Section 5, Indian Trust Land Acquisitions, and Secretarial Authority

G. WILLIAM "BILL" RICE*

With an introduction by

ROBERT N. CLINTON**

INTRODUCTION

At least since the Termination Era of the 1950s, the federal Bureau of Indian Affairs (BIA) has drawn a distinction for purposes of taking tribal land into federal trust status between so-called mandatory acquisitions and claimed discretionary takings. Some statutes, usually tribally specific statutes contained in settlement legislation, such as the Gila Bend Indian Reservation Lands Replacement Act of 1986, *require* the Secretary of the Interior (Secretary) to take land into trust for designated tribes, often when certain conditions are satisfied.[1] Since such statutes vest no discretion in the Secretary to take such action, these trust acquisitions are often known as mandatory takings. By contrast, the BIA has long taken the position that the only general, i.e. non-tribally-specific, statute authorizing the Secretary to take land into trust, § 5 of the Indian Reorganization Act of 1934, granted the Secretary *discretion* as to whether to take tribal and individual Indian law into federal trust status, the so-called discretionary takings. Remarks by the late Professor G. William "Bill" Rice published for the first time below challenge both this distinction and the very notion that the Secretary has any discretion

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* The late G. William Rice walked on in 2016. At the time of death, Bill was an Associate Professor of Law and Co-Director of the Native American Law Center, University of Tulsa College of Law. He also was a tribal citizen of the United Keetoowah Band of Cherokee Indians in Oklahoma.

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1. Gila Bend Indian Reservation Lands Replacement Act, Pub L. No. 99-503, § 6(c)–(d), 100 Stat. 1798, 1799–80 (1986).

or even decisional authority in the matter, at least where a tribe acquires, by purchase, bequest, gift or otherwise, new land for itself.

Since Professor Rice's argument relies so critically on the actual text of § 5, it is set forth here. For most of its post-enactment history, § 5 of the Indian Reorganization Act of 1934 was codified at 25 U.S.C. § 465. It is so cited in virtually all cases interpreting the statute. For completely inexplicable and unknown reasons, the Reviser chose to move it to 25 U.S.C. § 5108 sometime in the summer of 2017, thereby rendering Indian law research in the field even more complicated than it already was. Section 5 of the Indian Reorganization Act, as amended, is therefore now set forth at 25 U.S.C. § 5108 and reads in full as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
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> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
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> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.[2]

The language in brackets was added by a 1988 amendment, the only amendment to date of § 5, and is not relevant to Professor Rice's analysis. The remainder of the text is original to the 1934 Act. Professor Rice's remarks were delivered prior to the Reviser's unceremonious uprooting of

2. 25 U.S.C. § 5108 (2018).

§ 5 from its historic position at 25 U.S.C. § 465. Accordingly, he references § 5 interchangeably with § 465.

The late Professor G. William "Bill" Rice was a dear friend and a wonderful supporter of the Indian Legal Program (ILP) of the Sandra Day O'Connor College of Law at Arizona State University. On April 28–29, 2011, the ILP sponsored a program on the Indian land trust entitled *Treaty to Trust to Carcieri*.[3] Bill spoke at this program and delivered remarks, which I told him afterwards, constituted the single most brilliant, startling, and eye-opening talk I had heard in the decades I had been involved in Indian law. I promptly encouraged him to publish his talk, which he said he would do in a book on the Indian Reorganization Act on which he was working. Unfortunately, Bill's untimely passing deprived Indian country of that major contribution. As a tribute to our friend and supporter, the late Professor G. William "Bill" Rice, the Indian Legal Program is proud to publish his remarks with the permission of his family.

