Recognizing Rights in the Era of Appropriation: Understanding the Institutional Underpinnings and Evolving Legal Framework of U.S. Federal Indian Land Policies

By: Laura D. Taylor

Abstract: The U.S. government routinely used legal mechanisms to usurp U.S.-sanctioned property rights for Indian nations over the course of American history. Policies were explicitly introduced to disenfranchise tribes, eradicate governance structures on tribal nations, and transfer land and resources away from tribes. These policies worked to an extent – since colonization tribes have found themselves in a complicated maze of changing property rights as they relate to tribal and trust land. Nonetheless, as the era of self-determination has evolved, tribes have been able to strategically interface with U.S. institutions of their choosing, in order to further aims designated by their own nations. This chapter focuses on the evolution of property rights in the context of U.S.-tribal relations, and the institutional framework that engendered the system of appropriation that played out in the late 19th and early 20th centuries in the American west. I also present summary findings relating to American Indian reservation land loss during U.S. western settlement, indicating the importance of geologic and natural resources, but also of socio-economic factors in terms of the pattern of land loss.

1 Introduction

In the post-colonial era, economic development for American Indian tribes was inextricably linked to non-Indian settlement patterns. Despite the existence of legally ratified treaties between tribes and the U.S. government, even protected land and resources were extracted from tribal ownership and use over the course of western settlement, most notably in the mid-1800s to early 1900s. This process was fueled by federal legislative changes that systematically reduced the state's transaction costs associated with bargaining, negotiating, and removing land from tribal use and ownership in the American west. This process was protracted over a long time frame because engineering technologies and federal investments advanced the discovery of mines, settlement, and the availability of water for agriculture and development in the dry western states, with legislation evolving alongside these technologies. Consistent resource and land extraction from Indian land affected economic, socio- and governmental development on and off reservations.

This chapter will focus on the evolution of property rights in the context of U.S.-tribal relations, and the institutional framework that engendered the system of appropriation that played out in the late 19th and early 20th centuries in the American west. I will also present summary findings relating to American Indian reservation land loss during U.S. western settlement, indicating the importance of geologic and natural resources, but also of socio-economic factors in terms of the pattern of land loss.

Several researchers have investigated American Indian economic development in the context of institutional economics and property rights, most notably in the modern era. Taylor and Kalt (2005) and Akee and Taylor (2014) have documented the lack of educational and human-capital infrastructure on tribal reservations. Property rights on reservations have been found to differ from those off reservation (Grogan, Morse and Youpee-Roll, 2011), and Anderson et al. (2016) uncovered several findings supporting the theory that reservations associated with better resources were encroached upon first by western settlers, a process facilitated through the passage of the General Allotment Act in 1887. Leonard, Parker and Anderson (2020) have found that this practice was then associated with lower levels of per-capita income in modern years. The Harvard Project on American Indian Economic Development has contributed extensively to the literature on tribal economic and institutional development, drawing from case-study and empirical methodologies to understand governance and cultural cohesion.

A key question that underpins much of this work, however, is how did these property-rights institutions form the way they did in the first place? Understanding the framework that allowed these transfers to occur is a pivotal first step in understanding the social and economic framework they currently exist in. This paper presents a detailed contextual history based on information gathered from congressional records,

archived sources (letters, reports, maps, and photographs), and from tribal sources when accessible, and outlines the changing American legislative framework relating to tribes. It also describes how American Indian legislation was used in many ways to facilitate western settlement and resource extraction, and how federalism in the developing American nationhood played a role in these changes.

2 Historical Background

To understand the precursors of modern property rights, and the modern relation between tribes and the federal government, it is important to understand the evolution of the legal institutions that have underpinned American Indian policy over the last two centuries. The federal government's relation to tribes has in part reflected the federal government's assertion of its own sovereign powers. The duality between sovereignty and "domestic dependency" that tribes have historically faced are similar dualities that the federal government sought to balance between state power during the early colonial days of the United States. The Federal government used its relationship with tribes to assert its own sovereignty and independence on the international stage (Ablavsky, 2015).

2.1 Early Federalism and American Indian Nations - The Treaty Era

Contracts with tribes date back to the beginning of British colonization of America. As early as 1704, individual colonies came to agreements with tribes for cession of their lands. After colonization, between 1778 and 1871, 372 treaties were ratified between the U.S. government and tribal nations. Even contemporaneously, these agreements were often viewed as unfair towards tribes. As Commissioner of Indian Affairs T.J. Morgan noted in 1890, "it can not be denied that wrong was often done to tribes in the negotiation of treaties of cession; that the Indians were not infrequently overborne or deceived; that more powerful tribes were permitted to cede lands to which weaker tribes had as good if not a better claim … (Office of Indian Affairs, 1890, page XXX)." By 1890, "Indian title" had been extinguished within all of the public domain, only existing on confined Indian reservations and within the territory of Alaska. Only 51 of the 162 reservations that were established by 1890 had been formed by treaty. The rest had been established through executive order, acts of Congress, or combinations of these methods.

Despite various types of tenure on different reservations, land use was consistently managed by the federal government. American Indian tribes were expressly precluded from alienating or leasing any part of their reservation lands without consent of the U.S. Government. This stark interference in land-use and management expressly took control away from tribes. It was not until the 1870s that leasing of reservation land was even allowed, through state legislation, with the federal government passing similar legislation in 1891, while still maintaining discretionary control over leasing activity.

Three tribes, all located within the Indian Territory (current day Oklahoma) – the Cherokee, Choctaw and Creek Nations – were able to obtain fee-patent title to their lands, however such arrangements expressly stated that transfer of title was only allowed back to the U.S. Government. Even when land was ostensibly held more "freely," its transference was still tightly controlled by the United States government.

2.2 The Allotment System

Despite having set up protected areas for tribal nations, by the 1800's the federal government was actively trying to erode these protections in order to free up land for white settlement. In 1854 President Franklin Pierce assigned Commissioner of Indian Affairs George Manypenny to negotiate for reservation land from western tribes. The first of these negotiated agreements, with the Otoes and Missourias, allowed for reservation land to be apportioned into individual allotments for tribal members, for the purpose of agricultural cultivation and/or establishing permanent, individual homes. The President had the power to individualize tribal land into individual/family lots, with the authority to subsequently issue such persons individual/family patents for these parcels. This treaty gave extensive authority to the President, who could revoke such a patent

if the holder "rove" away from the land, or refused to till the land. Additionally, the treaty gave the President authority to refuse annuity payments to any such persons if they rove or neglected to pursue agriculture.[1]

A precursor to later legislation, these "allotments," as they were known, were assigned at the discretion of the President, held in trust by the U.S. government on behalf of individual allottees, and restricted from alienation or leasing for a set period of time. The agreement also allowed for reservation land in excess of the allotments to be sold for "the benefit of the tribe," and if an allottee abandoned or did not use his or her land, it could be disposed of by the government or reassigned. Importantly, most of these types of clauses that were negotiated in treaties included terms that relinquished all claims by tribes for moneys owed to them by the government under earlier agreements (Cohen, 1945). Therefore, the process of allotment served two purposes: to quickly distribute Indian land to white settlers, and to relieve government of long-term financial liability.

Under Manypenny and subsequent Commissioners until the onset of the Civil War, it was the policy of the Office of Indian Affairs (OIA) to enter into such treaties that included allotment policies (Cohen, 1945). After the Civil War, allotments continued via ad-hoc treaty negotiation, but the OIA began actively lobbying for a standardized, national law that would allow the agency to allot land without treaty negotiation. A stated goal at this time was to break up reservations, encourage individual ownership, and support Indian assimilation into the wider U.S. society. Practically, although reservation land was technically protected, these protections were not well enforced and the OIA noted repeatedly this hindered tribal use of land. In 1881, Hiram Price, then Commissioner of Indian Affairs, appealed to the Secretary of the Interior in his annual report that one "cause of the unsatisfactory condition of our Indian affairs is the failure of the government to give the Indian land in severalty, and to give it to him in such a way that he will know that it is his (OIA 1881 page IV)." Price continued:

> *He has learned by painful experience that a small piece of paper…is not good for much as title to land. He has again and again earnestly solicited the government to give him a title to a piece of land, that he might make for himself a home. These requests have, in a great many instances, been neglected or refused, and this is true even in cases where, by treaty stipulations, the government agreed to give the Indian a patent for his land.*

The fact that property rights – even those that had been established through treaties – were not properly enforced was discussed by officials throughout this time period as a major impeding factor to individual investment in development. Further, a conflict between protection and assimilation, sovereignty between nations and control over settlement and territory had also emerged. Viewed through this lens, the treaties enacted in the 1800s appear tenuous and temporary in comparison to the constant push to contain and control land rights in the United States.

