indian title. The words are broad enough to include a tribe holding lands by patent from the United States, and the purpose of the statute manifestly requires it to receive that construction.<sup>26</sup>

Twenty-eight years later, Attorney General Augustus Hill Garland was asked to determine whether the INIA required federal approval of surface leases of tribal trust land to non-Indian ranchers on three reservations in what was then the Indian Territory.<sup>27</sup> Attorney General Garland took a similarly sweeping view of the applicability of the INIA to Indian land transactions.<sup>28</sup> He concluded that:

This statutory provision [the INIA] is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. . . . Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States.<sup>29</sup>

Although Attorney General Garland’s words follow the thinking of his predecessor, the context of his opinion involved reservation lands—lands set aside for the tribes by act of the United States.<sup>30</sup> As a federal set-aside, those lands belonged to the United States and federal approval of their sale or encumbrance would have been required by virtue of that fact alone; recourse to the INIA was not necessary and the

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<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 6–7.

<sup>27</sup> Lease of Indian Lands for Grazing Purposes, 18 Op. Att’y. Gen. 235 (1885).

<sup>28</sup> *Id.*  
<sup>29</sup> *Id.* at 4–5.

<sup>30</sup> *Id.* at 1.

opinion's language goes beyond what is necessary to reach the proper result. Notwithstanding that, the little authority that there is from the 19<sup>th</sup> century reads the INIA literally and applies it to any lands held by a tribe under any form of title.

#### **IV. 20<sup>th</sup> and 21<sup>st</sup> Century Authorities**

In the 20<sup>th</sup> and 21<sup>st</sup> centuries courts began to address the scope of the INIA. The modern cases arose in a number of different contexts due both to the varying historical contexts in which tribal lands were set aside and to the growing diversity of the nature of tribal land ownership. First came the Pueblo fee land cases, in which Pueblos in former Spanish territory held land nominally in fee but subject to restraints on alienation under Spanish law. Next we consider the cases dealing with the condemnation of lands of the Tuscarora Nation in New York, which are sometimes cited as standing for the proposition that the INIA applies to tribal fee lands but in fact do not. We then look at cases that state that the INIA applies to tribal fee lands and find that that conclusion is dicta. Finally, we look at the most recent cases which do not apply the INIA to tribal fee lands.

##### **A. Pueblo Fee Land Cases**

The analysis of 20<sup>th</sup> century cases starts with a series of decisions known as the Pueblo fee land cases. These cases, two from the Supreme Court and one from the Tenth Circuit, have been read to stand for more than what they actually hold. The Pueblo fee land cases addressed the status of lands held by Indian pueblos in the southwest United States in the area formerly held by Spain, then by Mexico after its independence, then acquired by the United States in 1848 under the Treaty of Guadalupe Hidalgo.<sup>31</sup> They have often been cited for the proposition that the INIA applies to lands held by tribes in fee, which is superficially correct.<sup>32</sup> However the nature of that fee title as it originated under Spanish law is an anomaly which the courts concluded to be the functional equivalent of aboriginal or trust title elsewhere in the country.<sup>33</sup> The application of the INIA to those lands, once they came under the jurisdiction of the United States, necessarily followed in order to apply the same protections and restrictions to those lands as applied to aboriginal lands under United States law.

The first of these cases, *United States v. Sandoval*, 231 U.S. 28 (1913), involved not the INIA but the application of federal statutes restricting the introduction of intoxicating liquor into Indian country in New Mexico. The Court traced the nature of the

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<sup>31</sup> See *infra* pp. 8–10. The Treaty of Guadalupe Hidalgo, formerly known as the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, was signed on February 2, 1848 and proclaimed on July 4, 1848. 9 Stat. 922.

<sup>32</sup> *Id.*

<sup>33</sup> *United States v. Sandoval*, 231 U.S. 28, 39–40 (1913).

land holdings of the New Mexico pueblos which originated in grants from the Spanish Crown.<sup>34</sup> These grants were reserves made in fee simple status but subject to restraints on alienation under Spanish law and official supervision by the Crown.<sup>35</sup> That status continued upon acquisition of the territory by the United States and confirmation of the Spanish grants by Congress.<sup>36</sup> Therefore, although the pueblos in what was formerly a Spanish possession held their land in fee simple, that fee was granted to them by the Spanish crown under a guardian/wardship concept similar to the trust concept that developed in the United States (where the fee itself is held by the United States).<sup>37</sup> *Sandoval* thus established the basic nature of pueblo fee title.