Since Bill's usual folksy story-telling oral style of presentation often buried the lede, as the journalists would say, I offer in this introduction the gist of Bill's revolutionary point so it can be fully appreciated. Applying a Justice Scalia-like[4] textual statutory analysis, Professor Rice makes the point that the only discretion granted to the Secretary in § 5 is the "discretion, *to acquire*, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations" set forth in the first paragraph of the section. The language regarding taking land in trust is contained not in that first paragraph but in the last paragraph of § 5. The last paragraph mandates that "[t]itle to any lands or rights acquired pursuant to this Act . . . *shall* be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." In short, utilizing only the language of § 5, Professor Rice demonstrates a point that has been staring Indian law scholars and practitioners in the face for decades but has been completely ignored until he raised it—§ 5 does not grant the Secretary any discretion over whether to take tribally held lands that were not purchased by the Secretary into trust. More important, Professor Rice claims that the last paragraph does not even create a Secretarial decision process. Since lands acquired by Tribes are often acquired pursuant to either § 16 or 17 of the Indian Reorganization Act, they are "lands or rights acquired pursuant to this Act," and that paragraph merely

3. Indian Legal Program, *NABA-AZ Announcements*, ASU C. L. (Mar. 22, 2011), https://newsletters.asucollegeoflaw.com/ilp/2011/03/22/naba-az-announcements/ [https://perma.cc/NVS4-YRH2].

4. Apologies to Bill's memory and to his family for the comparison to the late Justice Scalia since Bill unquestionably would have hated the comparison.

requires that the "[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe . . . ." It does not require any Secretarial action. According to late Professor Rice, when a tribe purchases land, the Tribe can, under the authority of this paragraph of § 5, simply have the deed read that the land is purchased by the name of the United States in trust for the designated tribe. The Tribe can then simply notify the Secretary that the United States has acquired new Indian trust lands. At the conference, Professor Rice claimed (off-mic) that as a practicing lawyer, he had actually undertaken precisely such a land purchase closing, which I subsequently learned was for the Sac and Fox Nation in Oklahoma. Needless to say, Bill's revelation is simultaneously both startlingly revolutionary and, since predicated entirely on the plain language of the statute, startlingly conservative.

We are honored to be able to present the late Professor G. William "Bill" Rice's telling of this story as a tribute to our late friend and a wonderful scholar and teacher who is sorely missed.[5]

SECTION 5, INDIAN TRUST LAND ACQUISITIONS, AND SECRETARIAL AUTHORITY

G. WILLIAM "BILL" RICE[6]

Thank you very much Carl [Artman]. It's a pleasure to be here. I'll start telling stories pretty soon. Every now and again, I get to tell the story. So, I guess I'll have to tell a few before we're all done here. I'll try to keep us back on time, so I'm not going to go as far as I think I was intending to earlier, but let me just start with where we started yesterday a little bit. This is what in the world of science, we call that independent verification of what Professor ([Clinton)] and Professor ([Tsosie)] and a few others said. I have the treaties up on my website, if anybody wants to look at them. They are by tribe. They

5. Professor Rice's remarks below are derived from a transcription of a videotape of his conference remarks made after his untimely death. They have been minimally edited to remove repeated words, "ums" or "ahs" or other distracting speech inflections common to oral presentations, or to insert a logical word apparently not caught by the microphones. With the exception of such light-touch editing, Professor Rice's remarks are presented as orally delivered. Bracketed material in the remarks are not Professor Rice's words but inserted by the editors for clarification.

6. The explanatory footnotes in this section are offered by the editors of the *Arizona State Law Journal* and were not original to the late Professor Rice.

are searchable. They are everything. So take a look. And what Professor ([Clinton)] said is precisely correct. In that if you go looking and searching for Indian trust property, you should be able to go find it during the Treaty era. There is the Seneca case at ([Onondowa'ga)] and that occurred in a lot of ways because the Ogden Land Company had purchased the preemptive right from the State of New York to extinguish the tribal title, so that under American law, there was this Corporation. There is this weird thing called the preemptive right of purchase and in part that purchase occurred and when it occurred and they were supposed to move and they refused to move and it was all kinds of interesting things going on. But the long and the short of it, is that they ended up with a trust title. That is the only other trust title I've really been able to find—except I think there was one with the Otoe's where they had a proportion of their land in trust in the late 1860s. But the only other ones really were when a tribe was being removed from Iowa to Oklahoma or from Kansas to Oklahoma or from someplace else. And instead of simply receiving a flat fee or a flat amount for their properties that they were leaving, they left it behind to be purchased by homesteaders thinking they would get more money that way than the United States was offering. So they put it up for the highest bidder, and in the meantime between the time when the tribe actually left and the time that the land was sold, there would be a treaty agreement that [would] hold the land in trust for the tribe and then to be sold to the homesteaders. And then the proceeds of the sale [would] go under the U.S. Treasury and Trust. So, there was no contemplation of current, long-term trust title for Indian lands prior to the General Allotment Act.[7] Really even most of the individualized allotments that occurred prior to the General Allotment Act, the allottees got a fee title just like you saw yesterday in the Kansas Indians and the New York Indians cases. They were still considered Indian lands. They were still tax-exempt, [and] they had all the indicia of Indian country because the Indian title had not been extinguished, but they weren't in trust.

