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Returning Home and Restoring Trust: A Legal Framework for Federally Non- Recognized Tribal Nations to Acquire Ancestral Lands in Fee Simple

Taino J. Palermo
Candidate for Juris Doctor, Roger Williams University School of Law

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Taino J. Palermo*

ABSTRACT

There is a special trust relationship between the federal government and American Indian tribes, referred to as the "trust responsibility." However, it is difficult to frame the scope of this relationship. One narrow interpretation is the trust instrument formed when the federal government takes tribal land in fee simple, to manage for the benefit of the tribe. This result leaves tribes with a possessory interest unique only to Indians—the sole right of occupancy. However, access to this narrow interpretation of the trust relationship is limited to tribes with federal recognition. As a result, non-recognized tribes do not have a legal pathway under American Indian law to petition the federal government to secure tribal lands in trust. Contributing to the complexity of this issue, many federally non-recognized tribes are recognized elsewhere with indisputable land ties. Nonetheless, without federal recognition, there is no ability to reclaim ancestral real property under U.S. law. In response, this Article proposes a legal framework for the

* Dr. Taino J. Palermo is a third-year law student at Roger Williams University School of Law and is the founding president of the American Indian Law Student Association. Dr. Palermo is the Kasiké (Chief) of the Baramaya Guaínía Clan, a federally non-recognized tribal nation indigenous to the Guaínía region of Borikén (known today as Ponce, Puerto Rico), and also the Deputy Director General of the Federation of Aboriginal Nations of the Americas.

fee simple trust acquisition of tribal lands by non-recognized tribes to assert their inherent right to self-governance, to control their ancestral lands, and to operate as an independent sovereign nation. Part I of this Article will provide a brief legal history on the formation of the trust relationship between the federal government and tribes. Part II will propose a legal scheme for tribes to take their ancestral lands into trust and exercise their full sovereignty with complete control and ownership rights over their ancestral real property. Part III of this Article will discuss two key concessions to consider when applying the proposed legal concept. The Article will conclude with recommendations for strengthening the framework moving forward.

INTRODUCTION

A special trust relationship exists between the federal government and American Indian tribes, referred to by the United States Supreme Court as the "trust responsibility."[1] However, it is difficult to frame the scope of this relationship. Most broadly, the trust relationship entails legal duties, moral obligations, and expectancies that arise from dealings between the federal government and tribal nations.[2] Most narrowly, the trust relationship refers to the legal relationship created between parties under the formation of a trust where the United States serves as trustee and tribal nations as beneficiaries.[3] Applying this narrower interpretation, the federal government takes tribal lands into trust, via treaty[4] or statute,[5] as trustees with fee simple possessory interest over the tribal lands. The result of which leaves tribal nations with the sole right to occupancy as their possessory interest.[6] This limited possessory

1. *See* United States v. Jicarilla Apache Tribe, 564 U.S. 162, 175 (2011) (citing United States v. Mitchell, 463 U.S. 206, 255 (1983)); United States v. Navajo Nation, 537 U.S. 488, 490 (2003) (acknowledging the "general trust relationship" that exists between the federal government and Indian tribes); Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2021) ("[T]he government has longstanding and substantial trust obligations to Indians.").

2. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 35 (6th ed. 2015).

3. *Id.*

4. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 30 (4th ed. 2012).

5. *See* 25 U.S.C. § 5108.

6. *See* Johnson v. M'Intosh, 21 U.S. 543, 587 (1823).

interest has, and continues to be, a major point of contention between tribes and the federal government.[7] To further complicate matters, the special trust relationship only applies to federally recognized tribes. Tribes not federally recognized prior to 1934 are precluded from receiving recognition.[8] Moreover, the Department of the Interior, the federal agency responsible for all Indian affairs and land management, expressly stated that acknowledgment of tribal existence by the Department "[i]s a prerequisite to the protection, services and benefits of the Federal Government available to those that qualify as Indian tribes . . . ."[9] Thus, as it stands today, there is no legal pathway for non-recognized tribes to petition the federal government to take tribal lands into trust.

In response, this Article will propose a legal framework for the fee simple trust acquisition of tribal lands by non-recognized tribes, who can then assert their inherent right to self-governance and control over their ancestral lands and operate as an independent sovereign nation. A tribe that lacks federal government recognition does not necessarily mean that the tribe is not recognized elsewhere. However, without federal recognition, non-recognized tribal members are effectively dual-nationals—citizens of both the United States and their sovereign tribal nations. To that end, the proposed framework's legal authorities derive from U.S. property, trust, and American Indian law, as well as international human rights law.

