STATE ACQUISITION OF INTERESTS IN INDIAN LAND: AN OVERVIEW

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Introduction

The attachment of the American Indian to the land historically has been a focal point in tribal cultures and a cornerstone in Indian traditions, religions, and values. As described by a contemporary Hopi Indian, inherent in this emphasis on the importance of the land is the realization that land serves as "sacred monuments to the past" and provides "the continuity which insures survival of their culture as a people."[1] In concurrence with this view, the Final Report of the American Indian Policy Review Commission, submitted to Congress in 1977, reaffirms the central role land plays in both the tribal and individual Indian way of life by its observation that "[t]he overwhelming conviction of Indian people is that an adequate tribal land base is essential. Their economic security and development of tribal economies depend on it; the very survival of Indian cultures . . . depend on it."[2]

This concern over protecting what remains of the Indian land base is not unwarranted. From 1936 through 1974, during a period in which the official federal policy was to encourage the consolidation of the Indian land base, a total of 1,811,010 acres of tribal land were taken by the federal government through condemnation proceedings.[3] The land loss due to state condemnation is not known. Future diminution of Indian land by condemnation may be augmented, moreover, by the fact that the remaining 53 million acres[4] of Indian land contain great mineral

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1. Sekaquaptewa, *Culture of Indians of the Southwest and Southern Rocky Mountains*, in ROCKY MTN. MIN. L. FOUND., INSTITUTE OF INDIAN LAND DEVELOPMENT, Paper 3, p. 10 (1976).

2. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 308 (Comm. Print 1977).

3. *Id.* at 310. This figure does not include lands taken for rights-of-way for roads, pipelines, powerlines, and other federal or state projects. *Id.*

4. Included in this figure are 271 Indian reservations and communities, comprising 2.3% of all lands of the United States. ANNUAL REPORT OF INDIAN LAND AND INCOME FROM SURFACE AND SUBSURFACE LEASES AS OF JUNE 30, 1974 (U.S. Dep't of Interior,

wealth.[5] The attraction of both government and industry to these abundant energy resources and the concomitant development of the surrounding areas will inevitably necessitate condemnation of rights-of-way for pipelines, power lines, and access roads, resulting in a further reduction of the Indian land base.

It is thus quite apparent that the applicability of the federal and state powers of eminent domain to Indian lands is of prime importance and carries far-reaching ramifications. This article will examine the origin, the nature, and the extent of state[6] condemnation of Indian lands.[7] The article, however, will not examine the question of compensation under the fifth amendment for takings of Indian land by the federal government.

In particular, the focus will be on (1) which types of Indian lands are subject to state condemnation (and, by negative inference, which types are not); (2) the statutory scheme by which the federal government has granted the states authority to condemn Indian land; and (3) the various issues that have arisen under the statutes and have required judicial interpretation, including whether state or federal jurisdiction obtains over state condemnation of Indian land, the extent to which the statutes in question waive the sovereign immunity of the federal government, and whether the United States should be an indispensable party-defendant in such condemnation suits. Finally, an examination will be made of the issue put forth in the 1980 Supreme Court decision of *United States v. Clarke*[8]—whether a state may "inversely" condemn Indian land, and the issue addressed in several recent

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Bureau of Indian Affairs), *cited in* Ferguson, Jr., *Industry Problems with the Emerging Tribal Role*, in INSTITUTE ON INDIAN LAND DEVELOPMENT, *supra* note 1, Paper 11, p. 1.

5. The wealth of Indian resources is both wide and deep: "It is estimated that Indian land coal could provide more than one-tenth of the nation's future coal needs. Based upon Atomic Energy Commission estimates, it is believed that uranium reserves located on Indian land constitute about two-thirds of the reserves on federal lands." *Id.*, citing Bureau of Competition, *Report to the Federal Trade Commission on Leasing on Indian Lands* 11, 17 (Oct. 1975).

6. Although the term "state" will be used throughout this article, it should be recognized that states, as sovereigns, "may delegate the power of eminent domain to administrative officers or other agencies of the sovereign and to public and private corporations." 1 P. NICHOLS, EMINENT DOMAIN § 3.1[2] (3d ed. 1973). The most common beneficiaries of such delegated authority are municipalities and power and communication companies.

7. Although the focus of this article is on state condemnation of Indian land, the issue of whether a *tribal* government may condemn Indian land is also briefly discussed. See *infra* notes 66, 83.

8. 445 U.S. 253 (1980).

lower court decisions—whether the specific Indian right-of-way statutes and the general condemnation provision constitute alternative methods available to states for the acquisition of rights-of-way across certain types of Indian land.

I. *Types of Indian Land*

Real property interests can vest in or be acquired by Indians in a variety of ways, each affecting differently the applicability and reach of the particular (federal or state) eminent domain power asserted. Because of the important distinctions and limitations that emanate from the nature of Indian land subject to condemnation, it is necessary to first become familiar with the various ways by which tribes and individual Indians may acquire and hold real property.