There was a lot of Trust Land. The Trust Land entered the vocabulary and into the legal world with the General Allotment Act. All the individual allottees got individualized allotments, and those were to be held in trust for twenty-five years.[8] At the end of which time is to be nice brown-white people and nice brown-white farmers and then after that, we would obtain the fee to our properties, and we would've given up our [traditional] way[s] and just become brown-white guys. Therefore, the Indian problem of the United

7. General Allotment Act of 1887, Pub. L. No. 49-119, 24 Stat. 388. This was also called the Dawes Act after its lead proponent, Senator Henry Dawes.

8. *Id.*; *General Allotment Act*, LIBR. OF CONGRESS, https://www.loc.gov/law/help/statutes-at-large/49th-congress/session-2/c49s2ch119.pdf [https://perma.cc/M98G-7FK3].

States, being that we had assets, and they wanted them, they would go away. We would no longer have assets, and they would have them, and therefore we would become irrelevant. It didn't happen. For 50 years, the United States sat around and waited for it to happen as that whole era between 1887 and 1934. So, when we look historically, we see that there really isn't such a thing as an Indian trust title. It just didn't exist. We held land as Indian land as Indian lands are held. Most of the treaties prior to the great Treaty Commission, the Great Peace Commission of the 1850s and 60s, in fact, drew boundaries.[9] The purpose of the treaty was not to determine how the tribe held its title but to draw boundaries between the United States and the tribe. So you see that in all the early Cherokee treaties, all the early Great treaties, all the treaties on the East Coast, and out into the Plains. You see a description of a boundary line between the United States and a particular tribe or tribes. This is words of dominion. This is words between foreign powers. Maybe not foreign states pursuant to Article III of the Constitution, but certainly a foreign power pursuant to Article—I believe it's part of the Constitution to prohibit states from in fact negotiating compacts with foreign powers.[10] And certainly, the Supreme Court has held over and over the Indian tribes' powers are foreign to the federal legal system,[11] to the American legal system, because our powers predated the development of the American legal system.

So we have this drawing of boundaries and even under the documents of discovery, if you will, as between the United States and the colonial powers of Europe perhaps the United States would claim in these early days, that we set within their boundaries. We were within their jurisdiction, and if France or Spain or England or somebody else came and tried to treat[y] with the tribes, they would consider that a threat to the United States and act accordingly. Sounds like NATO. If somebody attacks [a] NATO country, they are going to treat it as a threat to the United States and an attack to the

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9. In 1867, Congress passed a bill authorizing a commission (the "Indian Peace Commission") to establish peace with various Indian tribes, following decades of fighting between the tribes and the United States. For an in-depth look at the Indian Peace Commission, see Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867–1868*, 22 GREAT PLAINS Q. 35 (2002).

10. U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation."). The power to negotiate treaties and compacts with foreign governments is explicitly given to Congress and the President. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."). The power to regulate commerce with foreign nations is reserved to Congress alone. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, *and with the Indian Tribes*.") (emphasis added).

11. *See* Worcester v. Georgia, 31 U.S. 515 (1832). This case is traditionally considered to have founded the doctrine of tribal sovereignty in the United States.

United States and respond accordingly. As between the United States and the tribe there was a boundary line. There was no space. The reason we call it a reservation is because we reserved it for ourselves. There was no grant to start with. No grant occurred later when we swapped land over there for land over there. But even that swap was to be held as Indian lands are held. So, we start off in a world where we have tribal title. We have original title. Every way we characterize it, it was ours. We owned it.

That changed with the Allotment Act.[12] The Allotment Act, in my view, is the first real colonial strike by the United States. We had wars. We had land swaps. We had all the same types of things that other countries have with respect to the countries next door to them. But the 1887 Allotment Act was really the first time the Americans extended their property laws into the tribal jurisdictions, and he placed tribal property law with American property law. So, what happened? Where does that leave us?