Part I of this Article will provide a brief legal history on the formation of the trust relationship between the federal government and tribes. By framing Indians as "savages" and "heathens" unfit to retain possession of their lands,[10] Congress and the Supreme Court lawfully justified the taking of tribal land.[11] For the privilege of a tribe's ability to engage with the federal government on any land-related matters, the tribe must first be "recognized" by the

7. *See generally* Montana v. United States, 450 U.S. 544 (1981); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945); Winters v. United States, 207 U.S. 564 (1908).

8. Carcieri v. Salazar, 555 U.S. 379, 382–83 (2009).

9. 25 C.F.R. § 83.2(a) (2020).

10. *M'Intosh*, 21 U.S. at 577, 590.

11. *See generally* General Allotment (Dawes) Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–342).

federal government.[12] Therefore, non-recognized tribes have been left with no legal pathway to petition the federal government to take tribal lands into trust under existing American Indian law.

As a solution, Part II proposes a legal framework for tribes to take their ancestral lands into trust and exercise their full sovereignty with complete control and ownership rights over their land. Citing the federal and international legal authorities, the application of the proposed framework navigates the lawful boundaries of dual-nationalism—where a non-recognized tribal member, otherwise considered an American citizen, is also a citizen of a functioning sovereign tribal nation that may be recognized locally or internationally but is otherwise considered a foreign nation to the United States. This dual-national status is unique to tribes with functioning governments indigenous to the United States,[13] and as a result, the proposed framework is only applicable in this context.

Finally, Part III of this Article will discuss two key concessions to consider when applying the proposed legal framework. These concessions include the financing for, and availability of, tribal lands for purchase; and the refusal of the U.S. to be bound by international legal authorities.

I. THE HISTORY OF THE TRUST RELATIONSHIP

Chief Justice John Marshall provided the initial legal framing of the trust relationship between the federal government and tribes in his series of Supreme Court opinions known as the "Marshall Trilogy."[14] In *Johnson v. M'Intosh*, Justice Marshall described Indians as "savages," unfit to retain possessory title of their lands. And because Indians were considered conquered, "[c]onquest gives a title which the Courts of the conqueror cannot deny."[15] As tribes continued to assert their sovereign status and protect tribal lands from American expansionism, Justice Marshall issued the trilogy's

12. *See* 25 C.F.R. § 83.2(a).

13. "Indigenous to the United States" refers to the continental United States as well as territories. *See Indigenous Peoples in the United States*, INT'L WORK GRP. FOR INDIGENOUS AFFS., https://www.iwgia.org/en/usa.html [https://perma.cc/U7UU-B8UJ] (last visited Nov. 12, 2021).

14. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

15. *M'Intosh*, 21 U.S. at 588.

second opinion in *Cherokee Nation v. Georgia*.[16] In that opinion, Justice Marshall described Indian tribes as "domestic dependent nations" that exist "in a state of pupilage" whose "relations with the United States resembles that of a ward to his guardian."[17] And finally, Justice Marshall's opinion in *Worcester v. Georgia* sent a clear signal that only the federal government can deal with Indian tribes and that state law has "no force" within tribal territories.[18]

The "Marshall Trilogy" fortified the lawful taking of tribal lands and established a new possessory interest only available to Indian tribes: the right of occupancy. This right of occupancy for Indian tribes is a legal possessory interest only the "discovering" or "conquering" sovereign can extinguish,[19] and is evidence of a legal byproduct of the trust relationship between the federal government and Indian tribes. Over a century later, the legal doctrine of title by conquest and the exclusive right to occupancy of Indian tribes over their ancestral lands continues to be cited by the Supreme Court.[20] The "Marshall Trilogy" opinions, coupled with rapid territorial expansion, prompted Congress to pass the Indian Removal Act.[21] The Act gave the federal government authority to negotiate with tribes for their removal west of the of Mississippi River and launched an entire era in federal Indian policy focused on the dispossession of tribal lands.