As stated by Commissioner Atkins in 1886, without the "moral and physical power which is represented by the Army of the United States, what are these treaties worth as a protection against the rapacious greed of the homeless people of the States who seek homesteads within the borders of the Indian Territory (OIA 1886 p V)?" Yet to provide these protections seemed outside of the inclination of the officials, the Commissioner continued, as "it is not reasonable to expect that the Government will never tire of menacing its own people with its own Army."

An alluring counterpart to protecting *individual* ownership, was that land in excess of these individual parcels could be "thrown open" for white settlement, much as was the case with the early allotment clauses in the treaty negotiations. Carlson (1983) discussed how these competing interests between Indian and non-Indian interests laid the groundwork for apportioning allotments in a way that benefitted white settlers over American Indians, thanks to widespread disenfranchisement of Indian interests in relation to those of American settlers. It is no surprise, then, that it was not until a provision was added to the draft legislation allowing for the public sale of "surplus" lands that the allotment act passed in 1887 (General Allotment Act, 24 Stat. 388). By this point, a new Commissioner of Indian Affairs, John D.C. Atkins, had carefully enumerated how these surplus land sales would work. Excess land, after Indian allotments had been made, could be sold to the Government

[1] Treaty with Ottoes and Missourias, 1854 *in* Cohen, 2012, page 62

in order to open it up to homestead entry at $0.50 to $0.75 per acre, with proceeds from these sales held in trust for tribes and earning interest (Office of Indian Affairs, 1886). As a point of reference, these prices were vastly below market values for land. Before the Civil War, the government provided for the sale of public lands at $1.25 per acre in 1820. By 1880, choice land near railroads was being sold to settlers for an average of $4.70 per acre. In the early 1880s, land that was suited for agriculture was sold to homesteaders for a price between $1.25 to $3.50 an acre (Bradsher, 2012). In addition, the plan would allow for the government to invest proceeds on behalf of federally-managed tribes from the sale of surplus lands in government bonds that would pay for education, and other development costs – essentially pushing private land ownership for collective benefits.

The official terms of the General Allotment Act (GAA) were as follows: The U.S. government was empowered to allot land in severalty to individual American Indians within their respective reservations. The legislation allowed for 160 acres to be allotted to heads of families; 80 acres to single persons over 18 years of age; 80 acres to orphan children under 18 years of age; and 40 acres to each other single person under the age of 18. Land sizes, however, varied if the reservation was not large enough to accommodate these amounts, or if the land had grazing purposes or irrigation needs.

The GAA outlined that these allotments should be patented and held in trust by the government (and inalienable) for a period of at least 25 years, at the discretion of the President. Additionally, the law enabled the government to then purchase reservation lands in excess of allotment parcels for an agreed-upon amount and hold such purchase money in U.S. Treasury accounts earning 3% interest. In terms of land selection, the GAA officially stated that individual tribal members were allowed to select their own parcels (except for orphans), but this had to be administered by agents, and approved by the Secretary of Interior, who ultimately had full discretion. The law also stated that agents could assign allotments if American Indian individuals had not selected their parcels within four years of the reservation being open to allotments. This effectively made allotment compulsory, because if an individual refused to participate by selecting an allotment, an allotment was just assigned to them. Additionally, once the trust period ended for the allotment (which, again, could be shortened at the discretion of the President), the individuals were then liable to pay any taxes on the land. Finally, any individual granted an allotment under this act was then deemed to be a U.S. citizen.

Upon immediate passage of the act, $100,000 was appropriated by Congress for the surveying of reservation lands, which was to be immediately repaid to the U.S. government with proceeds from the sale of surplus lands (GAA, Section 9) – i.e., with tribal money. This law was immediately applicable to all reservations within the United States, with a few exceptions including reservation land in the Indian Territory, New York, and the Rosebud Reservation in Nebraska.

With any legislation there is wide discretion in implementing regulations from the law; it was the same with the GAA. There was much discretion on the part of the OIA in implementing the law. This amounted to wide variation in allotment sizes and selections, and land characteristics such as soil productivity and fertility were taken into account. As outlined in 1886 by the Commissioner, "the number of acres in each holding may and should vary in different localities according to fertility, productiveness, climatic and other advantages… (Office of Indian Affairs, 1886 report, page IV)". There was further variation in implementation just due to the sheer fact that agents within the Office of Indian Affairs were fairly autonomous thanks to large distances between agencies and the head office in Washington, D.C., and poor communication options. The general territory of American Indian reservations covered over 181,000 square miles in 1890. As the Commissioner lamented at that time: "[t]he means of communication between the Bureau and the agents are at best imperfect, and in some instances very unsatisfactory. It is impossible for the Commissioner to visit and inspect all the agencies, he cannot always rely upon official reports, and it is often very difficult even for agents to have a personal knowledge of the territory and the people over whom they are placed." As a result, the Commissioner noted that agents had "semi-despotic" power over American Indians, "keeping of thousands of them on reservations practically as prisoners, isolated from civilized life and dominated by fear and force (Office of Indian Affairs, 1890, page V)."

Passage of the GAA also served as a catalyst for further land cessions. While the legislation allowed for swift action, it wasn't speedy enough. Technically, Congress was able to bypass the whole GAA process and just sell surplus lands when "clearly desirable" by passing special legislation. Returning to the ad-hoc

negotiation, this special legislation enabled allotments to occur "without waiting for the slower process of the General Allotment Act, which involve[d] the survey of the land, the allotment in severalty by special agents appointed by the President for that purpose, and negotiations with Indians for the cession and relinquishment of their surplus unallotted lands (OIA 1890, page XXXVIII)." In the year between 1889 and 1890 alone, such special legislation was responsible for the cession of approximately 13 million acres of reservation land (this accounted for a little more than one tenth of the reservation acreage in 1889) , with the cession of 4.5 million acres pending ratification by Congress at the time of the 1890 annual report (Office of Indian Affairs, 1890). Ceded lands were then available to be transferred to non-Indian persons from the public domain.

In justification of this admittedly "rapid reduction" of reservation land, Commissioner T.J. Morgan asserted that "when it is considered that for the most part the land relinquished was not being used for any purpose whatever, that scarcely any of it was in cultivation, that the Indians did not need it and would not be likely to need it at any future time, and that they were, as it believed, reasonably well paid for it, the matter assumes quite a different aspect (OIA 1890, page XXXIX)." It seems the crux of the issue was the breaking up of tribal relations and the repossession of land. The Commissioner continued: "The sooner the tribal relations are broken up and the reservation system done away with the better it will be for all concerned." Despite his explanation that land would never be used or needed, the Commissioner noted a few lines down the page that "there is always a clamor for Indian lands…[and] their lands are becoming more valuable every year (OIA 1890 page XXXIX)."

Further, for a government fixated on encouraging "individual" ownership, property rights and incentives for economic development, there were remarkably few opportunities for American Indian individual control over land transference, or for individuals to benefit *directly* and immediately from the GAA. Proceeds from surplus lands were deposited with the Treasury not only to hold in trust, but to spend money as needed "for the [collective] benefit" of tribes. The Commissioner of Indian Affairs even went so far as to assert that "[i]t is not essential to their prosperity that they should have a great fund in the Treasury to draw upon for their support; on the contrary, it would be a positive evil. But I would sell their surplus lands, place the money in the Treasury, and expend the interest in assisting them to break and fence their lands, to build comfortable houses, to provide themselves with agricultural implements, seeds and stock, and, most important of all, to educate their children. It will not do to say that they do not hold their land by such a title as to render it obligatory upon the Government to give them the proceeds of the sale of their surplus (OIA 1890, page XL)." How this practice is not clearly paternalistic (and *not* individualistic) is never justified in terms of breaking up reservations as an excuse for promoting the inalienable and personal right to property.