Well, to move forward a little bit what that means is that our tribes have basically a few general postures that we're all in. Some tribes are still in their own country. Some tribes have never had to leave the territory to which they're indigenous. A lot of tribes out here, as I understand it, are blessed to be in that situation. You're in the place where God put you. You're in the place where you can track your culture and your history and your traditions back as far back as you can trace it. When your old folks say, "Right over there something happened." You can, you know, you can teach your grandchildren those things. So even those tribes, though as we heard yesterday, have lost big swaths of their territory, they may still be in their own country. They may still be where they were supposed to be, but yet they don't have it all. There are big chunks of it missing. There's maybe, you know sacred sites that are missing that's now owned by somebody else. That's now, way over there. And we got to leave the reservation and get on our pony and go over there if [we] are going to visit that site. If [we] are going to conduct that ceremony whatever it is willing to do.

Now other tribes end up being moved away across the country from their original location.[13] Some of them still have reservations where they got moved to. Some of them don't. Some of them still have all of their lands where they were moved to, some of them don't, but they've been cut off from their original place. They've been cut off from their original location. And these people have a hard time. I guess that is the best way I know how to say

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12. General Allotment Act of 1887, § 5; *General Allotment Act*, *supra* note 8.

13. *See Indian Removal*, PUB. BROADCASTING SERV., https://www.pbs.org/wgbh/aia/part4/4p2959.html [https://perma.cc/NH39-6XM4]; *Indian Removal Act: Primary Documents in American History*, LIBR. OF CONGRESS, https://guides.loc.gov/indian-removal-act [https://perma.cc/6HJJ-NZSY].

it, because while they have some other people or developing or have developed that same kind of tie to their new lands, there are still those who have that pull back to the old land, back to the homeplace. I remember old people talking about things like, "Back home we did it this way. Back home this is what we used." What they were meaning was back in the original place that we came from, not in Oklahoma where we ended up landing. There were thirty-nine tribes in Oklahoma. I think only three of them are indigenous to Oklahoma.[14] All the rest came from somewhere else. There's tribes in Kansas that come from the Great Lakes area. So, lots of tribes have been moved from one place to the other. In addition to that, a number of tribes were hit with the allotment problems, Allotment Era legislation. And amongst those tribes, we still have—we had two different kinds of groups. One group simply got allotted, and the tribe retained title to most of the rest of the reservation or almost all of it. So, we now have a reservation with tribally owned property, which has a lot [of] individual allottees and their heirs now owning lands within the reservation. Other tribes through the virtue of allotment in cession agreements or surplus land acts or various other processes, ended up with the individual allottees obtaining individual property rights and allotments and most, if not all, of the rest of the balance of the property was sold to non-Indians. A lot of times, the tribe's still there, but the tribe has no land or very, very little land on which the tribe, as a tribe, can operate. And most of the land has been taken up by your allottees, that's who has it. Sisseton Wahpeton Oyate is like that up in the Dakotas. They have very, very little tribal land—all allotments—and the Supreme Court came along later and said their reservation was abolished, but they still have the rest of this Indian country. A classic example in Oklahoma, a tribe that I represented for years and years, the Sac and Foxes, had 485,000 acres of land in the reservation. After the allotment and sale, they have about 15,000 left. I mean, that's the nature of what the allotment process did to a lot of tribes. They have 800 acres of tribal land, and they purchased some over the years. But by and large, they lost lots of their property.

So, we have tribes all over the map in the terms of what properties they own and then what the allottees own and how big their reservations are, and whether they're in their home country and all these types of things. But every single one of them had land problems . . . . How many tribal leaders we got [here]? Anybody [here] in tribal government or—okay. How many peoples' reservations have enough land? You don't want any more? Nobody [indicated they didn't want more]. How many [of you] have sacred sites [that

14. *See Oklahoma American Indian Nations*, OKLA. HIST. SOC'Y, https://www.okhistory.org/research/oktribes [https://perma.cc/XY7L-4ANH].

are] out of your control now, that you need to have control over? Only one! You don't have any sacred sites back home that you want to take control over? I suspect you do.