By entering treaties with the federal government, often under duress, coercion, or force, rather than by free will, tribes relocated to reservations in an effort to retain their tribal communities and culture.[22] Under this new model, the federal government acquired lands in trust for tribes to exclusively occupy.[23] However, to cap the number of tribes eligible for land reservations, Congress passed 25 U.S.C.A. § 71 in 1871 which precluded any other tribal nation

16. *Cherokee Nation*, 30 U.S. at 1.
17. *Id.* at 10.
18. *Worcester*, 31 U.S. at 520.
19. *M'Intosh*, 21 U.S. at 585.
20. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 204 n.1 (2005).
21. Indian Removal Act, Pub. L. No. 21-148, 4. Stat. 411 (1830).
22. *See* Doug Kiei, *Hidden in Plain View: Native Strategies of Resistance to Indian Removal*, NAT'L PARK SERV., https://www.nps.gov/articles/hidden-in-plain-view.htm [https://perma.cc/SGP4-YQKS] (last visited Nov. 11, 2021).
23. Indian Reorganization Act, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified as amended at 25 U.S.C. §§ 5105, 5108).

from forming a treaty with the federal government.[24] Thus, reservations established after 1871 were created statutorily or by executive order, until the latter method was eventually ended by Congress in 1919.[25] Moreover, the Supreme Court's ruling in *Carcieri v. Salazar* reaffirmed the federal government's desire to no longer acknowledge Indian tribes, and as a result, it had no obligation to address land claims or issue land rights with non-recognized tribes.[26]

In that case, the Supreme Court held that tribes must demonstrate that they were "under federal jurisdiction" in 1934 to qualify for the government taking of land into trust under the first definition of "Indian" in the Indian Reorganization Act.[27] In so doing, the Court took aim at the critical ability of tribes to amass a land base by splitting tribes into two factions: tribes whose history readily demonstrates they were under federal jurisdiction in 1934, and tribes who, due to a variety of reasons, face difficulty in making such a showing.[28] The *Carcieri* holding is a critical stop-gap for non-recognized tribes who want to reclaim their ancestral lands. It is in response to these historical and current barriers to recognition and tribal land rights that the proposed legal framework aims to address.

With the era of Indian removal nearing its end, Congress spawned the next era of destructive federal Indian land policy with the passing of the Dawes Act of 1887.[29] Also known as the General Allotment Act, the Dawes Act definitively eroded Indian land rights by allotting parcels of Indian land to individual Indians in order to break up landholding tribal nations.[30] The Dawes Act was also intended to convert possessory interests in real property from that of aboriginal title under American Indian law, to that of fee simple title under standard American property law.[31] After twenty-five

24. 25 U.S.C. § 71.
25. 43 U.S.C. § 150.
26. Carcieri v. Salazar, 555 U.S. 379, 382–83 (2009).
27. *Id.* at 388.
28. Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 PUB. LAND & RES. L. REV. 37, 39 (2019).
29. General Allotment (Dawes) Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–342).
30. § 1, 24 Stat. at 388.
31. § 5, 24 Stat. at 389.

years, the title would convert, and the land would be free of all encumbrances.[32] In doing so, the Indian allottee would become a U.S. citizen subject to state intestacy laws.[33]

Although the allotment era was responsible for the destruction of tribal communities and eroded their lawful rights to their ancestral lands, the Dawes Act itself is significant for another reason. The Dawes Act was the first and only time a legislative effort was made to convert one form of property interest into another, higher form of possessory interest. This is significant because the Dawes Act serves as legislative precedent for the ability to convert possessory interest under one body of law into a different possessory interest under another body of law. It is on this principle of lawful conversion of legal possessory interest that the proposed legal framework draws its legislative historical roots.

The historical formation of the trust relationship between the federal government and tribes has been undoubtedly destructive, in general, to tribal communities and territories, but even more so for non-recognized tribes. Without recognition, most tribes cannot operate within the unique trust relationship structure and therefore are afforded very few, if any, rights under American Indian law.[34] However, just because a tribe is not federally recognized statutorily as "Indian," a tribe could nonetheless be recognized by the surrounding state or by an international body.[35] Moreover, a tribe could meet federal common law requirements[36] for recognition and, at a minimum, enjoy the same sovereign immunity from suit as that of recognized tribes.[37] But neither form of supplemental recognition satisfy the recognition status required to access Section 5 of the IRA, allowing tribes to petition the federal government to take fee simple possession over tribal lands in trust for the benefit

32. *Id.*

33. *See id.*

34. *See* ADVISORY COUNCIL ON HISTORIC PRES., GUIDE TO WORKING WITH NON-FEDERALLY RECOGNIZED TRIBES IN THE SECTION 106 PROCESS 3 (2018).