Finally, it was clear from reports that in the early years of GAA implementation, surplus lands were sometimes sold before individuals were even secured allotment parcels – i.e., bypassing the veneer of the allotment system entirely. Even by 1890 it was clear from historical accounts that while a decade earlier federal agents at least provided some justification of the allotment practice by urging individuals be set up to succeed agriculturally on their parcels of land, this did not really happen in practice. Allotments were granted (or sometimes not) with the purpose of opening surplus land to settlement, sold without proper negotiation, at the discretion of federal government officials, and below market value.

Separately, the OIA was interested in protecting tribal interests, but in limited fashion when it conflicted with protecting American ones. As the arbiter of all tribal issues within the U.S., Commissioner Atkins felt in 1886 that he "greatly prefer[ed] that these people should voluntarily change their form of government, yet it is perfectly plain to my mind that the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own, or not to organize any government nor allow one to be organized for the one proposition contains the other (OIA 1886 page XI)."

There was much evidence during this time that the GAA was meant to help eradicate Indian culture. As asserted by J.D.C. Atkins, Commissioner of Indian Affairs during the passage of the GAA: "I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed it and of the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship (OIA 1887, page IIX)."

2.3 The Allotment Era and Reservation Land

Following the passage of the GAA came a period of rapid reduction in reservation land. Between 1887 and 1934, when allotments were disbanded, total reservation acreage had declined by over 50 million acres (Carlson, 1983). While the 1887 Office of Indian Affairs Annual Report noted that allotments would begin on reservations where tribes were more "amenable" to the process, researchers have since found evidence that land was allotted when it became sufficiently attractive to white settlers to warrant the costs (Carlson, 1981). Part of this decision metric would have revolved around land quality – Carlson (1981) noted that land in the more developed and more fertile Great Plains and Pacific Northwest was allotted before more remote lands elsewhere.

Thus, in the ensuing years after the GAA's passage, Congress found new ways to open up land for allotment – and to allow for the sale of allotted land before the end of the trust period. Surplus and ceded lands were largely made available in the first few years past 1887. As time passed, ceded lands became scarcer. In 1891, Congress authorized the Secretary of Interior to allow leasing of individual allotments for farming and grazing to non-Indians.[2] In 1902, the first amendment to the GAA was passed enabling allotments to be sold on behalf of heirs of allottees who had died, even if that land was still held in trust.[3] In 1903, the Supreme Court case *Lone Wolf v Hitchcock* asserted that the Department of Interior could sell surplus lands to private individuals, and make allotments on reservations without the consent of tribes. In 1906, Congress passed the Burke Act (34 Stat. 182), which enabled the government to extend or reduce the trust period on allotted land by declaring allottees "competent," or "not competent." The Secretary of Interior was authorized to do this without consent of the allottee (even if they did not want the trust period to end). Once land was moved out of trust status, the owner was liable to pay state and local taxes. If these taxes were not paid, the land was sold in foreclosure. Note, until this point, cash money was effectively held in trust for the tribes, and agriculture was barely supported by the OIA. Many allottees sold land in order to cover fees once they were liable for taxes. An estimated 80%-90% of American Indians sold their patent-in-fee land after the allotment trust period ended (Carlson, 1983).

The GAA was amended further in 1906 to enable allotted land to be sold if it was within a reclamation project area (34 Stat. 325; ILTF, 2016). A third GAA amendment (34 Stat. 1015) was passed in 1907 that gave the government power to sell trust land owned by American Indians who were deemed "non-competent," effectively negating any trust protections. By 1934, 4.58 million acres of original allotments had been removed from trust status by issuing patents; 1.28 million acres had been removed by [1907 legislation], and 2.5 million acres of allotted land had been sold through the 1903 inheritance amendment (Carlson, 1983).

These patterns in implementing the GAA impacted how tribes, tribal governance, industry on reservations, and economic development evolved. Even the timing of when allotments were made on reservations mattered, since allotments that were still in trust status by the time of the Indian Reorganization Act (1934) remained so, and earlier allotments were more likely to have been transferred into fee-simple ownership by that point. In fact, reservations that were allotted earlier now have a larger share of fee-simple land on current-day reservations (Anderson et al, 2016). Additionally, Anderson *et al* (2016) and Carlson (1981) have asserted that reservations located in states with faster-growing populations and more rainfall were allotted first, and Anderson *et al* (2016) also shows that proximity to a railroad in 1893, being in a densely-populated state in 1890, and having more arable lands were also associated with having more fee-simple lands on reservations today. They also find that location on semi-arid land, and proximity to railways were associated with more allotment-trust land today. Finally, Anderson *et al* (2016) find that the opposite - having more arid acreage on reservation land, being further from a railway, and located in a slower-growing state were all associated with *more* trust land today. These findings show broad circumstantial evidence that allotments were used in a way that facilitated non-Indian settlers acquiring "better" land, closer to population centers and in areas more conducive to farming and industry.

[2] Act of February 28, 1891 (26 Stat. 794)
[3] Act of May 27, 1902 (32 Stat. 284), the "Dead Indian Act".

3 Evolution of U.S. Federal Indian Policy and Legal Institutions

The above section details the contemporaneous motivations behind many of the key legislative and policy initiatives that stripped American Indian tribes of land and resources. Yet the fundamentals of Indian property law have evolved within the broader legal frameworks governing the colonization process, peacekeeping and boundary expansion. American Indian property rights have developed within an overarching framework that reflected the changing colonial landscape and relationship between tribes and external sovereign nations. Two related, overarching themes prevalent in modern Indian law – the "trust" relationship between tribes and the ruling sovereign or federal government; and control over trade and land through restrictions on alienation – stem from philosophies that date back to early European colonization.

After centuries of violent justifications of colonization dating back to the Crusades of the thirteenth century, the concept of "consent" for land acquisition was introduced in the 16th century by a series of lectures by theologian Francisco de Victoria (Cohen, 2012). These lectures formed the basis of international law. Victoria argued that discovery did not confer title to the discoverer, and the external sovereign had no inherent right of jurisdiction over Indian nations in new lands. He went further to outline justifications for when colonizers *could* gain authority over indigenous peoples, and introduced the concept of guardianship, which would feature prominently in colonization laws in later centuries.[4]

These concepts played out over the centuries of British colonization and U.S. nationhood, including the inherent duality between recognizing the innate property rights of indigenous peoples on the one hand, and maintaining the sovereign power's right to land, to managing trade, and to promulgating war and peace on the other. Charters, treaties, and land purchases, for example, helped to facilitate peaceful trade in land, resources and goods. This is one reason that previous European sovereigns restrained Indian land trade by claiming exclusive right to acquire land, which had the effect of controlling settlement and keeping peace between competing colonial powers. This system also entrenched power in the ruling sovereign by being able to on the one hand, respect indigenous property rights and enter into contractual land sales, but on the other hand have the first right of purchase and control over who could trade with tribal groups – also granting the ability to reward allies or profit from the reselling of land (Cohen, 2012).

As the new American republic emerged, a different power struggle was growing between states and the federal government. While the declaring of America as an independent nation from Britain solidified its role as arbiter of sovereign restraint on alienation, it was not clear whether this power would be largely delegated to the states or to the federal government within state boundaries (in the U.S. territory, Congress assumed the role as the new sovereign).[5] The U.S. Constitution both put an end to this ambiguity by assigning exclusive power over Indian affairs to the federal government (Cohen, 2012), and in the following year the first Congress passed the Trade and Intercourse Act of 1790 (i.e., the "Nonintercourse Act"), effectively usurping the overarching power over tribal trade, commerce, and land from states entirely.[6]

The Nonintercourse Act significantly shifted the power balance not only between states and the federal government, but between the United States and tribes. It has played a heavy hand in shaping U.S. Indian policy relating to property rights, and is still a dominant factor in the rights associated with tribal and trust land today. It has been relevant in legislation and case law into the 21st century.