Historical Background

American Indians historically had no concept of private ownership of land but instead followed a system of tenure of land for the perpetual use and occupancy by the tribe.[9] Indian and non-Indian cultures thus held significantly divergent views concerning their relative uses of and relationships to the land. Whereas the white man had an extremely well-defined body of property law based on clear-cut notions of individual ownership with concomitant rights and responsibilities, Indian tribes generally held land communally and shared benefits and burdens.[10] These differing views, placed in the context of the historical relations between the white man and the Indian, have contributed greatly to the unique stature Indian lands presently hold within the general body of property law.

One particular reason the general principles of real property do

9. Lavell & Back, *Indian Land Status*, in INSTITUTE ON INDIAN LAND DEVELOPMENT, *supra* note 1, Paper 5, p. 1 (1976). *See* 4 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 1166-67 (1929).

10. AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE FOUR: REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 111 (Comm. Print 1976). Although Indian tribes held land communally, tribal ownership is not to be equated to a tenancy in common. F. COHEN, FEDERAL INDIAN LAW 472 (1982) [hereinafter cited as COHEN]. The distinction is of some significance: whereas under a theory of tenancy in common descendants of tribal members who are not themselves members of a tribe would be entitled to share in the common property of the tribe (including, presumably, any proceeds resulting from an exercise of the power of eminent domain), no such claim would arise with respect to tribal property. COHEN, *supra*, at 288 (1971 ed.)

not fully apply in the context of Indian-held lands is found in the guardian-ward or trust relationship that exists between the United States and Indian tribes and, in certain circumstances, individual Indians.[11] Under this doctrine, legal title to Indian tribal lands is held in the name of the United States in trust for the tribe, which retains the beneficial incidents or equitable title to the property.[12] Hence, "[t]ribal property is neither public domain of the United States nor the private property of the tribal members."[13] In addition to tribal property, certain lands that have been allotted[14] to individual Indians are also held by the United States in trust. It is with regard to these individual allotments that the question arises whether the United States, because of its trustee capacity, should be deemed an indispensable party-defendant in state condemnation proceedings.[15]

Tribal Property

The term "tribal land" has been defined as "lands held by the United States in trust for a tribe, or title to which is in the Indian tribe subject to federal restrictions against alienation or encumbrance . . . [including] all unallotted or unpatented[16] reservation lands, as well as non-reservation lands acquired by the tribe."[17] Beyond this definition, Indians also have asserted tribal property rights based on aboriginal possession.

Aboriginal Indian Title

Aboriginal title (or "original" Indian title) is based on the exclusive use, occupancy, and possession from "time immemorial."

11. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, J.) ("[The Indians'] relation to the United States resembles that of a ward to his guardian").

12. P. MAXFIELD, M. DIETERICH & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 125 (1977) [hereinafter cited as NATURAL RESOURCES LAW].

13. *Id.* Because Indian lands are not included in the term "public lands," Indian lands are not subject to sale or disposal under the general public land laws. *See* Bennett County, South Dakota v. United States, 394 F.2d 8, 11 (8th Cir. 1968) (held 43 U.S.C. § 932 (1976) [right-of-way for highways over public lands] not applicable to Sioux Indian lands). *See also* Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

14. "Allotment is a term of art in Indian law," which means "a selection of [specified] land awarded to an individual allottee from a common holding." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142 (1972). See *infra* notes 30-40 and accompanying text.

15. See *infra* text accompanying notes 77-82.

16. See *infra* text accompanying notes 32-36.

17. Comment, *An Overview of the Question of Access Across Indian Lands*, 10 LAND & WATER L. REV. 93, 99 (1975). *See* 25 C.F.R. § 169.1(d) (1983). See also *infra* notes 162-166 and accompanying text.

Title must have been perfected in the tribe before the sovereignty of the United States attached to the lands involved, and the lands must not have thereafter been abandoned.[18] The validity of the aboriginal title theory, at least as to the issue of whether such title creates a compensable interest, has not been settled.[19]

Reservation Lands

Indian reservations have been created by three distinct methods: treaty, act of Congress, and executive order. Until 1871[20] the primary way in which Indian tribal rights in land were acquired or confirmed was by treaty.[21] Since 1871, reservations have been established either by act of Congress or by the setting aside of public lands by executive order.

State Reservation Lands

As of 1970, there existed twenty-six state Indian reservations in nine states totaling approximately 237,000 acres[22] and populated by approximately 17,700 Indians.[23] The land of these Indians, if the state's assumption of power over the tribes is valid,[24] is sub-

18. M. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 475-76 (1973). *See* COHEN, *supra* note 10, at 486-93.

19. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955), the Supreme Court held that aboriginal title may be extinguished by the federal government without compensation. Recent commentators, however, have argued that the decision should either be overruled or limited to its facts. *See* Bloxham, *Aboriginal Title, Alaskan Native Property Rights, and the Case of the Tee-Hit-Ton Indians*, 8 AM. INDIAN L. REV. 299 (1980); Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980); Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977).