35. *See id.* at 1–2.

36. Montoya v. United States, 180 U.S. 261, 266 (1901) (federal common law requirements for recognition include ethnicity, continuity, leadership, and established territory).

37. *See* Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442, 476 (E.D.N.Y. 2009); Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 68 P.3d 814, 817 (Mont.2003).

by right of exclusive occupancy for the tribe[38]—the narrowest interpretation of the trust relationship. It is this specific aspect of the trust relationship, the actual trust instrument, that the proposed legal framework is modeled after. The concept of converting title status from an aboriginal title to fee simple is critical to the framework's design because in application, the "trust responsibility" owed to tribes from the federal government would instead transfer to the tribes being responsible to and for themselves exclusively.

II. THE PROPOSED LEGAL FRAMEWORK

The proposed legal framework is based on the legal theory of that which has not been taken away remains.[39] In other words, tribes that never entered treaties with the United States in exchange for right of occupancy possessory interests in real property, (and are not federally recognized as a result) were never dispossessed of their inherent rights to ownership and control over their ancestral lands.[40] The inherent right to ancestral lands for non-recognized tribes is also supported by international legal instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);[41] the American Declaration on the Rights of Indigenous Peoples (ADRIP);[42] the American Declaration

38. 25 U.S.C. § 5108.

39. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 207 (Neil Jessup Newton et al. eds., 2012) ("Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."); *see also* United States v. Wheeler, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished*.' . . . Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.") (emphasis in original); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 171 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.").

40. *Wheeler*, 435 U.S. at 323.

41. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

42. Org. of Am. States, American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888 (XLVI-O/16) (June 15, 2016).

on the Rights and Duties of Man (American Declaration);[43] and by international institutions like the Inter-American Commission on Human Rights (IACHR).[44] Grounded in a theory that is supported by federal and international legal authorities, the proposed framework includes a critical presumption of the federally non-recognized tribes to which it applies.

For the proposed framework to pass legal muster, the tribe applying the framework must already function as an independent sovereign nation with some form of recognition other than federal recognition.[45] In other words, the framework is best applied by tribes with a functioning government, bound by their own constitution, laws, or codes, and maintain a dispute resolution or judiciary system to uphold and enforce their law. Having such foundational institutions in place, prior to applying the proposed legal framework, signals to the federal government and the international community that the tribal nation already intends to hold itself out as an independent nation capable of self-governance, commerce, and trade as any other sovereign. Moreover, recognition of the tribe in some form or fashion is a necessary presumption of the applied framework because the tribe's historical and ancestral ties to the lands in question must be indisputable.[46]

Indigeneity is *the* key aspect by which this framework can be applied. Therefore, it is critical for the tribe applying the framework to be recognized by other tribes, international entities, or under common law showing evidence of ethnicity/indigeneity, continuity of the tribe's existence, and established leadership and territoriality.[47] These presumptions are also critical to the tribe's

43. Inter-Am. Comm'n on H.R., American Declaration of The Rights and Duties of Man, O.A.S. Res. XXX (1948).

44. *See What is the IACHR?*, ORG. OF AM. STATES, https://www.oas.org/en/iachr/mandate/what.asp (last visited on Oct, 8, 2021).

45. *See About FANA*, FED'N OF ABORIGINAL NATIONS OF THE AMS., https://fana.global/about-fana (last visited Oct. 8, 2021) (describing the criteria needed to have standing as a member of FANA). For a link to the Tribal Registry form of the Taino People, see *Tribal Registry*, UNITED CONFEDERATION OF TAINO PEOPLE, https://www.uctp.org/tribal-registry-taino-people (last visited Oct. 8, 2021). *See generally Indigenous Peoples*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/ [https://perma.cc/DH5X-8VD7] (last visited Oct. 8, 2021).

46. 25 C.F.R. § 292.12(b)–(c) (2020).

47. 25 C.F.R. § 83.11(a)–(f) (2020).

ability to exercise the concept of dual-nationalism as tribal *and* American citizens. This is because when applying the framework, tribes will retain the highest form of property ownership under American law, while also prohibiting federal oversight of their lands and independent sovereigns and will need international legal and political support to do so. Therefore, tribes that meet these presumptive requirements will be in the best possible position to effectively apply the proposed legal framework.