In terms of trade, the Nonintercourse Act effectively enabled the federal government to control trade and commerce of any kind between Indian tribes and other participants, including the international community. Particularly this international component was an important driving factor in how the U.S. government interacted with tribes, and it used its relationship with tribes to assert border control. From a political philosophy standpoint, a key facet of this historical relationship between tribes and the U.S. government has been how it has represented the challenges faced by the federal government in forming statehood, developing

[4] As outlined in Cohen (2012), these doctrines actually became the basis of Spanish law n the American continents, which in turn served as the philosophical foundations for later U.S. law relating to tribes.
[5] The Proclamation of September 22, 1783 forbade all persons from purchasing or receiving land from Indian persons outside of state jurisdictions, without the authorization of Congress.
[6] Act of July 22, 1790, 1 Stat. 137

the nascent federal U.S. system, and asserting sovereignty for the U.S. while protecting borders and economic security. The U.S. did assert a paternalistic role in tribal governance throughout the 19th century, but early constitutional history suggests that federal Indian law was not based on ideas of dependency. The context here is vital – the Continental Congress saw national authority as comprising of a bundle of powers in the form of states. This idea was contested, and the foundational fight for the new American republic was in asserting international sovereignty of one nation while supporting semi-sovereign entities (such as states) within its borders (Ablavsky, 2015).

Early wars fought over Indian affairs were mostly related to border security and trade. The federal government was largely interested in restricting trade with Indian tribes in order to control commerce, and to mitigate concerns over border security should western tribes trade with international rivals such as the French, British, or Spanish. The federal government feared that British or Spanish support of Indian nations would inherently buffer American expansion (Ablavsky, 2015). Such concerns forced the budding nation to articulate laws for tribes regarding borders and trade.[7] As such, a duality was born: sovereignty and control. In a letter from Henry Knox to George Washington in the late 1700s, Knox asserted that "independent nations and tribes of Indians…ought to be considered as foreign nations, not as the subjects of any particular state (Ablavsky, 2015)." And yet, based on the concern over borders, Nonintercourse Act made it illegal for states or private parties to acquire Indian land without consent of the U.S. government (Anderson, 2006).

Several other U.S. founders and revolutionary figures supported the ideology that tribes were not subjects of the U.S. government – after all, they were asserting the U.S.'s independence on the world stage, and crafting the very delicate essence of federal power over state entities. Inherently though, the U.S. did not recognize tribe's claim to lands as having the same legitimacy as the federal government's claims. The original Nonintercourse Act contained a clause restricting alienation, which voided land sales by either an Indian *individual* or tribe without federal consent. Explicitly, the clause stated:

> *That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.*[8]

While the restraint on alienation from individuals was removed in 1834[9], many other aspects of the Nonintercourse Act remains, and has been validated time and time again in case law and legislative acts. The restriction on alienation seems to apply broadly over *all* tribal land, regardless of title and including tribal fee land and land that was always held in fee, unless expressly removed from restraint by Congress. While harder to uphold in court, it is not entirely clear that these restrictions do *not* apply to land purchased by a tribe *without* federal involvement, this issue being debated in court as recently as 2009 (Cohen, 2012, page 1036).

Thus the United States' federal restraint on alienation begins formally in 1790. It was not until a set of U.S. Supreme Court cases under Chief Justice John Marshall in the 1820s and 1830s that the relationship between the federal government and tribes began to take definitive shape in terms of specific legal tenures to land. In *Cherokee Nation v Georgia* (1831), the U.S. sought clarity on the status of tribes. This was the first time that the term "domestic dependent nation" was used, in Justice Marshall's opinion (Ablavsky, 2015), that tribes were reliant on the state for "protection." This marked a significant political shift from previous notions of statehood and tribal rights, but would begin to change the course of relations between tribes and the U.S., setting up the paternalistic control that characterized the next century.

---

[7] In fact, the legal underpinnings of federal reserved Indian water rights were in part based on international relations and border concerns over boundary waters with Canada. Theoretical rights to water are tied to *Winters v United States*, 207 U.S. 564 (1908), which involved disputes over the Milk River in Montana. This came after a string of water-related cases in the Supreme Court asserting the federal government's authority over states in terms of water. The Boundary Waters Treaty was agreed upon a year after the *Winters* decision, in 1909. (Shurts, 2012)

[8] Act of July 22, 1790, § 4, 1 Stat. 137

[9] The restraint on land transfers/sales originating from *individuals* was not removed from law until 1834 [Act of June 30, 1834, §12, 4 Stat. 729].

The Marshall cases also clearly asserted the concepts of "split title," the right of preemption and the respect for a tribe's perpetual right of occupancy of land. *Johnson v. M'Intosh*[10] outlined the concept of split title, where the U.S. held the ultimate title to land, and tribes held a title of occupancy for the full and exclusive possession use and enjoyment. The ultimate title, held by the U.S., was essentially a right of preemption. As elucidated in *Cherokee Nation v. Georgia*[11], the right to extinguish title was based on the tribe consenting – i.e., having unquestionable right of occupancy (as long as peace was kept) to lands until voluntarily extinguished. This split title and respect of tribes' usage and consent was akin to the trust concept in private law: that a fee of trust property can be held by a trustee for the use and benefit of a beneficiary (Cohen, 2012).

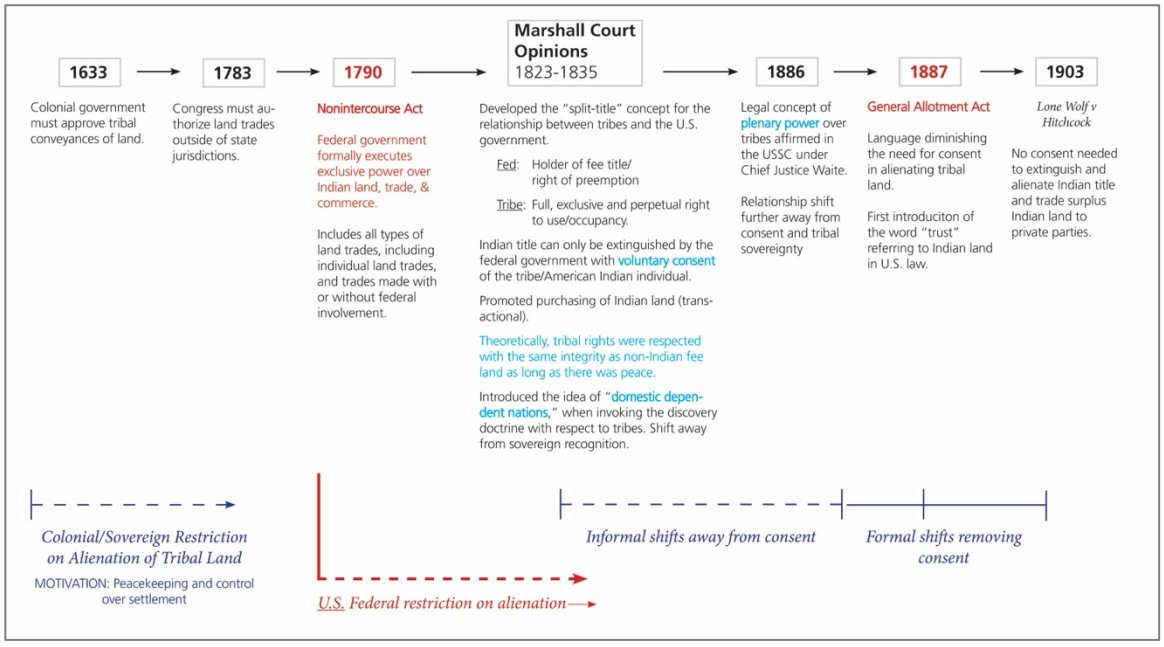
In 1832, a year after *Cherokee Nation v. Georgia*, the U.S. Supreme Court solidified the concept of consent by noting that issuing a grant to land still held in Indian title was not enough to *extinguish* that title – the land must be purchased from the tribe.[12] Finally, in *Mitchell v. U.S.*[13], the court plainly asserted that until extinguishment, Indian title is "as sacred as the fee simple of whites."

The decades following the Marshall opinions marked a clear, informal shift away from this respect and Indian title and tribal consent, gradually towards a clear move towards the more extreme control over Indian affairs and land, under the "plenary power" concept of U.S.-tribal relations, which legal scholars agree was introduced in 1886 through the *U.S. v. Kagama* decision (Wilkins, 1994)[14], and also through *Buttz v. Northern Pacific Railroad*, in the court opinion asserting that extinguishment of tribal title was solely a matter for the government and not open to judicial review or contest.[15] In *U.S. v Kagama*, the Supreme Court described tribes as "wards of the nation." It was this decision, predicated on the Marshall decision in 1831, which clearly ushered in the General Allotment Act (1887), which, amongst many other factors affecting tribal property discussed later, further attenuated the concept of tribal consent for alienation and extinguishment of tribal title.