The next case in the line is *United States v. Candelaria*, 271 U.S. 432 (1926). This case involved an action brought by the United States “to quiet in the Indian Pueblo of Laguna the title to certain lands alleged to belong to the pueblo in virtue of a grant from Spain, its recognition by Mexico and a confirmation and patent by the United States.”<sup>38</sup> The Court specifically held that the INIA applied to lands held by the pueblos based on the guardian/ward relationship previously identified.<sup>39</sup> The Court stated:

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. . . . Thus it appears that 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>40</sup>

In short, under Spanish law the pueblos were unable to alienate their land without governmental consent, even though the fee title held by the pueblos, and that restriction carried over when the land involved became part of the United States. That restriction could not be applied through the concept of trust title, because fee title was held by the pueblos rather than the United States. The legal vehicle used to accomplish the result was the INIA.

The final case of the three, *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958) also involved a quiet title action brought by the United States with respect to property owned in fee by the Pueblo of Laguna. Two statutes were at issue in *Alonzo*, the INIA and Section 17 of the Pueblo Lands Act of

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<sup>34</sup> *Id.* at 39.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 40.

<sup>37</sup> *Id.*

<sup>38</sup> *United States v. Candelaria*, 271 U.S. 432 (1926).

<sup>39</sup> *Id.* at 437.

<sup>40</sup> *Id.* at 442 (citations omitted).

1924, which explicitly imposed a requirement of federal approval with respect to any conveyance of pueblo lands in New Mexico.<sup>41</sup>

In *Alonzo*, different parcels of the property involved had different histories: (a) 51,578.19 acres had been held by the Pueblo in fee since the time of Mexican sovereignty, (b) 4,693.36 acres consisted of land which initially had been confirmed in the Pueblo by the United States, but which it later lost to the holders of superior title and then purchased from those holders, and (c) 480 acres consisted of land adjacent to the land in (a) and which the Pueblo purchased in fee in the 20<sup>th</sup> century.<sup>42</sup> The court held that all of the lands at issue were subject to federal restrictions on transfer, and did not distinguish between the lands held by the Pueblo prior to the Treaty of Guadalupe Hidalgo, the lands within those lands lost and then acquired by the Pueblo, and the small tract adjacent to the Pueblo's aboriginal lands purchased by the Pueblo.<sup>43</sup> However, given Section 17 of the Pueblo Lands Act there would likely be no difference in outcome.

What is central, in reviewing *Sandoval*, *Candelaria*, and *Alonzo* is that they involve tribal fee titles held by pueblos under grants originating from the Spanish Crown and restricted under Spanish law. While these cases are frequently cited for the proposition that the INIA applies to land held by tribes in fee,<sup>44</sup> the nature of the fee titles in these cases is particular to the pueblos. Restricted fee title held by a pueblo is treated similarly to aboriginal title as that title is understood in those parts of the country that had not been under Spanish rule. The cases did not address land that was in the public domain, patented to non-Indians, and later purchased by a tribe.<sup>45</sup>

## **B. The Tuscarora Cases**

Before proceeding further, we must note that a number of decisions (for example, *Lummi Indian Tribe v. Whatcom County*<sup>46</sup> and *Tonkawa Tribe of Oklahoma v.*

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<sup>41</sup> *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957). Section 17 of the Pueblo Lands Act read: No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

For a discussion of the essential provisions of the Pueblo Lands Act, see *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).

<sup>42</sup> *Alonzo*, 249 F.2d at 438–439.

<sup>43</sup> *Id.* at 443–444.

<sup>44</sup> See the discussion at IV.C, *infra*.

<sup>45</sup> With the possible exception of the 480 acres in *Alonzo* that was not separately addressed by the court.

<sup>46</sup> *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

*Richards*,<sup>47</sup> both discussed below) refer to the Tuscarora cases<sup>48</sup> as standing for the proposition that the INIA applies to tribal fee lands. That is simply incorrect. The Tuscarora cases involved the condemnation, for purposes of a reservoir for a hydroelectric project on the Niagara River, under the authority of Section 21 of the Federal Power Act, 16 U.S.C. § 814, of land acquired by purchase by the Tuscarora Nation and held by the Nation in fee.<sup>49</sup> The Nation argued that the INIA prohibited the condemnation.<sup>50</sup> The courts, however, did not address whether the INIA applied to the property; they held, instead, that even if the INIA did so apply it would not stand in the way of the condemnation:

[W]e must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras . . .; and that 25 U. S. C. § 177 does not apply to the United States itself nor prohibit it, or its licensees under the Federal Power Act, from taking such lands in the manner provided by § 21, upon the payment of just compensation.<sup>51</sup>

In the Tuscarora cases neither the Court of Appeals nor the Supreme Court held that the INIA applied to the lands held by the Nation in fee.