As federally non-recognized tribes, American Indian law, and therefore limitation on tribes possessing fee simple title over their lands, does not apply under this framework.[48] Therefore, a non-recognized tribe can lawfully purchase ancestral real property as a bona fide purchaser for value (BPFV) and transfer the property into an inter vivos trust. As trust managers, and under their inherent legal right to govern themselves,[49] tribes can securely protect their ancestral lands as sovereign nations exercising jurisdiction over themselves. And by putting the global community on notice of its declared status as an independent land-based governmental entity, a tribal nation could theoretically maintain its fee simple possessory interest in its ancestral lands, as well as its universal right to control its ancestral lands. In doing so, tribes can shift federal oversight to exclusive tribal oversight.

In practice, the legal framework operates as follows:

> (1) The tribe, or an agent acting on their behalf, purchases and acquires title to their ancestral land in fee simple as the BPFV. [It is important to note that] [i]ndians and tribes can obtain fee land by purchasing it, inheriting it, or receiving it as a gift just as everyone else can.[50] However, acquiring title in fee simple came at the expense of losing federal recognition and falling out of the trust relationship,[51] the result of which meant not having the federal protections and rights that flow from recognition under

48. 25 C.F.R. § 151.1 (2020).

49. Worcester v. Georgia, 31 U.S. 515, 520 (1832); *see also* G.A. Res. 61/295, *supra* note 41, at 8.

50. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 165 (4th ed. 2012).

51. *See id.* at 35.

American Indian law. This framework helps tribal nations use that disadvantage to their advantage.

(2) The BFPV transfers the real property gratuitously to the tribal nation by forming an *inter vivos* foreign trust.[52] As the BFPV, they can gratuitously transfer the real property to the tribal nation in trust.[53] In doing so, this framework would place the BFPV as the trust settlor; the tribal council, or functional equivalent, as the trust manager(s); and the tribal members serving as an ascertainable class of beneficiaries.[54] However, this framework suggests the creation of a foreign trust in particular; any trust can be deemed a foreign trust so long as it meets the requirements of a validly executed trust.[55]

(3) A foreign trust is a trust that fails either the "control" test or the "court" test under federal law. The "court test" is satisfied if an American court has "jurisdiction to supervise the trust's administration."[56] The foreign trust formed under the proposed framework would fail this test because as a separate sovereign and fee simple title holder, only a tribal court would have jurisdiction to supervise the trust's administration.[57] The "control test" requires that one or more U.S. persons have the ability to render substantial control or decision-making authority over the trust.[58] The foreign trust formed under the proposed framework would fail this test as well because as dual-nationals, all trust-related stakeholders would assert their tribal citizenship status, not their U.S. citizenship status, for all decision-making authority over trust matters. Thus, the formation of the foreign trust instrument created by the gratuitous transfer of ancestral real property from the BFPV, for the benefit of tribal citizens as non-U.S. third-party

52. *See* 2 FREDERICK K. HOOPS ET AL., FAMILY ESTATE PLANNING GUIDE § 31:5(a), (d) Westlaw (database updated Dec. 2020).
53. RESTATEMENT (THIRD) OF TRUSTS § 10(b) (AM. L. INST. 2001).
54. RESTATEMENT (THIRD) OF TRUSTS § 3 (AM. L. INST. 2001).
55. *See* HOOPS ET AL., *supra* note 52, § 31:5(a).
56. *Id.*
57. 26 C.F.R. § 301.7701-7(a)(1)–(2) (2021).
58. *See* HOOPS ET AL., *supra* note 52, § 31:5(a)(1)–(9).

> beneficiaries, is valid and income generated from non-U.S. sources is exempt from federal taxation.[59]
>
> (4) As fee simple title holders—the highest form of possessory interest in real property under U.S. law—and as a self-governing sovereign tribal nation, the tribe sends constructive notice to the federal government, as well as international institutions, declaring their independent sovereign nation status. The constructive notice will make clear that the tribe has reclaimed possessory interests over their ancestral lands under federal and international law, as well as under their own tribal law. Constructive notice would be issued by the tribal nation-trust managers to the federal government and the international community such as the United Nations (U.N.) and the Organization of American States (OAS). The intent of the constructive notice is to declare the tribal nation's sovereign status and lawful application of federal[60] and international instruments[61] to possess and secure their ancestral lands and govern themselves.