Figure 1 outlines these shifts in broad brush strokes, including the informal and then formalized shift away from "consent" as a concept in colonial land acquisition. The formal shift from respecting tribes' use and occupancy as paramount to complete lack of consideration for tribal consent was completed in 1903, expressed in the U.S. Supreme Court opinion for *Lone Wolf v. Hitchcock*, where the court asserted that Congress could take tribal property without consent of tribes, and in violation of treaty agreements. The court asserted this was not subject to judicial review, and was a political issue, not a legal one. The Victoria era was over.

[10] Johnson v. M'Intosh, 21 U.S. 543, 585 (1823)
[11] Cherokee Nation v. Georgia (1831)
[12] Worcester v. Georgia (1832)
[13] Mitchell v. United States, 34 U.S. 711 (1835)
[14] U.S. v. Kagama, 118 U.S. 375 (1886)
[15] Buttz v. Northern Pacific Railroad, 119 U.S. 55, 66 (1886); See Cohen, 2012 page 1052.

***Figure 1**: Evolution of Legislative Framework & Philosophy, Colonial Period - Turn of the 20th Century*



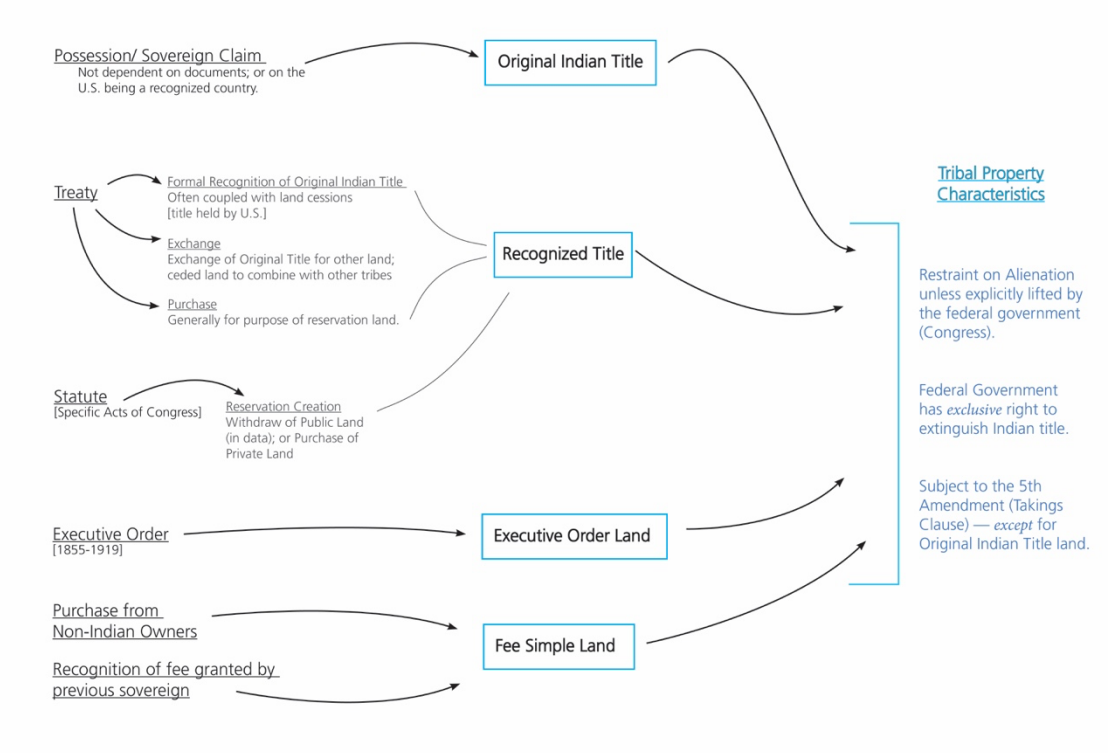
Thus, perpetually from the Marshall court to the *Lone Wolf* decision, despite information and formal shifts in how tribes were viewed in the participation of land conveyances and tribal property rights, one constant remained: The U.S. had the exclusive power to extinguish Indian title, and this principle was constant over time. This evolution describes not only the initial motivations for control over Indian commerce and land conveyances, but how the law evolved to shape and assert that control. The second, related overarching theme outlined in the beginning of this section – the trust relationship – can be most clearly seen in how tribal property and individual Indian property rights developed, which is outlined in the section below.

3.1 Tribal Property

In the context of federal law, tribal property is categorized as any property that an Indian tribe has a legal interest in. It is a form of ownership in common, however it differs from a tenant-in-common property right in the sense that the individual has no alienable or inheritable interest in the property right. The property is held in common for the benefit of *living tribal members.* The extent that an individual person can exert control to benefit from tribal land is generally through participation in the governmental process as a tribal member (Cohen, 2012).

Tribal property can take several forms, and while virtually all forms of tribal property are held in trust by the United States for the benefit of tribes, the type of land tenure, and how the tribal right to the property was recognized, has important ramifications for the characteristics of ownership, alienability, and usage. Figure 2 provides a basic flow-chart of these different forms of tribal property.

***Figure 2**: Forms of Tribal Property*



Virtually all types of tenures have been entered into at some point by tribes. There are four major forms of Indian tribal property that exist in federal law, and they can overlap for parcels and land areas. **Table 1** outlines key features of these forms, and how they can be acquired.

***Table 1:** Tribal Property Types and Characteristics*

Property Form	**How Acquired**	**Key Features**
Original Indian/ Aboriginal Title	Acquired by Possession/Exercise of sovereignty	• Not dependent on the pre-existence of the United States • Title not proven through letters/statutes/treaties, but through establishing "actual, exclusive, and continuous use and occupancy for a long time prior to loss of property (Cohen, 2012)." • Not subject to the Fifth Amendment • Restraint on alienation as default • Trust land (with U.S. government as trustee) • Only the federal government can extinguish title.
Recognized Title	• **Treaty** ○ **Formal recognition of Original Title**: often coupled with land cessions, with title held by U.S. ○ **Exchange**: Exchange original title for other land; or ceded land to combine with other tribes. ○ **Purchase**: Generally for purchase of reservation land with tribal funds. Purchase often from U.S. government or other tribes. ○ Often for patent-in-fee land; for a specific use right; or, in later years, a combination of use + occupation. • **Statute** – specific acts of Congress ○ Often used for res. creation.	• Exchanges characteristic of removal period • Restraint on alienation as default • Only federal government can extinguish title • Subject to 5th Amendment

	○ Res. creation mainly via withdraws of public land or purchase of private land. ○ More popular after 1871.	
Executive Order Lands	Created from 1855-1919 through executive order, usually for the purpose of creating reservations.	• Debates over impermanent, but generally treated as having the same characteristics as reservation land created under recognized title methods. • Restraint on alienation as default • Only federal government can extinguish title • Subject to 5th Amendment
Fee Land	• Purchase from non-Indians by tribe, with or without federal involvement. • Recognition of fee title by prior sovereign (ex: Pueblo land recognized as fee by Spanish)	• Restraint on alienation as default (questioned when there is not federal involvement) • Only federal government can extinguish title • Subject to 5th Amendment • May be placed under trust status by an act of Congress or the Secretary of the Interior.

The above characteristics – restriction on alienation, and the federal government's exclusive role in extinguishing title – are resultant of the trust relationship between tribes and the U.S. federal government. This trust relationship exists in many facets of the tribal/federal relationship. In terms of land, the U.S. government holds tribal land in trust for the benefit of tribes or individual Indians (illustrated in the split title described in the section above, and dating back to control over Indian trade and commerce). The trust relationship relating to land dates back to the Crown Proclamation of 1763 and international law from France, Spain and Great Britain.

The split title elucidated in the Marshall court opinions relies heavily on the concept of a sovereign holding in trust land for the use of a beneficiary for either a period of time (the term limit on trust land used extensively from the General Allotment Act onwards) or in perpetuity. This trust/trustee relationship, where the trustee holds the actual title to the land, effectively serves to delay or remove the ability for the beneficiary (tribes or an individual) to convey land independent of federal involvement and explicit approval.