20. Congress prohibited the future use of the treaty power in Indian affairs in 1871. 25 U.S.C. § 71 (1976). The prohibition was in part a response to the fact that treaties in the past had often operated to transfer large amounts of Indian land outside the public domain to non-Indian purchasers. Critics of this method of land transfer feared that the treaty-making process would be increasingly used to circumvent public land law restrictions. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 452-53 (1968). *See* COHEN, *supra* note 10, at 107 n.369. *See also* United States v. Southern Pac. Transp. Co., 543 F.2d 676, 686 n.4 (9th Cir. 1976).

21. NATURAL RESOURCES LAW, *supra* note 12, at 128. For a complete compilation of Indian treaties, *see* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES (1904).

22. T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 226-28 (1972). Florida, Maine, and New York state reservations comprise approximately 97% of the acreage total. *Id.*

23. *Id.*

24. Two alternative theories have been put forth as "sources" for the assumption by a state of power over an Indian tribe in face of the presumption of constitutionally mandated paramount federal power in the area of Indian affairs. The first of these theories, applicable only to the original thirteen colonies, is that these states possess a "sovereign

ject without qualification[25] to the eminent domain power of the state.

Individually Owned Indian Lands

Although Indians have traditionally adhered to notions of communal ownership of land, through a historical process of interaction with and imposition of the white man's laws, the concept of individual Indian ownership of real property has arisen. The process came about primarily through a series of statutes authorizing allotments of lands to individual tribal members,[26] and was prompted by a desire to assimilate the Indian into the mainstream of the dominant white culture.[27] This movement toward assimilation culminated in the General Allotment Act of

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power . . . over Indian lands independent of and never surrendered to, the Federal government, derived from its status as one of the . . . colonies." Tuscarora Nation of Indians v. Power Authority of State of New York, 257 F.2d 885, 888 (2d Cir. 1958). This theory was rejected by the Supreme Court in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), where the Court held that the proposition that "Indian title is a matter of federal law and can be extinguished only with federal consent [applies] in all of the States, including the original [thirteen]." *See also* Seneca Nation of Indians v. State of New York, 397 F. Supp. 685, 686-87 (W.D.N.Y. 1975).

A second potential source of the states' power is premised upon the "extinction of the tribe as a legally cognizable unit." O'Toole & Tureen, *State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy?*, 23 ME. L. REV. 1, 17 (1971). This theory, it is argued, was present in the Maine decision of State v. Newell, 84 Me. 465, 24 A. 943 (1892), which held that the Passamaquoddy Tribe no longer existed as a tribe in the legal sense. O'Toole & Tureen, *supra*, at 16-18. The legal test for tribal existence today may rest upon whether Congress has expressly terminated tribal status; for "once Congress has surrendered its paramount power over [the tribe] by specific enactment, factual existence [alone] will not support attacks upon state assumption of power." *Id.* at 21-22. *Cf.* United States v. Nice, 241 U.S. 591 (1916), which suggests that termination acts may not confer a general power on a state vis-a-vis the terminated tribe, but may only confer such power for precise and narrow purposes. *See* O'Toole & Tureen, *supra*, at 22 n.115.

25. That is, it does not depend on a grant of authority from the federal government and is not constrained by the contours of such grants. See *infra* text accompanying notes 41-42.

26. Lavell & Back, *supra* note 9, at 7.

27. The history of the allotment movement is set forth in D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973). The primary objection to the allotment movement centered on its destructive effect on the Indian land base. The allotment statutes generally provided that "surplus" unallotted lands—those reservation lands remaining after allotment—could be purchased by the United States and distributed to settlers, with the proceeds to be held in trust for the Indians. Largely as a result of this policy, Indian landholdings were reduced from 137 million acres in 1887 to 52 million acres in 1934. 1 AMERICAN INDIAN POLICY REVIEW COMM'N, *supra* note 2.

1887,[28] which provided for allotment of lands to individual Indians on any reservation and on lands of the United States under certain specified circumstances.[29]

In addition to lands disbursed to individual Indians pursuant to the General Allotment Act, the term "allotted lands" includes individual allotments issued pursuant to provisions in specific treaties or statutes dealing with particular tribes.[30] Allotments were issued by two methods, both designed to prevent the individual Indian "from improvidently disposing of [the] allotted lands."[31] The first method involved the issuance of a patent to the allottee conveying the land in fee, subject to a restriction upon its alienation for a twenty-five-year period, which could be extended.[32] The second method involved the issuance of a trust patent, under which the United States retained and held legal title to the land "for [a] period of twenty-five years, in trust for the sole use and benefit of the [allottee] . . ."[33] Upon the expiration of the designated periods for both restricted and trust allotments —if no extension has been granted[34]—the land was to be discharged of all restrictions and the allottee was to hold a fee title free of all incumbrance and subject to state law.[35] In addition, patents in fee simple could be granted prior to the expiration date if the allottee requesting the issuance of the fee simple patent was

28. 24 Stat. 388, 25 U.S.C. §§ 331-358 (1976), *as amended*.