In theory, the application of the proposed framework could expose a new legal space where property law, trust and estates law, American Indian law, and international human rights law intersect. The proposed framework allows for indigenous communities, as BFPVs and trust administrators with jurisdictional oversight, to reclaim their ancestral lands that were once taken from them under a foreign system. Under this legal framework, grounded in legal theory and taking key presumptions into consideration, a tribe applying the proposed legal framework can not only return home to where they once came, but can also retain complete control over its

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59. GRAYSON M.P. MCCOUCH, FEDERAL INCOME TAXATION OF ESTATES, TRUSTS, AND BENEFICIARIES IN A NUTSHELL 353–54 (2017).

60. *See* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); United States v. Wheeler, 435 U.S. 323 (1978); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172–73 (1973); Worcester v. Georgia, 31 U.S. 515, 559 (1832); NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 91 (8th Cir. 1956); COHEN, *supra* note 39, § 15.01, at 995.

61. Org. of Am. States [OAS] Charter art. 3(b); G.A. Res. 61/295, *supra* note 41, at 2–3; American Declaration of The Rights and Duties of Man, *supra* note 43, pmbl.

land and engage with the world as an independent sovereign nation.

III. CONCESSIONS TO CONSIDER

When considering the application of the proposed legal framework there are two key concessions worth discussing. These concessions include the financing and availability of tribal lands for purchase; and the refusal of the United States to be bound by international legal authorities. The availability of a particular tribe's ancestral lands for purchase from the free market is an obvious initial hurdle to executing the proposed legal framework. At a minimum, any given tribe's historical territorial boundaries likely span across multiple municipalities, states, and jurisdictions, all with their own governing property and real estate laws.[62] To that end, to reclaim a tribe's ancestral territory in its entirety would be extremely challenging and likely require a scattered development approach purchasing parcels within the tribal boundaries as they become available over time. Moreover, the title that may be available for purchase may not be a title with fee simple possessory interest. This framework relies upon a tribe's financial or fundraising capabilities to secure the required financing to purchase their ancestral lands. However, assuming the ancestral lands are available, and financing is secured, a tribe could purchase their ancestral real property as a BFPV recognized under United States property law. As functioning tribal nations native to the lands they also retain fee simple title over, the have both the highest form of legal possessory interest in real property under United States law, and the highest form of inherent right to ancestral real property under international law. This legal framework exposes these parallel forms of real property interests as an indigenous American Indian with fee simple ownership over ancestral lands can only raise.

A second critical, and arguably the most important, concession to consider is the United States' refusal to be bound by international legal authorities. In a death penalty case, a United States national on death row in Texas petitioned the IACHR on grounds that certain evidence admitted violated his rights to life, equal protection, and due process afforded to him in the American

62. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 8 (2019).

Declaration.[63] The IACHR's report stated that under the American Declaration, the United States violated the prohibition on the arbitrary use of capital punishment and denied the defendant's rights to a fair trial and due process of the law.[64] The Seventh Circuit declined to stay the defendant's execution nonetheless, and described the American Declaration as an "aspirational document."[65] Moreover, Congress has yet to statutorily adopt any portion of the UNDRIP or ADRIP that the proposed framework relies upon.[66] Statutory adoption of UNDRIP or ADRIP articles related to property ownership and control are crucial to future development of this framework. This is evident in the case, *Medellin v. Texas*, where the Court found that an international court's decision is not enforceable in United States courts in the absence of any statutory authority enacted by Congress.[67] And although the United States has signed onto to the Organization of American States, and United Nations charters and declarations referenced above, the United States has yet to ratify either.[68] This refusal to be bound by international legal authorities affords the United States the right to deny a tribe's assertions to fully self-govern their ancestral real property above and beyond the legal parameters of fee simple ownership under United States law. However, there is one documented case in which the United States defended its position against indigenous claimants challenging the federal government over uses of their tribe's traditional land.

In *Mary and Carrie Dann v. United States*[69] the IACHR issued the following statement in their opinion:

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63. Garza v. United States, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 2 (2001).

64. *Id.* ¶ 3.