3.2 Individual Indian Property

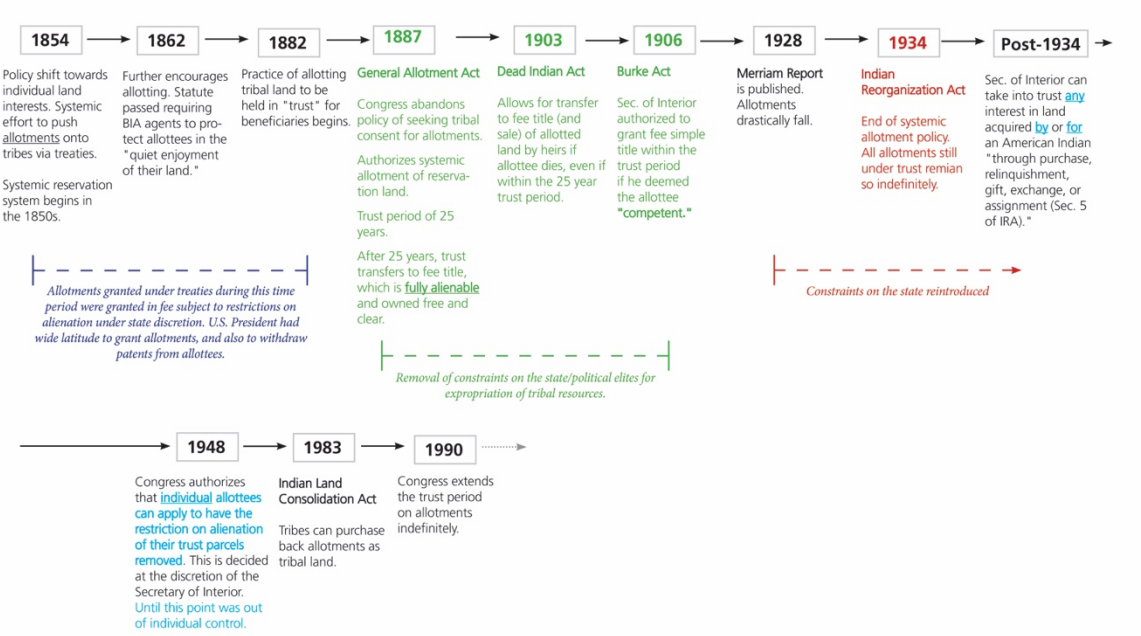
Historically, the concept of American Indian individual property rights has consistently been defined via communal land and usage. Individual land holdings, when they began to emerge within federal property laws, stemmed from tribal land, were controlled as trust land by the U.S. government, and were often for use rights which were inalienable. For the most part, funds earned from leasing, selling, or otherwise trading individual Indian land holdings were paid into government-run, communal accounts and managed by the federal government.

While much about individual ownership has evolved in the 150 years since the U.S. government began pushing this style of individual "ownership," there is still much that is remarkably the same. Individual ownership stemming from trust lands and allotments are still heavily restricted, and the federal government, through the tremendous autonomy of the Secretary of Interior, has power to alienate, trade, and manage funds associated with these lands. Currently, there are approximately 11 million acres of land still currently held in allotment parcels. Federal statutes authorize and regulate trade relating to them (sale, exchange, gift, inheritance, partition, mortgage, condemnation, etc.).[16] Thus, the system of individual ownership stemming from the post-colonial time period, is very much influenced by communal land forces. Individual interests in land and property are derived through participation in the government process (both tribal and federal), and tribal membership.

[16] Cohen, 2012, page 1079

Figure 3 depicts key shifts in individual property ownership. It was not until the mid-1800s that they key ideas of established a federal reservation system for tribes, and pushing individual interests in land through the introduction of individual "allotments," began to emerge.

***Figure 3**: Individual American Indian Property Rights -- Timeline of Key Legislative Shifts*



Contextually, a wave of settlers began moving westward thanks to the California gold rush in 1849, and the rapid increase in the 1840s of settlers traversing the Oregon Trail. It is not surprising that these two events evolved simultaneously with the creation of reservations, as both reservations and allotments were vessels to control and contain Indian communities and facilitate western settlement. Several Commissioners of Indian Affairs during this time period increasingly discussed issues of western settlement and its impact on tribes who existed in the western frontiers, and those that had been forcibly removed there. Commissioner William Medill, for example, discussed containment issues in the context of tribal safety and forced assimilation.

In his 1848 report, he urged that "[t]he policy has already begun … to colonize our Indian tribes beyond reach, for some years, of our white population; confining each within a small district of country, so that, as the game decreases and becomes scarce, the adults will gradually be compelled to resort to agriculture and other kinds of labor to obtain subsistence, in which aid may be afforded and facilities furnished them out of the means obtained by the sale of their former possessions (Office of Indian Affairs, 1848, page 386)." At the same time the Office of Indian Affairs was actively urging the reduction of annuities paid to tribes and the expenditure of "large amounts" if proceeds from land sales to go directly for programs and processes that improve "character" of tribes (Office of Indian Affairs, 1848).

Multiple Commissioners during this time increasingly reported on the need for a separate reservation system explicitly for controlling Indian populations, allowing for settlement of frontier lands by non-Indians, and forcing assimilation by coercion and, essentially, starvation. By 1858, federal Indian policy fully reflected the shift from removal policies to concentrations of American Indians on fixed reservations (Cohen, 2012). Commissioner George Manypenny, mentioned earlier in this chapter for his work in allotting reservations through treaty negotiation, was a key architect of removal policies at the time and subsequently the reservation system. He forcefully pushed the uptake of reservations that would essentially provide subsistence to tribes, and divide land in severalty and provide agricultural inputs and menial labor schools "for youth" in lieu of

monetary annuities paid to tribes. Tribes were contained in these "schools for civilization" by military force (Cohen, 2012).

Manypenny's treaties were also known for including clauses requiring tribes to relinquish all moneys owed to them under previous agreements with the U.S. government. Importantly, under Manypenny, there was a distinct shift in the financial policies for land regarding tribes and annuities paid and owed to them. The government ceased paying for land by means of permanent annuity, which had been the practice previously, and served to uphold contractual obligations and "conserve the Indian estate (Cohen, 2012)." Instead, the federal government pushed through the policy of rapidly distributing tribal funds. Combined with the rapid distribution and diminishment of tribal lands, these policies pushed Manypenny's and the government's goal of terminating tribes through financial and logistical means.

Several similar treaties were implemented in the ensuing years with tribes, implementing various methods of apportioning land and assigning rights to property.[17] These treaties contain early language about "competency," taxation, and in some cases, removing restrictions to title that would become more systematic in later years under the General Allotment Act. All of the treaties enacted during this time set aside land in reservation for the use of tribes. Successive Commissioners continued in this legacy.

Despite extensive history making contracts and treaties with tribes as a method of colonization and governance, federal policy shifted after the Civil War. In 1871, the U.S. government officially ended treaty-making with tribes,[18] and shifted towards using the legislative process to "contract" with tribes. By the end of the Civil War, and increases in technology brought renewed vigor to western settlement. More rapidly, in the successive years that followed, legislative measures were pushed through to facilitate settlement and put land to productive use. We see this in our timeline of legislative changes to individual property. Allotments became central to this movement, as the U.S. government strove to open surplus lands up to settlement more systematically, while continuing the practice of forced assimilation for tribes – which was seen as a justification for the taking of indigenous land.

Therefore, we can see that the legal machinations of the late 19th century in terms of eroding Indian land was the result of a long-term evolution of the U.S.'s stance on colonial powers and sovereignty of tribes. The historical events and outcomes of the GAA are fully in line with the clear intent for the U.S. to control American Indian property and usurp indigenous rights to it when it was advantageous for the state to do so. The GAA significantly reduced transaction costs involved in transferring Indian land out of Indian use and ownership and available for non-Indian interests, trade, purchase or any other use. It was *easier* under the GAA to not only use tribal land, but to alienate it and transfer it, without further Congressional involvement necessary. It was difficult if not impossible for a tribe to trade its land, but the GAA and its amendments made the process of allowing non-Indian interests to do this less costly and easier. Further, contextually, aside from general migration, this was a pivotal period in the west for the formation of the Bureau of Reclamation (1902), and the introduction of massive amounts of federal dollars expended for private benefit on irrigation projects, power plants, and dams. In the initial years of the Bureau of Reclamation, its funding for reclamation projects in each state was based almost exclusively on the revenue from public-domain land sales – some of which would have included those ceded parcels of tribal land.