29. Lavell & Back, *supra* note 9, at 8. *See* 25 U.S.C. §§ 334, 337 (1976). For a more detailed discussion of the history and provisions of the Allotment Act, *see* COHEN, *supra* note 10, at 130-32; NATURAL RESOURCES LAW, *supra* note 12, at 27-31, 134-36; OTIS, *supra* note 27.

30. Comment, *supra* note 17, at 98-99.

31. United States v. Bowling, 256 U.S. 484, 486 (1921).

32. *Id.* at 487.

33. 25 U.S.C. § 348 (1976). As with restricted allotments, the President is given the power to extend this period. *Id.*

34. Under section 2 of the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1976), the periods of trust and alienation restrictions were extended indefinitely for those tribes who elected to accept the Act. 25 U.S.C. § 462 (1976). The extension provisions of section 462 do not apply, however, to allotments "upon the public domain outside of the . . . boundaries of any Indian reservation . . . ." 25 U.S.C. § 468 (1976). *See* Putnam v. United States, 248 F.2d 292, 294-95 (8th Cir. 1957).

35. United States v. Bowling, 256 U.S. 484, 486-87 (1921); 25 U.S.C. § 349 (1976). *See* United States v. Wilson, 523 F. Supp. 874, 897 (N.D. Iowa 1981), *rev'd on other grounds*, 707 F.2d 304 (8th Cir. 1982) (upon issue of a fee patent, Indian lands lose status as trust lands and are governed by state law); Dillon v. Antler Land Co., 341 F. Supp. 734, 741 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (10th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

deemed by the Secretary of the Interior to be "capable of managing his or her affairs. . . ."[36]

The present status of Indian allotment laws has been affected by the enactment of the Indian Reorganization (Wheeler-Howard) Act of 1934,[37] which stopped the allotment of Indian lands in order to end the diminution of the Indian land base caused by the sale of "surplus" unallotted lands[38] and the fractionalization of allotments caused by the process of intestate succession.[39] The laws of allotment continue to apply, however, to members of tribes not electing to accept the Act, unless the contrary is specifically provided.[40]

II. *Indian Land and Allocation of the Federal and State Powers of Eminent Domain*

Origin of Power and Statutory and Administrative Scheme

Whereas both tribal and individually held Indian lands are subject to the federal power of eminent domain by virtue of the United States Constitution[41] and the federal-Indian guardian or trust relationship, they are not subject to state or local condemnation unless Congress has specifically so provided.[42] Although

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36. Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. § 349 (1976). *See* Dick, *Indian Lands*, 1 ROCKY MTN. MIN. L. INST. 59, 67-68 (1955). The 1906 Act did not provide for formal application by allottees to request such a patent, nor did it establish procedures or criteria by which the Secretary was to determine competency. After several court decisions interpreted the Act to require the consent of the allottee before a fee patent could be issued, *see, e.g.*, Choate v. Trapp, 224 U.S. 665 (1912) and United States v. Benewah County, 290 F. 628 (9th Cir. 1923), Congress passed a series of statutes known as the "cancellation acts," which were intended to correct the wrongs caused by the forcing of fee patents on allottees without their application or consent. *See* Act of Feb. 26, 1927, 44 Stat. 1247, 25 U.S.C. § 352a (1976) (subsequently amended by Act of Feb. 21, 1931, 46 Stat. 1205, 25 U.S.C. § 352b (1976)). *See generally* Covelo Indian Community v. Watt, No. 82-2377, slip op. at 6 n.8 (D.C. Cir. Dec. 21, 1982). The "forced fee patents" have produced both trespass claims and quiet title problems.

37. Act of June 8, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976).

38. See note 27 *supra*.

39. *See* Stevens v. Commissioner, 452 F.2d 741, 748 (9th Cir. 1971), *cited in* NATURAL RESOURCES LAW, *supra* note 12, at 135.

40. NATURAL RESOURCES LAW, *supra* note 12, at 135-36.

41. U. S. CONST. art. I, § 8; art. II, § 2. For a discussion of these and other provisions of the Constitution which support the paramount power of the federal government over Indians, *see* COHEN, *supra* note 10, at 207-12.

42. PRICE, *supra* note 18, at 643. Congress has occasionally authorized federal agencies to cooperate with state condemnation efforts for various public projects. *See* COHEN, *supra* note 10, at 521. Whether Congress has consented to the exercise of state eminent

Congress has authorized states to condemn tribal lands in specific circumstances, it has not subjected tribal lands to the *general* state power of eminent domain, with the temporary exception of the lands of the Pueblo Indians in New Mexico.[43] With respect to *allotted* lands, however, Congress has enacted a general state condemnation provision. Under section 3 of the 1901 Indian Appropriations Act, now section 357 of Title 25 of the United States Code, Congress provided that: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."[44]

Section 357 is a general grant of federal authorization, permitting state condemnation of allotted lands "for any public purpose."[45] Also found in Title 25 of the United States Code are

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domain power over Indian lands in a particular instance "is a question requiring close statutory analysis and application of the maxims of statutory construction favoring Indians." *Id.*

43. This temporary statutory exception imposed on the Pueblo Indians, who hold their lands by a unique form of ownership in fee simple communal title, was noted by Cohen in the 1971 edition of *Federal Indian Law*:

> [T]he acquisition of Indian lands for non-Indian use was facilitated by the Act of May 10, 1926 [44 Stat. 498], entitled "An Act To provide for the condemnation of the lands of Pueblo Indians in New Mexico for public purposes . . . ."
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> This act is substantially similar to the general statute governing condemnation of allotted lands, but there is no parallel statute governing tribal lands generally, so that the Pueblos are subjected to a type of action from which other tribes are immune.