Think about it. Every tribe needs land. How do we get land? Well, we go get it, right? We go to war. Well that [didn't] work very well last time. So, we go buy it. What happens when we buy it? Well, I feel kind of strange up here because I'm the guy who for 15 years really stood up and said we don't need no more Trust Lands. What Indians want is that we don't really want Trust Lands. What we want is land over which we have dominion and control. We have land no matter how you call the title. Where our laws apply, the state laws don't apply, and federal laws only apply when we agree that it does. That's really what we need. We need tax base. We need lands upon which to live. We need lands that we can—every tribe can decide and determine for itself how it wants to proceed, how it wants to make a living, what kind of businesses and things that they want on their property. We need dominion over [our land]—we need a boundary between the United States and the tribe.

We need to go back to *Worcester v. Georgia*[15], back to the early days, treat[y] situation[s] where the United States acknowledges that's your land, and you do what you need to do with it. And we have a failsafe mechanism for keeping people from trying to take it out of our hands, which was 25 U.S.C. [§] 177[16], which we talked about also yesterday. That was based on, if you will, the 1763 King's Proclamation that said the same thing.[17] You can't purchase land from the tribes. You can't get any individual rights except under tribal law, that's *Johnson v. M'Intosh*[18] too, that you can get those without the permission of the sovereign from Europe. So, you can go within the tribe and take whatever tribal title there is, but you can't take that and take it outside the tribe's title.

But the way that has become the practical way. The way that we talk about taking title anymore is that we put land in trust for trust. And the reason we

15. *Worcester*, 31 U.S. at 515.

16. 25 U.S.C. § 177 (2018) (regulating purchases or grants of land from Indians).

17. After winning the Seven Years' War, King George III issued the Royal Proclamation of 1763 which, among other things, explicitly stated that all Indian land would be considered Indian land until "ceded by treaty." It also forbade settlers from claiming land from the Indians. Instead, only the Crown could buy land from the Indians. *Royal Proclamation, 1763*, INDIGENOUS FOUND., https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/ [https://perma.cc/M2W3-4ENM]. Some theorize that the Proclamation was actually a "spark" of the American Revolution. *See* Jesse Greenspan, *How the Proclamation of 1763 Sparked the American Revolution*, HISTORY (Oct. 28, 2018), https://www.history.com/news/remembering-the-proclamation-of-1763 [https://perma.cc/38MA-HWDK].

18. 21 U.S. 543 (1823).

talk about doing it that way is not the General Allotment Act because the General Allotment Act didn't provide for trust title for *tribes*. The first thing that provided for trust title for tribes that I've been able to find in my research is an act that was . . . [i]t was an Act to conserve and develop Indian lands and resources, to extend the Indians the right to form business[es] and other organizations, to establish a credit system for Indians, to grant certain rights of home rule to Indians, to provide for vocational education for Indians and for other purposes. That's the [formal] title of the Act. And that's the Act that we shorthand and say the Indian Reorganization Act of 1934.[19] It's really not titled the Indian Reorganization Act. It's got a big long fussy title, and so we all shorthand it.

And we all have ended up shorthanding a number of things about the Act. Now the Act was designed to do basically four things. [First, it sought] to stop the loss of Indian lands through the allotment process and the allotment system. [Second,] it was designed to acquire additional lands that Indian people needed, primarily tribal lands. It was—and as part of that to this—one of the very first Indian Land Consolidation Acts. It was designed to provide a mechanism where fractionated heirship allotments could be returned to the tribes and purchased from the allottees. And then it would become tribal land again.

So, the third purpose was to provide education for Indian people: vocational, college, higher ed[ucation]. And the fourth one was to provide a credit system for Indian people.

Now in the process, several places in the Act provide for appropriations for those purposes or education, or land acquisitions, for organizing tribes into constitutions and charters, and also to provide a revolving credit fund. So, there are four or five sections of the Act to provide for appropriations. There's also four or five sections in the Act to provide for land acquisitions. [Section] 463[20], which was § 3 of the IRA, provided for the return of surplus lands to the tribe by the Secretary [of the Interior]. Now what were the surplus lands? They were lands that the tribe had conveyed to the United States. And so, they were federal lands. They are lands owned by the United States but had not been claimed by homesteaders. They were surplus. They were extra. Nobody seemed to want them. And the tribe could use them. So, we had a provision that says, we can, the Secretary may, return to tribal ownership

19. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as 25 U.S.C. §§ 461 et seq. and transferred to 25 U.S.C. § 5108); *see also* G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575 (2009).