### **C. Authority that the INIA Applies to Tribal Fee Lands**

There have been a few courts that have held that the INIA applies to land acquired by a tribe and held in fee, but we have not been able to find a case where that conclusion has controlled the result. As such, the conclusions are dicta. A prime example is *Jicarilla Apache Tribe v. County of Rio Arriba*, 883 P.2d 136 (N.M. 1994). This case addressed the scope of the INIA in the context of the question of whether 28 U.S.C. 1360(b)<sup>52</sup> deprived a state court of jurisdiction to adjudicate the existence of an

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<sup>47</sup> *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996).

<sup>48</sup> *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (2nd Cir. 1958), *cert. denied*, 358 U.S. 841 (1958), *vacated as moot sub nom.*, *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608 (1960); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

<sup>49</sup> *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d at 887.

<sup>50</sup> *Id.* at 888.

<sup>51</sup> *Federal Power Commission*, 363 U.S. at 123–124.

<sup>52</sup> 28 U.S.C. 1360(b) states that: “Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation

easement over fee lands acquired by the tribe.<sup>53</sup> The tribe argued that, under the INIA, the fee land became subject to a federal restriction upon alienation when it was acquired by the tribe and, as a result, the state court was without jurisdiction to adjudicate the existence of the claimed easement.<sup>54</sup> The New Mexico Court of Appeals agreed with the Tribe, holding that “[u]nder federal case law . . . the [land in question] became subject to federal restrictions against alienation under the INIA when it was purchased in fee simple by the Tribe in June 1985, and was subject to these restrictions at the initiation of this lawsuit.”<sup>55</sup> However, with the exception of an earlier edition of Felix S. Cohen’s Handbook, the authorities cited by the court consisted of the three Pueblo fee land cases (*Candelaria*, *Sandoval*, and *Alonzo*), a case involving trust lands (*United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (5th Cir. 1938)), and a case under 25 U.S.C. 81 which specifically reserved the question of the applicability of the INIA (*Narragansett Indian Tribe v. RIBO, Inc.*, 686 F.Supp. 48 (D.R.I. 1988)).<sup>56</sup> None of these authorities provided support for the Court of Appeals’ conclusion. On review, the New Mexico Supreme Court, referring to the same edition of Cohen’s Handbook, stated: “We . . . agree that the [land in question] became subject to a restriction against alienation imposed by the United States when it was purchased by the Tribe.”<sup>57</sup> However, the New Mexico Supreme Court went on to conclude that that restriction did not deprive it of jurisdiction to adjudicate the claimed easement and, as a result, the conclusion did not control the result in the case.<sup>58</sup>

In *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996), the court cited the 1885 opinion of Attorney General Garland,<sup>59</sup> *Alonzo*, the Tuscarora cases, and situations of aboriginal, treaty, or trust title as authority for its conclusion 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>60</sup> However, the court found that the tribe had no interest in the land in question to be protected by the Act.<sup>61</sup> Again, the conclusion that the INIA applied to the land did not control the result.

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imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.”

<sup>53</sup> *Jicarilla Apache Tribe v. County of Rio Arriba*, 862 P.2d 428, 432 (N.M.App. 1993).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 435.

<sup>56</sup> *Id.* at 53, n.1.

<sup>57</sup> *Jicarilla Apache Tribe v. County of Rio Arriba*, 883 P.2d 136, 140 (N.M. 1994).

<sup>58</sup> *Id.* at 140–141.

<sup>59</sup> See *supra* Part III.

<sup>60</sup> *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996).

<sup>61</sup> *Id.* at 1047.

#### **D. Authority that the INIA Does Not Apply to Tribal Fee Lands**

Although, as we have seen, the INIA has often been read broadly, no case has applied the Act to tribal fee lands<sup>62</sup> so as to invalidate a transfer or encumbrance of those lands. To the contrary, there are a number of decisions holding that the Act does not apply to property that had been placed in the public domain, patented to non-Indians and then purchased by a tribe, whether within or outside the boundaries of the tribe's reservation. Unlike the cases discussed in the immediately preceding section, here the conclusion as to the reach of the INIA did control the results.