COHEN, *supra* note 10, at 393. However, the Tenth Circuit Court of Appeals, in Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), held that the Act of May 10, 1926, was repealed implicitly by the passage of the Act of Apr. 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1976) (applying 25 U.S.C. §§ 311-15, 317-19, and 321 (1976) to the Pueblo Indians), and the Act of Feb. 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-28 (1976) (dealing with the acquisition of rights-of-way over, *inter alia*, Pueblo Indian lands). See *infra* notes 139-143 and accompanying text. *Pueblo of Laguna* overturned an earlier decision, State *ex rel.* State Highway Comm'n v. United States, 148 F. Supp. 508 (D.N.M. 1957), which held that the Act of May 10, 1926, had not been repealed by the Act of Feb. 5, 1948. The Act of May 10, 1926, was also repealed by the express terms of the Act of Sept. 17, 1976, Pub. L. 94-416, 90 Stat. 1275, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2368-76. See *infra* note 149 and accompanying text. The Act of Sept. 17, 1976 is codified in part at 25 U.S.C. § 322a (1976).

44. Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1084, 25 U.S.C. § 357 (1976). Although section 357 is concerned only with lands allotted in severalty to Indians, jurisdiction over non-Indians may be exercised if the requirements for pendent jurisdiction exist. *See* Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1154-55 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

45. In Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959), the Ninth Circuit rejected the contention that the United States, as trustee, could

more specific provisions allowing states to acquire, without resort to legal action, rights-of-way across both reservation and allotted lands for particular purposes and under specific conditions. The procedure by which rights-of-way are acquired under these more specific provisions differs from the section 357 judicial condemnation procedure. The rights-of-way are granted pursuant to administrative regulations[46] under the aegis of the Secretary of the Interior,[47] whose consent is required.[48] The regulations, which are

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authorize condemnation only upon a showing that it was in the best interest of the Indian allottee, noting that: "Section 357, in allowing condemnation for public purposes, carries out such right for the benefit of the public as a whole." *Id.* at 618. *See also* Yellowfish v. City of Stillwater, 691 F.2d 926, 931 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 2087 (1983) (United States not required to make a showing that its position supporting city's power to condemn trust allotments under section 357 is in the Indians' best interest).

46. 25 C.F.R. § 169 (1983). "The process also differs from the usual condemnation procedure in that the right-of-way obtained is in the nature of an easement or permit for a term with the right of reversion in the Indian owner upon abandonment or expiration of the term." PRICE, *supra* note 18, at 644. *See* 25 C.F.R. § 169.18 (1983). Rights-of-way may also be terminated for failure to comply with terms of the grant or regulations, nonuse for two years, and abandonment. 25 C.F.R. § 169.20 (1983).

47. The Secretary of the Interior's extensive involvement in the granting of rights-of-way across Indian lands, viewed in the context of the federal-Indian trust relationship, see notes 11-15 *supra* and accompanying text, raises the question of whether the various right-of-way statutes impose fiduciary duties upon the government which, if breached, would subject the United States to a suit for money damages. The question was answered affirmatively by the Supreme Court in United States v. Mitchell, 103 S. Ct. 2961 (1983) (*Mitchell II*). The United States in *Mitchell II* was alleged, *inter alia*, to have breached fiduciary duties imposed by 25 U.S.C. §§ 318 and 323-25 by failing "to develop a proper system of roads and easements for timber operations and [by exacting] improper charges from allottees for maintenance of roads" located on the Quinault Indian Reservation in Washington. *Id.* at 2964. The Court, invoking the test set forth in United States v. Testan, 424 U.S. 392, 400 (1976), found the claims to be cognizable under the Tucker Act, 28 U.S.C. § 1491, and its counterpart for claims brought by Indian tribes, 28 U.S.C. § 1505, and held that the Tucker Act constitutes a waiver of the sovereign immunity of the United States with respect to the claims. *Id.* at 2965-67, 2969-72. The Court, which noted that its interpretation of the statutes in question was reinforced by the existence of the general federal-Indian trust relationship, summarized its decision as follows:

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.

Id. at 2972-73.