The practice of allotments was put to an effective end by 1934, and restrictions on alienation significantly ramped up again, with the passage of the Indian Reorganization Act (IRA).[19] By this time, millions of acres of reservation land had been lost to encroachment, largely through these mechanisms. When the IRA took effect, GAA allotment parcels that were still in trust would remain in trust status.

After 1934, there was still ad-hoc allotting of land, although it was greatly diminished, and the Secretary of Interior was given ever-more discretion in the management of tribal property in the decades that followed. For example, with the passage of the IRA, the Secretary of Interior was authorized to take into trust

[17] Treaties included those with Delawares (1854); Sacs and Foxes (1854); Kickapoos (1854); Chippewas (1854); Wyandots (1855); Mississippi Band of Chippewa (1855); and Winnebagoes (1855), amongst others.
[18] The Appropriations Act of March 3, 1871, §1, 16 Stat. 544
[19] 25 U.S.C. §464

any interest in land acquired by or for an American Indian through virtually any type of transaction.[20] It was not until **1948** that Congress authorized that **individual American Indians themselves** could apply to be deemed "competent" and have trust parcels transferred to fee-simple title. Even as late as 1979, the Secretary of Interior ruled that it is not mandatory to approve an application for a fee patent, or a sale, even if an allottee is "competent."[21] The Secretary *also* has the power to withhold application approval if he or she deems that the removal of title restrictions would "adversely affect the best interest of the tribe … until the affected parties have had a reasonable opportunity to acquire the applicant's interest (Cohen, 2012, page 1082)." In essence, despite decades of assimilation, privatization and property-rights policies, so much of individual Indian interest in land is still based on the collective unit.

4 Reservation Land Loss and Western Settlement

The history described above presents a nuanced picture of how the legal and political institutions of colonization, federalism, and U.S.-tribal relations evolved since American colonization. While on the face of these policies, looking back it may seem that they prioritized individual private property over collective ownership – for the benefit of economic development in the United States – but in reality, they were the result of complicated political economy structures, war and peace making, and strategic activity between the federal government, international trade partners, states and tribes. The resulting landscape is a sometimes-conflicting maze of laws, relationships and definitions.

Despite this history, tribal governments have consistently been able to utilize openings to either historically stave off encroachment, maintain cultural institutions in the face of these assimilation policies, or find avenues to assert and protect rights to use and benefit from land. Even in the height of these detrimental land policies towards tribes – during the allotment era – not all tribes lost land to western settlement. As part of ongoing research looking at American Indian land dispossession, I have analyzed reservation land loss in the context of western settlement, juxtaposing hand-digitized maps of federal Indian reservations with information on federal land disposals during the period of 1880-1915. While I analyze changes in reservation land based on parcel-level data (Taylor, 2021), I first assessed trends in township-level data looking at the correlations between natural resources, climate, and socio-economic indicators and reservation land loss. So much of the land-loss patterns tell the story of a deeper, intricate narrative of the political economy behind settlement. There was widespread heterogeneity not only in the geographic landscape, but between tribes, between competing stakeholders for natural resources (like mines, irrigators, etc.), and the implementation of policy by the Office of Indian Affairs (Dippel and Frye, 2020, discuss implementation in empirical detail).

Summarizing township-level data (usually a six-square-mile area in the Public Land Survey System), results from a multinomial logit model estimating the probability of land share in township area changing indicate that land left on reservations over this time period was in general of lesser quality in terms of soil characteristics, rainfall and timber values, but that agricultural activity on reservations and less dependency on the federal government for subsistence rations were correlated with less encroachment onto reservation land per township area.

I also breakdown the analysis into two time periods, from 1880-1900, and 1900-1915, allowing me to focus on structural change in western settlement associated with the Bureau of Reclamation. The earlier period, 1880-1900, was pre-Bureau of Reclamation, when irrigation projects were private, drought cycles were intense, and agriculture was difficult in arid regions in much of the west. Additionally, these were the early days of the Allotment Era (1887-1934), where the OIA was actively attempting to allot reservations in order to reduce boundaries and encourage settlement. With the passage of the Reclamation Act in 1902, private landowners were able to benefit from federal investment in irrigation, which was a game-changer for western settlement. As the Reclamation Service grew, arid land was increasingly workable, and drainage also became an important factor of agricultural productivity. In addition, this is a period of increasing mineral resource discoveries, which also impacted settlement patterns.

[20] IRA, section 5
[21] Oglala Sioux Tribe v. Comm'r, 7 I.B.I.A. 188; 86 Interior Dec. 425, 433-434 (1979)

Between 1880 and 1915, reservation acreage was completely eradicated in nearly two-thirds of townships in western states that had started off with 100% reservation coverage in 1880 (with almost half of these full losses occurring by 1890). An additional 10 percent of these original townships experienced partial reservation land loss over this time. However, 27% of townships that had full reservation coverage in 1880 stayed that way through to 1915.

Reservations that only made up part of a PLSS township were likely more vulnerable lands because of encroachment of non-Indian settlers. Of the PLSS townships that were partially covered in reservation land, most (73.3%) were completely non-reservation land by 1915. Most of this decline was again concentrated in the earlier period from 1880-1900. Overwhelmingly, most of the PLSS parcels contained no reservation land at all in both 1880 and 1900. It was rare to see increases in reservation coverage (partially or otherwise) for initially non-reservation PLSS townships.

In all cases, results confirm the previous literature's findings that land quality significantly correlates with changes in reservation coverage. For townships starting off with 100% coverage, a one-standard-deviation (OSD) change in soil productivity yields a 10.8% increase in the odds that reservation land would completely disappear in the PLSS township by 1915. Similarly, higher soil productivity was associated with lower odds of staying at 100%. These results are consistent over all time periods, but are most pronounced in the later period. Interestingly, soil *drainage* seems to be associated with higher probabilities of retaining reservation land. This could relate to the fact that in this early time period less drainage was less important than productivity was with the absence of irrigation.

For land that started off partially filled by reservations, the positive association between reservation share and soil drainage all but disappears. Here, we see that all indicators of good quality land effectively correlate with reservation share loss, and particularly so in the earlier period (1880-1900). This land is perhaps more vulnerable to encroachment; if non-Indian settlers began populating nearby land that had relatively good soil, it is conceivable that in the era of allotments and land cessions, it would be difficult to hold onto this "better" land.

What about other factors? This time frame not only coincided with agricultural settlement in the western U.S., but in prospecting for minerals and timber. I also included covariates relating to natural resources and reservation activity, in addition to indicators for timber and rain levels (Leonard, Parker and Anderson, 2020), as well as socio-economic indicators for reservation activity, including acres of reservation land in cultivation in 1880 and 1900, and the percent of population per reservation dependent on government rations in 1880 (a statistic recorded in and collected from the OIA annual reports for select years). Additionally, I included a binary variable indicating whether or not by 1915 there was an authorized Bureau of Reclamation project within the township (collected from Congressional correspondence for the Bureau of Reclamation (United States, 1948) and the Bureau of Reclamation's website, which often provides latitude and longitude coordinates of projects, alongside historical timeframes for early histories of project construction. Once the Bureau began building reclamation projects, significant sums of money began flowing to regions that may not have had significant development beforehand. Arid land became more usable, or at least by 1915, contained *potential.* By 1915, Congress had appropriated upwards of $100 million to the Bureau of Reclamation for project funding (United States, 1948).

These results also show, as before, that the better the land, the higher the probability that reservation shares would decrease. Yet there are important nuances to point out. For changes over the entire period (1880-1915), in townships that started with 100% reservation coverage, higher soil productivity significantly increased the probability that reservation coverage would drop from 100% to 0%, with a 6.68% increase based on an OSD change in soil productivity. Timber values were also important indicators that reservation shares would fall. In townships with higher timber values, reservation shares were more likely to drop from 100% to 0% (especially in the earlier period).

A final part of this preliminary, township-based, work was that I also created a panel of township-year statistics on land transfers, broken down by representation of *type* of transfer (recorded in the historical patent) per township-year from 1880-1915. I found that better land, in terms of soil drainage and productivity, rain levels, and having more individuals on reservations dependent on subsistence rations were all associated with

more cash-sale- and homestead-type transfers in the township, and that townships with more individuals on reservation dependent on government support, there were, on average, more cash sales in that township. If a township contained a reservation, and that reservation had on average more land in cultivation, this was correlated with a smaller share of the township attributable to homestead grants.