The lead case in this section is *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994). *Lummi* involved an attempt by Whatcom County, Washington, to impose ad valorem property taxation on land located within the Tribe's reservation that had been allotted, and patented in fee to Lummi tribal members under the Treaty of Point Elliot of 1855, and later acquired by the Tribe.<sup>63</sup> The Tribe contended that once the land was acquired by it, the INIA rendered the lands inalienable and protected from taxation, citing the Tuscarora cases, *7,405.3 Acres of Land*, and the Pueblo fee land cases.<sup>64</sup> The court rejected the argument based on the facts that (1) the federal government had previously removed any restraints on the alienation of the land in question, and (2) the government created a procedure through which tribes can convert their fee lands to trust.<sup>65</sup> The Court said that:

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. Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable. We

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<sup>62</sup> Excluding Pueblo fee lands for the reasons given above. See *supra* Part IV.A.

<sup>63</sup> *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1356 (9th Cir. 1993). The ability of a state or local government to tax tribal fee lands involves many issues in addition to the issue of the application of the INIA that are far beyond the scope of this paper. We address here only those decisions in which the courts have addressed the applicability of the INIA as a defense against taxation. We also note that taxation and condemnation cases raise the issue of whether the INIA applies to involuntary transfers, given the Act's reference to "purchase, grant, lease, or other conveyance." Some courts have concluded that the Act "applies only to voluntary conveyances by the tribes themselves and not to involuntary conveyances by the state for nonpayment of taxes." See, e.g., *Bay Mills Indian Community v. State*, 626 N.W.2d 169, 173 (Mich.App. 2001).

<sup>64</sup> *Lummi*, 5 F.3d at 1358–1359.

<sup>65</sup> *Id.*

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.<sup>66</sup>

A similar result, also in the context of taxation, was reached in *Saginaw Chippewa Tribe v. State of Michigan*, 882 F.Supp. 659 (E.D. Mich. 1995), *rev'd on other grounds* 106 F.3d 130 (6th Cir. 1997), *cert. granted and judgment vacated sub. nom. Michigan v. United States*, 524 U.S. 923 (1998).<sup>67</sup> The court reached the same conclusion as the Ninth Circuit and held that the INIA did not apply to land that had been patented and later acquired by a tribe:

[I]f all land held by Indian tribes were automatically restricted by operation of the Nonintercourse Act, then the Tribe would not have to submit to the cumbersome and lengthy process the United States referred to in oral argument and in its briefs whereby Tribes may petition the Department of the Interior to place lands owned by them into trust. If return to trust status were automatic via the Nonintercourse Act, a petitioning process to return land to trust status would be superfluous.<sup>68</sup>

The same conclusion was reached, not in the taxation context, in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996). That case involved an action to quiet title to 80 acres of land within the Quinault reservation that had been patented in 1958 and in which the Quinault Nation subsequently acquired a one-sixth undivided interest in fee.<sup>69</sup> The court relied upon *Lummi* and *Saginaw Chippewa* in reaching its conclusion that the INIA does not apply to land as to which the United States had removed restraints on alienation by patent and which was then reacquired by a tribe.<sup>70</sup>

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<sup>66</sup> *Id.* at 1359 (citations omitted).

<sup>67</sup> This case demonstrates the point made in footnote 63. The Section 177 argument was only addressed in the District Court; the Sixth Circuit's reversal (in turn, vacated by the Supreme Court) was based on a question of Congressional intent as to the taxability of the lands in question.

<sup>68</sup> *Id.* at 676. For practitioners of federal Indian law, loose language such as this is highly frustrating. Applying the INIA to tribal fee lands would not result in those lands becoming trust lands. Title to trust lands is in the United States with the tribes having the beneficial interest; restricting the alienation of tribal fee lands wouldn't result in a transfer of the fee from the tribe to the federal government. It is true, however, that the practical consequences of the application of the INIA to fee lands would be similar to a conversion to trust status.

<sup>69</sup> *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 381 (Wash. 1996).

<sup>70</sup> *Id.* at 387.