48. The contours of this consent requirement have been further delineated with respect to 25 U.S.C. § 311 (1976) (public highways). In United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206 (1943), the Supreme Court held that a road established pursuant

found in part 169 of Title 25 of the Code of Federal Regulations, "prescribe the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land, and Government owned land may be granted."[49]

The right-of-way provisions can be further distinguished from the section 357 judicial condemnation procedure by their number. Congress has provided for rights-of-way across Indian lands for specific purposes since 1875, and many of the treaties of the nineteenth century also made provisions for rights-of-way.[50] Rights-of-way may be obtained for, among other things, railroads,[51]

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to section 311 across allotted land was governed by state law and that the state could permit maintenance of electric service lines on the right-of-way without the consent of the Secretary of the Interior. *Id.* at 214-15. This holding was extended to lines across reservation lands in United States v. Mountain States Tel. & Tel. Co., 434 F. Supp. 625 (D. Mont. 1977), wherein it was held that section 311 governs telephone lines in public highways while 25 U.S.C. § 319 (1976) governs all other telephone lines. *Id.* at 628.

49. 25 C.F.R. § 169.2(a) (1983). As noted by one commentator, the regulations are not comprehensive:

> The Secretary's regulations furnish little in the way of standards for granting rights-of-way. As the leasing regulations do, the regulations governing rights-of-way recite that consideration "shall be not less than the appraised fair market value," plus any severance damages for the remaining lands [25 C.F.R. § 169.12 (1983)]. Unlike leases, however, rights-of-way are not subject to periodic reappraisal and revision of annual payments, which seems insufficient in view of the fifty-year or perpetual tenure of most rights-of-way [*Id.* § 169.18 (1983)].

COHEN, *supra* note 10, at 544. The regulations contained in part 169 also do not cover rights-of-way granted in connection with projects for which a license is required by the Federal Power Act, 16 U.S.C. §§ 791-823 (1976). 25 C.F.R. § 169.2(c) (1983).

50. NATURAL RESOURCES LAW, *supra* note 12, at 141.

51. 25 U.S.C. § 312 (1976):

> A right of way for a railway, telegraph, and telephone line through any Indian reservation in any State or Territory, except Oklahoma, or through any lands . . . which have been allotted in severalty to any individual Indian . . . but which have not been conveyed to the allottee with full power of alienation, is granted to any railroad company . . . which shall comply with the provisions of sections 312 to 318 of this title . . .: *Provided*, That no right of way shall be granted under said sections until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case [of] objection . . . said Secretary shall afford the parties so objecting a full opportunity to be heard . . . [detailed terms and conditions omitted].

Sections 312-18 of Title 25 are the present-day codification of the Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (amended 1902, 1910). As noted in COHEN, *supra* note 10, the 1899 Act was the first uniform legislation in the area:

> Prior to the 1899 Act railroad rights-of-way were granted piecemeal, either by treaty provision . . . or by special statute providing for compensation to the Secretary for the benefit of the Indians . . . . Occasionally a tribe was paid directly . . . . Other acts simply stated that tribes should be paid without specifying how . . . .

telephone and telegraph lines,[52] pipelines,[53] reservoirs for railway

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COHEN, *supra*, at 542 n.135 (citations omitted). *See also* United States v. Southern Pac. Transp. Co., 543 F.2d 676, 688-89 n.20 (9th Cir. 1976) (lists statutes passed prior to 1899 which grant rights-of-way to specific railroads across executive order reservations). The 1899 Act was recently interpreted in Southern Pac. Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3369 (U.S. Nov. 7, 1983) (No. 83-180), to vest "in the Secretary authority to require tribal consent prior to processing a right-of-way application [under the Act]." The railroad had argued that the 1899 Act grants to railroads the power of eminent domain and that the Secretary of the Interior was consequently precluded from imposing by regulation (25 C.F.R. § 169.3 (1982)) the precondition of tribal consent. The Ninth Circuit, however, found that the 1899 Act was not an eminent domain statute and further held that the Secretary, by requiring tribal consent, acted pursuant to the 1899 Act and had not improperly redelegated its authority under the Act to the tribes. *Id.* at 554-56.

Rights-of-way granted to railroads under sections 312 to 318 of Title 25 through "any canyon, pass, or defile" must comply with 43 U.S.C. § 935 (1976), which concerns the rights of competing railways and highways. 25 U.S.C. § 316 (1976). The Secretary of the Interior is also involved in many aspects of railway rights-of-way across Indian land. *See* 25 U.S.C. §§ 314-15 (1976); 25 C.F.R. § 169.23-.24 (1982); COHEN, *supra* note 10, at 542-43 n.135. *See generally* United States v. Southern Pac. Transp. Co., 543 F.2d 676, 691-93 (9th Cir. 1976); Sand Springs Home v. State *ex rel.* Dep't of Highways, 536 P.2d 1280, 1282-83 (Okla. 1975).

52. 25 U.S.C. § 312 (1976). *See also* Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1083, 25 U.S.C. § 319 (1976):

> The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, . . . or through any lands which have been allotted in severalty to any individual Indian . . . but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands . . . until authority therefore has first been obtained from the Secretary of the Interior . . . . The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way . . . shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval . . . . [A]ll such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe . . . [detailed terms and conditions omitted].

The regulations construing section 319 are found at 25 C.F.R. § 169.26 (1983). *See generally* City of Tulsa v. Southwestern Bell Tel. Co., 75 F.2d 343, 347 (10th Cir.), *cert. denied*, 295 U.S. 744 (1935). Regulations involving service lines are found at 25 C.F.R. § 169.22 (1983).