20. 25 U.S.C. § 5103 (formerly 25 U.S.C. § 463).

those lands. Section 4 of the IRA[21] provided for the transfer and exchange of restricted Indian allotments, so that you could transfer your allotment to the tribe. You could exchange your lands with the tribe. It provided mechanisms for individual Indians with the approval of the Secretary to let go of their title. They could swap lands or give their lands back to the tribe or to the tribal corporation.

Section 5[22] said that the Secretary—and this is the one that we're all taught, and we're all told to believe [it] . . . gives the Secretary the authority to take land in trust for Indians. I mean, I don't [know] how long I've heard that banter. And I believed it. When I was in law school, I always thought that § 5 of the IRA gives the Secretary the power to put land in trust for the Indians. *It doesn't say that!* I've looked at it for 20, 30, 40 years, I'm not going to tell you how long, a long time. Long enough that I didn't use to wear these [glasses]. I've always been told that and I always believed it. And I've looked right at it. *But that's not what it says!*

And then § 17 of the Act, which is 25 U.S.C [§] 477[23], authorizes tribal corporations, and the implications tribal § 16[24] also, authorizes tribal governments under their Constitution to acquire property to acquire lands.

So, let's read § 465[25] if you'll humor me. It's on page 161 in the handout materials in the book, so if you got them, you can follow along with me and if you don't, I'm going to read them to you. 'Cause I'm a professor, and this is exercise in statutory interpretation. So, we're going to look at this. Alright. If you look at the structure of § 465, which is § 5 of the IRA, it's got four paragraphs in it. And those four paragraphs, the very first one, says,

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase . . . relinquishment, gift, exchange, or assignment, any interest in lands, water rights, all kinds of other rights, whatever, including trust or otherwise restricted allotments whether the allottees be living or deceased for the purpose of providing land for the Indians.

The word trust is nowhere to be found. The Secretary's authorized to acquire land for Indians. Now if you turn over to [§] 477 and let's look at the authority for tribally charted or secretarially chartered federal corporations. This is a federal instrumentality. It's a federal corporation. It's *McCulloch v.*

21. 25 U.S.C. § 5107 (formerly 25 U.S.C. § 464).
22. Today, § 5 is codified as 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465).
23. 25 U.S.C. § 5124 (2018).
24. 25 U.S.C. § 5123 (2018) (formerly 25 U.S.C. § 476).
25. 25 U.S.C. § 5108.

Maryland.[26] It's *Osborn v. the Bank of the United States*.[27] It's all these old cases that say Congress can create corporate entities to take care any of its functions to, you know, as a means to an end. If it's got the right to control commerce or to regulate money or to do other things, which it does with Indians, we can use corporations—good.

Here's the language [of § 17]:

> the charter may convey to the incorporated tribe the power to purchase, [take] by gift, or bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase *restricted* Indian lands and to issue in exchange . . . therefor interest[s] in corporate property.

In other words, a tribal title for the same land. Think about that. Sounds an awful lot like the Secretary's authority under the first paragraph of § 5. Does it not?

Now let's go back to § 5 for a minute. Like I said[,] the first paragraph authorizes the Secretary to acquire land for Indians. The second paragraph authorizes an appropriation so the Secretary will have some money to buy land with. There was no contemplation that tribes would have to go out and buy this property and give it to the Secretary. The Secretary is supposed to have his own money. The Secretary bought it with § 5. The tribes bought it with § 17. The Secretary uses his money. The tribes use their money or credit funds. Credit funds for buying land was one of the authorized uses of the credit fund. I've got the documents from 1934 to prove it.

Now look at the third and fourth paragraphs of this section. "The unexpended balances of any appropriations made pursuant to this section shall remain available [to be] expended." So, all the money the Secretary got to purchase land, is going to stay there until he purchases land. Right? The next paragraph provides that, "title[s] [of] any lands or rights acquired pursuant to *this Act*," not the Section, this Act. Now the Secretary would have us read that as saying[,] "this Section," but that's not what it says. It says "title to . . . [lands acquired under this Act] . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which . . . land is acquired and such lands or rights shall be exempt from State and local taxation." I always . . . thought it says[,] "this Section." It doesn't say "this Section." It says[,] "this Act."