65. Garza v. Lappin, 253 F.3d 918, 923 (7th Cir. 2001).

66. *See* Gale Courey Toensing, *House Resolution Falls Short of Unqualified UN Declaration Adoption*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://indiancountrytoday.com/archive/house-resolution-falls-short-of-unqualified-un-declaration-adoption [https://perma.cc/3E8M-5EBX].

67. Medellin v. Texas, 552 U.S. 491, 523 (2008).

68. *See* American Declaration on the Rights of Indigenous Peoples, *supra* note 42, at 47; *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html [https://perma.cc/NM6A-PKLF] (last visited Nov. 12, 2021).

69. Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002).

> [W]here property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, [indigenous peoples have the right to] recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.[70]

Nonetheless, the United States has yet to adopt the ruling of the IACHR in *Dann*.[71] But the larger importance is that the international legal community is willing to engage and support actions brought against the United States for wrongs against indigenous Americans. And should the federal government challenge an application of the proposed framework by any tribe, the IACHR can provide tribes a legal forum to hold the United States accountable. It is important to note that any one nation's laws does not supersede international law, even if that nation's laws takes jurisdictional precedence over an international law.[72]

CONCLUSION

"Real property holdings are the single most important economic resource of most Indian tribes."[73] Land ownership allows for the preservation of distinct nationhood, making it central to tribal sovereignty.[74] In the United States, the taking of Indian land was how tribal sovereignty was systematically disassembled. By codifying superiority in law, the United States created land reservations and a federal recognition process to tell Indians who they were and where they could exist under the guise of "agreement" by treaties—many of which were often abrogated as the law also allowed

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70. *Id.* ¶ 130.

71. *See* Response of the Government of the United States, Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002).

72. *See* Avena & Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶¶ 27–28 (Mar. 31).

73. COHEN, *supra* note 39, § 15.01, at 995.

74. *See id.*

for.[75] As terms of the treaty, and out of the need for self-preservation of a tribal community, tribes were assigned reserved lands that was theirs, but not *fully* theirs.

Those tribes now federally recognized have a lawful status allowing them to petition the federal government to take more lands into trust for the benefit of their tribes, albeit still with limited possessory interest.[76] However, there are many tribes with no documented history of land dispossession because they did not enter into treaty terms with the United States.[77] Therefore, the legal theory underscoring the proposed framework is that barring any actual documentation of any dispossession of tribal lands (i.e. via treaty for reserved lands or an allotment agreement to convert title), the inherent and legal rights to the lands that were never given away still remain.

This Article proposes a legal framework that would allow a tribe to assert those rights that still remain lawfully and reclaim their ancestral tribal lands in the highest form of possessory interest under United States law. And protect that possessory interest in real property by placing it in a trust for the benefit of the tribal community. This framework operates around the restraints of the American-made limited right to occupancy only applicable to Indians. Michael Blumm describes this Indian property right as a "fee simple [that is] subject to the government's right of preemption" or, alternatively, as a "fee simple with a partial restraint on alienation."[78] In response, the proposed legal framework removes all restraints on the Indian's right to their ancestral real property.

Non-recognized tribes operate outside of the trust relationship between the federal government and tribes the government formally confers recognition upon. As such, non-recognized tribes cannot petition the federal government to take additional tribal lands into trust. However, even if non-recognized tribes were allowed to

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75. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566–567 (1903) ("When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . . ."). *Id.* at 566.

76. *See* COHEN, *supra* note 39, § 3.02[3], at 134.

77. *See id.* § 3.02[3], at 135.

78. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 741 & n.183 (2004).

petition the federal government, approval of the petition would give the federal government fee simple possessory rights over the tribal lands and defeat the framework's purpose. Instead, federally non-recognized tribes can purchase their ancestral lands as fee-simple title holders outright, transfer the real property into a foreign trust, and maintain both the highest form of possessory interest under United States law, as well as their inherent universal right to self-governance over their ancestral lands.

The concepts of title conversion and dual-nationalism are not foreign to the American legal system, nor under the narrower area of American Indian Law. However, the proposed legal framework addresses the barriers and limitations to Indian property rights from a new and unexplored position—being a citizen of two fully separate sovereign nations of the same geographic territory in the twenty-first century. In its fullest realization, the proposed legal framework attempts to restore the nation-to-nation relationship between the United States and Indian tribes and restore the trust missing from the existing "trust relationship."