53. Act of Mar. 11, 1904, ch. 505, § 1, 33 Stat. 65, 25 U.S.C. § 321 (1976):

> The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas . . . through any lands which have been allotted in severalty to any individual Indian . . . but which have not been conveyed to the allottee with full power of alienation upon the terms and conditions herein expressed . . . . The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way . . . shall be determined in such manner as the Secretary of

companies,[54] power and communication lines,[55] and other

Interior may direct, and shall be subject to his final approval . . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary . . . at the expiration of said twenty years, may extend the right . . . for another period not to exceed twenty years . . . upon such terms and conditions he may deem proper . . . [detailed terms and conditions omitted].

Regulations are found at 25 C.F.R. § 169.25 (1983). Pipeline companies may also have power to condemn tribal lands pursuant to section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1976), which provides that a natural gas company holding a certificate of public convenience and necessity can acquire necessary rights-of-way through the exercise of the right of eminent domain where an agreement with the owner of the property cannot otherwise be reached. The applicability of section 7(h) of the Natural Gas Act to rights-of-way across tribal lands has not been addressed by the courts.

54. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 25 U.S.C. § 320 (1976):

When . . . it is necessary for any railway company owning or operating a . . . railway in any Indian reservation to acquire lands in such Indian reservation for reservoirs, material, or ballast pits for the construction, repair, and maintenance of its railway, or for the purpose of . . . growing thereon trees to protect its line of railway, the said Secretary is authorized to grant such lands . . . under such terms and conditions and such rules and regulations as may be prescribed by the said Secretary.

. . . .

All moneys paid for such lands shall be deposited . . . to the credit of the tribe or tribes, and the moneys received by [the] Secretary as damages sustained by individual members of the Indian tribe . . . shall be paid . . . to the Indian or Indians sustaining such damages. The provisions of this section are . . . made applicable to any lands which have been allotted in severalty to any individual Indian . . . but which have not been conveyed to the allottee with full power of alienation; the damages and compensation to be paid to any Indian allottee shall be . . . fixed in such manner as the Secretary . . . may direct and shall be paid by the railway company to said Secretary . . . and . . . paid by said Secretary to the allottee sustaining such damages [detailed terms and conditions omitted].

55. Act of Mar. 4, 1911, ch. 238, 36 Stat. 1235, 1253-54, 43 U.S.C. § 961 (1976) (amended May 27, 1952, ch. 338, 66 Stat. 95):

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities . . . to any citizen, association, or corporation of the United States, . . . *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment . . . .

In United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 213-15 (1943), the Supreme

miscellaneous purposes.[56] In addition, several sections are found in Title 25 which authorize acquisition of rights-of-way for public roads and highways,[57] including section 4 of the 1901 Indian Appropriations Act:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State . . . in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.[58]

Court held that 43 U.S.C. § 959 (1976) (see note 56 *infra*) and 43 U.S.C. § 961 do *not* govern the grant of rights-of-way over *allotted* lands. In apparent contradiction, 25 C.F.R. § 169.27(a) (1983) states that 43 U.S.C. § 961 "authorizes right-of-way grants across tribal, *individually owned* and Government-owned land . . . ." (emphasis added).

56. Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. § 959 (1976) (amended Mar. 4, 1940, ch. 40, § 2, 54 Stat. 41, 43:

> The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States . . . for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder . . . by any citizen, association, or corporation of the United States . . *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1 to 6 and 8 of title 47, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Section 959 does not apply to *allotted* Indian lands. See note 55 *supra*.

57. 25 U.S.C. §§ 311, 313, 315-16, 323-28 (1976). The regulations contain a special provision for highway rights-of-way in Nebraska and Montana. 25 C.F.R. § 169.28 (1983).

58. Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1058, 1084, 25 U.S.C. § 311 (1976). Section 311 on its face does not require the Secretary to obtain the consent of tribes before granting permission to states to acquire rights-of-way across reservations for

In order to simplify these right-of-way provisions, Congress passed the 1948 Indian Right of Way Act.[59] This Act empowers the Secretary of the Interior to "grant rights-of-way for *all* purposes, subject to such conditions as he may prescribe,"[60] and subject to the condition that "just" compensation be paid.[61] Tribal consent is a prerequisite to the grant of any right-of-way over tribal lands under the Act, with the consent requirement in the case of individually owned Indian land being waived only in limited and specified circumstances.[62] The Act by its terms does

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highway purposes. However, the Secretary has provided by regulation that no right-of-way be granted "across any tribal land . . . without the prior written consent of the tribe." 25 C.F.R. § 169.3(a) (1983). The consent of the individual possessory holders of the tribal land is not necessary. *See* Eastern Band of Cherokee Indians v. Griffin, 502 F. Supp. 924, 930 (W.D.N.C. 1980).

59. Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-28 (1976).

60. 25 U.S.C. § 323 (1976) (emphasis added).

61. 25 U.S.C. § 325 (1976). A similar compensation provision is found in 25 U.S.C. § 314 (1976), which is part of the Act of Mar. 2, 1899 (25 U.S.C. §§ 312-18).