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26. 17 U.S. 316 (1819).
27. 22 U.S. 738 (1824).

Now here's the interesting part, it used to say "this section." When this bill was originally introduced into Congress, these two words were flip-flopped. It said the unexpended balances of any appropriations made pursuant to this Act shall remain available until expended and title to any lands or rights acquired pursuant to this section shall be taken in trust. That was the original draft language. Congress changed it. Not trivial to statutory interpretation! Now those professors [who] teach statutory interpretation, which I don't, you can correct me, but it seems to me when Congress changes the words into sentences that are back-to-back, and they say "this Section" in one sentence and "this Act" in the next one, they mean two different things. When the draft bill says "this Section" and they changed the words to "this Act," they meant to create a different result!

That means something, seems to me. It seems to me when it says "[T]itle to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the . . . tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." We have to look and see where all in the Act lands are authorized to be acquired. Section 17 is one of those; it explicitly says the tribal corporation shall have these powers. Okay. That is precisely how the bureau did it. From 1934 to 1954, the tribal corporations incorporated, tribes even in Oklahoma where it had these cooperative associations that would be created and charted for any ten Indians. We had to use the same format. We used the same form. The standard bureau form in paragraph four for credit to borrow money to spend it for whatever you were going to do, required that all property acquired by the corporation and be taken in the name of the United States in trust for the corporation. Under the Standard Form A, the Kenwood Indian Livestock Association had to hold its cows and its goats, its tractors, its fences, and its land in trust. The Walters Poultry Association had to take its feed in trust until it was fed. When they fed it to their turkeys, then it went out of trust. My guys ate trust steak around Kenwood, Oklahoma. We had trust goats and trust cows and trust tractors. It's a fact; I got the documents. Now why don't we do it that way anymore then. If this was the way that Collier . . . and Cohen[28] and all those guys did this then why do we

28. John Collier was the Commissioner of Indian Affairs within the Department of the Interior during the Franklin Roosevelt administration. *A Passion for the True and Just: Felix and Lucy Kramer Cohen and the Indian New Deal*, U. ARIZ. PRESS, https://uapress.arizona.edu/book/a-passion-for-the-true-and-just [https://perma.cc/N7GF-MHUL]. Felix Cohen, author of the *The Handbook of Federal Indian Law*, was an assistant solicitor in the Department of the Interior and wrote the legislation for the Indian Reorganization Act (1934) and Indian Claims Commission Act (1946). *Id.*

not do it anymore? We don't do it anymore because we're still applying a Termination Era policy.

Everybody knows what Section Public Law 83-280 is, right? [It was] the law that authorized states to exert jurisdiction in the Indian country and seven states[29] were made mandatory, and all the other states could get it if they wanted it. And we all hate it. Anyone know what Public Law 83-281 is? That's the one that prohibited the Secretary of the Interior from requiring sales of the trust cows to be approved for individual Indians. The Secretary changed the BIA manual that changed the form that you had to fill out to get your credit. They didn't change the law. The law hasn't changed. Bureau policy changed because they thought they were going to terminate all the Indian tribes, [and] it would go away in four or five years. We wouldn't have to do this. We're closing all these old programs out. We're changing the BIA manual. We won't let them take any more land or any more cows, or goats or tractors in trust. That's the reason.

Part of this came, you know, when I asked the question who else is it that takes the title [in trust]. I found another federal corporation called the TVA, the Tennessee Valley Authority. And in their charter, they have the requirement that they take title to their land in trust in the name of the United States for the TVA. And I did what I thought a lawyer ought to do. I called up the General Counsel's office of the TVA, and I said to them, "What federal official approved your land acquisitions?" Is it Interior? Is it Energy? Is it defense? Who is it that authorizes your land transactions.? And they said it was our Board of Directors. These corporations have boards of directors. They're operated like a tribal council. They are federal corporations, which Congress has authorized to acquire land for Indians and required that the land goes under trust status, and they're the authorized acquisition officer. It's separate. Different from the Secretary. That doesn't take anything at all away from the Secretary. He's still got all the . . . discretionary authority to acquire land . . . that he always had, but these corporate entities have the same authority. That authority may not be revoked by statute [and] may not be revoked by the Secretary. So that means . . . he puts in a Section 151 of the regulations that only he can take land in trust[,] [and it] is void as to these entities. These constitutions and charters under the IRA are designed to be as binding on the Secretary of the Interior as a statute of Congress. Said so over