These three decisions—*Lummi*, *Saginaw Chippewa*, and *Anderson & Middleton*—have been followed by other decisions in which courts have had little difficulty dismissing claims of the application of the INIA to tribal fee lands when those lands had been patented, owned by non-Indian parties, and then acquired by a tribe.<sup>71</sup>

### **E. Congressional and Administrative Interpretations**

While some cases have generated confusion because of their failure to analyze the application of the INIA in its proper historical context, that confusion has been compounded by actions in the Congressional and Administrative areas. A number of tribes seeking to sell or encumber their tribal fee lands, including the Navajo Nation,<sup>72</sup> the Rumsey Indian Rancheria,<sup>73</sup> the Eastern Band of Cherokee Indians,<sup>74</sup> the Mississippi Band of Choctaw Indians,<sup>75</sup> the Lower Sioux Indian Community,<sup>76</sup> the Coushatta Tribe of Louisiana,<sup>77</sup> and the Shakopee Mdewakanton Sioux Community<sup>78</sup> have sought and obtained Congressional authorization to do so through legislation. The legislative history of these acts generally makes little reference to the court decisions but simply refers to the plain wording of the INIA. A typical example is found in the legislative history of the Lower Sioux act as it was being considered in the House of Representatives, where Mr. Sherwood (R-PA), in speaking in favor, said that:

[e]xisting Federal law enacted in 1834 provides that an Indian tribe may not lease, sell, or otherwise convey land which it has acquired unless conveyance is approved by Congress. This antiquated law applies even though the land was purchased by the tribe with its own money, and even though the land is located outside the tribe's reservation, and even though the land has never been taken into trust for the tribe.<sup>79</sup>

Sometimes this conclusion makes it into the legislation itself. For example, among the findings in the legislation authorizing the Rumsey Indian Rancheria to sell a tribally-owned fee parcel located 125 miles away from the tribe's trust lands is the

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<sup>71</sup> See, e.g., *Bay Mills Indian Community v. State*, 626 N.W.2d 169 (Mich.App. 2001) (taxation); *Cass Co. Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685 (N.D. 2002) (condemnation); and *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, Case No. 06-C-1302 (E.D. Wisc. March 28, 2008) (condemnation).

<sup>72</sup> Pub. L. 86-505, § 1.

<sup>73</sup> Pub. L. 101-630, Title I.

<sup>74</sup> Pub. L. 101-379, § 11.

<sup>75</sup> Pub. L. 102-497, § 4.

<sup>76</sup> Pub. L. 106-217.

<sup>77</sup> Pub. L. 106-568, § 301.

<sup>78</sup> Pub. L. 108-204, § 126.

<sup>79</sup> CONG. REC., H521 (Feb. 29, 2000).

following statement: “Section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress.”<sup>80</sup>

Administratively, the regulations of the Department of the Interior addressing the sale, exchange, or conveyance of tribal lands provide:

Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary.<sup>81</sup>

Thus, the recent Congressional and Administrative authority, to the extent that it exists, supports the proposition that the INIA applies to tribal fee lands but does so without analysis and without addressing the numerous court decisions holding otherwise.

## **V. Proposed Legislative Solution**

We have found two lines of authority, which do not refer to each other. The 19<sup>th</sup> century Attorney General opinions, the legislative history, occasional Congressional findings, and the Department of the Interior regulations lead to the conclusion that the INIA applies to tribal fee lands just as it does to any other tribal lands, but none of those authorities refer to the judicial decisions. Conversely, recent cases in both federal and state courts hold that, once land has been patented and placed in the public domain, the acquisition of that land by a tribe does not render it subject to the Act, but none of those cases refer to the Congressional findings or the legislative history of the various acts authorizing the sale or encumbrance of tribal fee lands, nor do they discuss the Attorney General opinions or the Interior Department regulations. There are also recent cases that support a broader application of the Act, but those cases did not lead to an invalidation of any transfer (and even those cases did not discuss the Congressional or Administrative authorities). The result is confusion.

If we go back to the reason for the enactment of the INIA in the first instance—to confirm the doctrine of preemption in United States law following the Revolution and to protect tribal landholdings from the grasping hands of ambitious states and settlers—there appears to be little justification in applying the Act to land patented, placed in the public domain, and then acquired in fee by a tribe. As to that land—land not part of a

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<sup>80</sup> Pub. L. 101-630, § 101.

<sup>81</sup> 25 C.F.R. 152.22(b).

tribe's aboriginal or trust holdings—a tribe should be able to buy, sell, mortgage, and otherwise deal with it as would any other landowner. The present, conflicting authorities impair the tribes' ability to deal with their fee land as other landowners, regardless of whether the land in question is within or outside the tribe's reservation boundaries.