5 Conclusions and Moving Forward

Despite the headwinds inflicted on American Indian tribes to be in command of their own economies, of their own institutions, and of their own governance, throughout history we have seen examples where, with increasing sovereignty, tribes have been able to implement governance and economic solutions that fit their own communities. Despite the difficult history of conflict, a remarkable upshot is that tribes have been able to use some of the key laws historically implemented as mechanisms of dispossession in ways that are beneficial for tribes in the modern day. For example, reservation land is connected to the ability for tribes to claim federal Indian reserved water rights, and several tribes have strategically selected into using that as a legal strategy to quantify water rights, or entered into strategic bargaining relationships with surrounding stakeholders to negotiate for settlements.

The Gila River Indian Community, for example, leveraged their location in drought-plagued Arizona to negotiate for substantial amounts of water in the region, positioning themselves as a lynchpin for drought planning in the state. As recently as October 2018, they had fought for and retained the ability to implement water policies relating to environmental quality and usage. In the post-1975 self-determination-era decades, tribes are increasingly able to strategically pick the legal institution they will exert sovereignty through, utilizing a hard-fought autonomy within a legal framework that is still largely reminiscent of the late 19th and early 20th centuries. Tribes have also been able to utilize the trust land system to get land back into tribal ownership or provide services – cultural or economic – to their nations.

These patterns illustrate the lessons of the Kalt-Cornell body of research. The ability to act with increasing autonomy and sovereignty has had beneficial impacts over the last several decades, including for non-tribal stakeholders, even despite institutionalized roadblocks aimed at tribes regarding land. Between 1990 and 2000, economic activity on tribal reservations grew at faster paces for a variety of indicators relative to the general U.S. population, regardless of the presence of gaming. Cornell and Kalt (2010) point to self-determination as a key driver for this resurgence. They note that prior to the 1970s, federal policy towards Indian nations was effectively uniform across tribes, relying on a "one-size-fits-all" approach to micro-administration and governance; even constitutions were "boiler-plate" models, stamped onto tribes after the Indian Reorganization Act of 1934 (Cohen, Robertson and Wilkins, 2010). Post self-determination, tribes were able to begin to implement governance specific to their specific desires. Since this time, tribes have effectively been able to restructure governance institutions and their relationships with the federal government. This has been met with resurgence and growth on many levels (Cornell and Kalt, 2010), and continued through the next decade from 2000-2010 (Akee and Taylor, 2014).

Finally, in recent decades, this strategic use of the historic framework applied in modern settings has allowed tribes to fight for monetary damages too, asserting that the federal government breached its duty as fiduciary trust. A seminal case in asserting this claim was the U.S. Supreme Court Case *U.S. v Mitchell (1983)*, in which tribes used the argument that under the allotment system, the federal government mismanaged timber reserves on allotment parcels. Under the GAA, the federal government held allotted land in trust, which including the management of land leases and payment of leases to tribes (*US v Mitchell* 1983 *in* Sisk 2003). The history of this decision spans over a decade and is a remarkable example of how fiduciary duties may be enforced depending on the prevailing context for enforcing property rights and government accountability. In 1971 several hundred Indians, including members of the Quinault Tribe, brought suit against the U.S. government in the U.S. Court of Claims for damages incurred as a result of government mismanagement of timber resources on allotted lands apportioned and managed under the General Allotment Act.

The Court of Claims ruled in the tribe's favor, asserting that the U.S. government had a fiduciary duty towards tribes, as outlined in the GAA for management of lands. The U.S. government appealed, and the decision reversed in the U.S. Supreme Court under jurisdictional issues, and under the assertion that the GAA

only outlined that the U.S. government was responsible for protecting allotted land from being transferred.[22] Three members of the Supreme Court dissented to this decision, recognizing the fiduciary responsibilities borne by the federal government, directly resultant from the General Allotment Act (Sisk, 2003).

The case was pushed back to the Court of Claims. Under a new legal framing, the Court of Claims again held that the U.S. government was liable to the tribe for damages as a result of breach of fiduciary duty. The case returned to the Supreme Court only a few years later, with seven out of the nine justices who participated in the original 1980 decision participating again. Under an amended legal framework, the court asserted that the General Allotment Act did indeed setup a trust relationship between tribes and the federal government, but that it was limited in scope. However, subsequent Acts that had been passed relating to timber management did in fact prescribe a fiduciary duty towards tribes in relation to timber resources on allotted land; the U.S. Supreme Court asserted this duty had been breached in their 1983 decision (Sisk, 2003). This is a stunning reversal of the initial motivations of these historic pieces of legislation. We are seeing these results borne out in courts due to the fact that tribes now have the ability to act with autonomy, and authority.

The U.S. government routinely used legal mechanisms to usurp U.S.-sanctioned property rights for Indian nations over the course of American history. Policies were explicitly introduced to disenfranchise tribes; eradicate governance structures on tribal nations, and transfer land and resources away from tribes. These policies worked to an extent – as a result, tribes have suffered from entrenched poverty and other socio-economic indicators. As the era of self-determination has evolved, however, tribes have been able to strategically interface with U.S. institutions of their choosing, in order to further aims designated by their own nations.

[22] U.S. v Mitchell (1981)

6 References

Ablavsky, Gregory. "Beyond the Indian Commerce Clause." The Yale Law Journal 124.4 (2015): 882-1345.

Akee, Randall, and Jonathan Taylor. “American Indians on Reservations: A Databook of Socioeconomic Change from 1990 to 2010,” 2014. http://taylorpolicy.com/us-databook/

Anderson, R.T. 2006, "Indian water rights and the federal trust responsibility", Natural Resources Journal, vol. 46, no. 2, pp. 399.

Anderson, Terry L. and A.M. Carlos eds., Unlocking the wealth of Indian Nations. 2016. Lexington Books. Lanham, Maryland.

Bradsher, Greg. “How the West was Settled: The 150-Year-Old Homestead Act Lured Americans Looking for a New Life and New Opportunities,” 44 Vol. National Archives Trust Fund Board, 2012.

Carlson, Leonard A. "Federal Policy and Indian Land: Economic Interests and the Sale of Indian Allotments, 1900-1934." Agricultural History 57.1 (1983): 33-45.

---. “Land Allotment and the Decline of American Indian Farming.” Explorations in Economic History 18.2 (1981): 128-154.

Cohen, Felix S. Handbook of Federal Indian Law. 4th ed. Washington, D.C.: United States Government Printing Office, 1945.

Cornell, S. & Kalt, J.P. 2010, "American Indian Self-Determination: The Political Economy of a Policy that Works", Faculty Research Working Paper Series, vol. Cambridge: John F. Kennedy School of Government, Harvard University, no. RWP-10-043.

Dippel, Christian and Dustin Frye. “The Effect of Land Allotment on Native American Households During the Assimilation Era,” UCLA mimeo, 2020.

Grogan, Maura, Rebecca Morse, and April Youpee-Roll. “Native American Lands and Natural Resource Development,” Revenue Watch Institute Report, 2011.

Leonard, Bryan, Dominic Parker, and Terry Anderson. “Land Quality, Land Rights, and Indigenous Poverty.” Journal of Development Economics. Volume 143 (2020).

Meriam, Lewis, 1883-1972, Hubert Work 1860-1942, and Brookings Institution. Institute for Government Research. The Problem of Indian Administration: Report of a Survey made at the Request of Honorable Hubert Work, Secretary of the Interior, and Submitted to Him, February 21, 1928. No. 17. Baltimore, Md: The Johns Hopkins Press, 1928.

Sisk, G.C. 2003, "Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity Symposium: The Indian Trust Doctrine after the 2002-2003 Supreme Court Term", Tulsa Law Review, vol. 39, pp. 313.

Taylor, Jonathan and Joseph P. Kalt. American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses. The Harvard Project on American Indian Economic Development, 2005.

Taylor, L.D. 2021, *American Indian Reservation Boundaries and Land Characteristics: A Spatial Analysis of Reservation Decline in the American West, 1880-1915*, Working Paper edn.

United States. Bureau of Reclamation. Laws. Bureau of Reclamation Appropriation Acts and Allotments: A Chronological Compilation of Allotments and Appropriations for the Bureau of Reclamation of the Department of the Interior, 1948.

United States. Office of Indian Affairs. Annual Reports of the Commissioner of Indian Affairs, 1880-1920.