29. Originally, Congress named six states ("mandatory states") to be mandatorily conferred Indian country criminal jurisdiction: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. In the years after the law passed, a number of other states chose to exercise their jurisdiction as well. *Frequently Asked Questions About Public Law 83-280*, U.S. DEP'T JUST. (May 1, 2015), https://www.justice.gov/usao-mn/Public-Law%2083-280 [https://perma.cc/T2AJ-KQYV].

and over and over in the history. They used to send out letters to the agent when they approved his constitution saying, all regulations of the Secretary inconsistent with constitution and charter are no longer applicable to this tribe. This constitution charter [is] binding on you and all of your employees and every officer employee of the interior department. Mind it. And they contain the authority to acquire land. Now we have one federal appellate decision that I know of while messing with the case I learned to hate while when I was in law school called *Mescalero Apache Tribe v. Jones*[30]. And we all hated it because when they built the ski lodge, the decision was that the state could in fact tax the income from the ski lodge. So, when they sold a lift ticket or did this or that, the state could tax it. But what most people didn't see . . . is that 9 to 0 the Supreme Court of the United States held that § 465 of the IRA prevented the state of Arizona from taxing their leasehold interest or any of the stuff that they had bought and purchased and attached to the land.[31] Because [§] 465 says you cannot—state taxes cannot apply to the land. Now the Supreme Court couldn't even figure out whether the Mescalero's tribal government had bought it or if their corporate entity had bought it, they said it doesn't matter it's an incorporated tribe. They got the leasehold, they bought the stuff, they put it on the land. It's not taxable because of [§] 465. The Secretary didn't approve anything as far as the acquisition of that lease. It was forest service land. So, it was leased to them, and if [it] had been a[ ] non-Indian, it would have been taxable under state law. But because of [§] 465, it was not taxable. Now if it's not taxable, it has to be trust property by operation of law. It's in the same sentence. If the last half of the sentence applies to that property, certainly the first half of the standards does. What does that mean? Well, what it means is that our tribes can go back and consolidate lands within their reservations. We can purchase those restricted allotments. We can again give tribal titles so that our people can find a place to live within our own home country. It means that we can go out and should be able to acquire all of those lands we've lost within the reservation from willing sellers. And we have congressional and executive consent to do that. This is a statute of the United States. The only way it doesn't work is if, in fact, it's unconstitutional but Congress has the authority under the Constitution to do this.

What about off-reservation acquisition? Oh, we're going to go to Denver and do gaming. Well no, because *Mescalero* says when you do—when you acquire a piece of property outside of the reservation—it's still subject to state law. That's the reason the state could tax the income from that resort. They

30. 411 U.S. 145 (1973).
31. *Id.* at 156–58.

couldn't tax the land because the land was non-taxable. They could tax and regulate everything else. So this acquisition within a reservation means that we've cut out all the competitors to power, [and] outside the reservation, all it simply means is that we have title to the property, that title can't be taken away, and that we have the tax exemption. Because what § 17 says in its restriction phrases is that we cannot sell, mortgage or lease for longer than twenty-five years lands within the reservation. Outside the reservation, we can go buy it and build 40 houses on 40 acres and sell them. They're not restricted. We have the power to dispose of them under the charter. Within the reservation, we can't do that. So, I think in a lot of ways, this is a fix for the conundrum. This is a fix for the three years' process for the Secretary to approve taking land interest. The Sacs and Foxes in Oklahoma have a charter that expressly says they can acquire, own, operate, [and] dispose of land provided they have to take it in trust under the section—under . . . § 5. They put twenty-eight tracts of land in trust that they've been waiting sometimes twenty years to get the Secretary to act on. Twenty-eight tracts of land, man, they bought other tracts, when they close it goes into trust. That's the way trust property acquisitions ought to be made. Thank you.