In order to resolve the uncertainties over a tribe's ability to sell or encumber its fee lands, the authors propose the consideration by Congress of a statute of general application similar to those that have been enacted on a case-by-case basis for individual tribes. In doing so, we are mindful of the different considerations that must be given to lands acquired in fee by a tribe within its reservation boundaries (often as part of a program of land restoration) and lands acquired elsewhere.<sup>82</sup> While the considerations of a tribe's ability to use financing in order to acquire land initially, and its ability to derive economic value from such land after acquisition, apply to lands located within a reservation as well as lands located elsewhere, the risk of a possible repeat loss of reacquired reservation lands might lead tribal leaders to prefer not to have any confirmation of conveyance authority apply to on-reservation fee lands.<sup>83</sup>

We propose the following language, with square brackets indicating options to be considered in the context of the on-reservation/off-reservation issue noted above:

#### APPROVAL OF TRANSACTIONS BY INDIAN TRIBES WITH RESPECT TO CERTAIN LANDS

(a) In General.--Notwithstanding any other provision of law, without further approval, ratification, or authorization by the United States, any Indian tribe may lease, sell, convey, warrant, or otherwise transfer all or any part of such tribe's interest in any real property that is--

(1) [not located within the exterior boundaries of the reservation of such tribe;

(2)] not held in trust by the United States for the benefit of the tribe; and

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<sup>82</sup> For example, in discussing the application of the INIA to tribal fee lands, the Solicitor of the Department of the Interior has said that it "appears to [be] ... the litigating position of the United States" that there is a distinction as to applicability between fee lands located within and those located without a reservation, "unless some extenuating circumstances exist." Opinion of the Solicitor of the Department of the Interior M-37023 (Jan. 18, 2009). The uncertain nature of the conclusion in the opinion—which did not cite the Department's own regulation on the subject—is indicative of the extent of the problem.

<sup>83</sup> We note that not applying the proposed statute to on-reservation fee lands would not change the result of the taxation cases discussed above, and that, as a result, reacquired fee lands even with a reservation would likely continue to be exposed to taxation, condemnation or conveyance to the extent that such cases are followed.

[(2)][(3)] not real property owned in fee by an Indian Pueblo on July 4, 1848[, continuously owned by such Indian Pueblo since that date,] and located within the area formerly part of the Republic of Mexico and made part of the United States of America under the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico.

(b) [Trust][Certain] Land Not Affected.--Nothing in this section is intended or shall be construed to--

(1) authorize any Indian tribe to lease, sell, convey, warrant, or otherwise transfer all or any part of an interest in any real property that is [located within the exterior boundaries of the reservation of the tribe or] held in trust by the United States for the benefit of the tribe; or

(2) affect the operation of any law governing leasing, selling, conveying, warranting, or otherwise transferring any interest in such [trust] land.

## **VI. Conclusion**

In the hotel acquisition transaction described at the beginning of this article, neither the tribe's nor the bank's attorneys could conclude with confidence that the tribe could grant a mortgage on the fee land that it planned to acquire. The parties were able to solve the problem with the cooperation of the seller of the hotel by placing the encumbrance on the land prior to its acquisition by the tribe. In a series of preplanned steps, the seller granted a mortgage on the parcel to the bank in order to secure the tribe's obligations to the bank under the loan documents; the tribe then used the proceeds of the loan to acquire the land and hotel from the seller subject to the existing mortgage; the tribe then assumed the obligations of the mortgagor under the mortgage instrument; and the bank then released the seller from liability under the mortgage. At the end of the series of transactions the tribe owned the land and hotel in fee, subject to a mortgage that was in place at the time of acquisition. Through this process, there was no "purchase, grant, lease, or other conveyance" of any interest in the site by the tribe; the encumbrance was already existing when the tribe took title.

This procedure worked in that particular transaction because the tribe did not start out with any interest in the land and the three parties—tribe, bank, and seller—were willing to work together to solve the problem. In particular, the cooperation of the seller (who had to start the chain of events by placing a mortgage on his land prior to being paid for it) was essential. Not all real estate transactions involving tribal fee lands will take place in such favorable environs. In order to address the problem, and to

enable tribes to enter into desirable commercial real estate transactions without hindrance from an unclear law, the authors recommend consideration of the proposed legislative solution described above.