Except when waived in writing by the landowners and approved by the Secretary, consideration for rights-of-way granted or renewed "shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate." 25 C.F.R. § 169.12 (1983). Rights-of-way granted for inadequate or "unjust" compensation may give rise to taking claims under the fifth amendment or claims for breach of the government's fiduciary obligation as trustee. In Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977), both claims were brought against the government for selling a right-of-way for about five percent of its true value. Because the conveyance was found, in the absence of the required consents under 25 U.S.C. § 324 (1976) and 25 C.F.R. § 169.3(b) (1983), to have been beyond the authority of the officials involved, it was held that no taking occurred for which the government could be held liable. 550 F.2d at 649-52. With regard to the claim for breach of fiduciary duty, however, the government was found liable for grossly negligent conduct in the valuation of the right-of-way. *Id.* at 652-54.

62. 25 U.S.C. § 324 (1976). Consent is required by section 324 for tribes and Alaskan Native villages organized under the 1934 Indian Reorganization Act and for tribes organized under the 1936 Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-09 (1976). *See* COHEN, *supra* note 10, at 543 n.143. Section 324 is the only *statute* that contains right-of-way consent requirements, and it is unclear whether rights-of-way obtained under pre-1948 statutes must comply with section 324. See note 63 *infra*. In addition, however, the Secretary of the Interior has extended the consent requirement by administrative regulation to all Indian tribes, 25 C.F.R. § 169.3(a) (1983), to individually owned lands with certain exceptions, 25 C.F.R. § 169.3(b-c) (1983), and to rights-of-way obtained under various pre-1948 right-of-way statutes. 25 C.F.R. § 169.23-.28 (1983). *See* COHEN, *supra* note 10, at 627 n.161. *See also* H.R. REP. No. 78, 91st Cong., 1st Sess. (1969) (report of the House Committee of Government Operations opposing a proposal by the Secretary of the Interior to eliminate the prior consent requirement for tribes not organized under the Indian Reorganization Act). In Southern Pac. Transp. Co. v. Watt, 700 F.2d 550, 553-54 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3369 (U.S. Nov. 7, 1983) (No. 83-180), the tribal consent regulation was applied over objection to an application

not repeal earlier legislation;[63] hence, it has been argued that it

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under the Act of March 2, 1899 (25 U.S.C. §§ 312-18 (1976)) for a railroad right-of-way. See note 51 *supra*. Conveyances of rights-of-way made in violation of statutory and regulatory procedures—including the requirement of tribal consent—have been held to be unauthorized, void, and wrongful acts. Coast Indian Community v. United States, 550 F.2d 639, 650 (9th Cir. 1977).

With regard to tribes organized under the Indian Reorganization Act, the necessity of obtaining tribal consent appears to be also required by 25 U.S.C. § 476 (1976), which provides, in pertinent part, as follows:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . .

However, the applicability of 25 U.S.C. § 476 to rights-of-way has been questioned in light of 25 U.S.C. § 463(4) (1976), which states that "[n]othing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes." *See* Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna, 542 F.2d 1375, 1380 n.4 (10th Cir. 1976). It is unclear, however, whether section 463(4) was intended to apply beyond the provisions of section 463 and to circumscribe the tribal powers set forth in section 476.

The consent of individual Indians who occupied tribal land as assignees of land controlled by a tribal entity was found not to be necessary before a right-of-way could be granted in Hunger v. Andrus, 476 F. Supp. 357, 359-60 (D.S.D. 1979). The assignment arrangement was held not to be within the definition of "individually owned land," 25 C.F.R. § 169.3(b) (1983), and consequently only the consent of the tribe under 25 C.F.R. § 169.3(a) (1983) was required.

63. "Sections 323 to 328 of this title shall not . . . amend or repeal . . . the Federal Water Power Act of June 10, 1920 . . . *nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.*" 25 U.S.C. § 326 (1976) (emphasis added). Although the 1948 Act apparently does not repeal earlier right-of-way provisions (see notes 64-65 *infra* and accompanying text), it has been argued that this does not preclude one from construing the 1948 Act as *amending* the earlier provisions. This contention was raised in the Intervenor's Brief to the Supreme Court decision of United States v. Clarke, 445 U.S. 253 (1980):

> Section 326 also provides guidance in interpreting the relationship between the 1948 statute and prior laws authorizing the Secretary to grant rights of way for specific purposes such as Section 311. Section 326 distinguishes betwen the Federal Water Power Act and statutes empowering the Secretary to grant rights of way. Nothing in the 1948 statute "amends or repeals" the provisions of the Federal Water Power Act, while the other statutes authorizing secretarial grants of rights of way are saved only from "repeal." The alteration of statutes like Section 311 by the provisions of the 1948 Act is therefore permitted.

Brief for Intervenor at 24 n.13. In this particular instance the argument was that section 324 of the 1948 Act imported its consent requirement in section 311 and thus "amended" it. This interpretation was drawn from an Interior Department decision, which held that section 326 does not bar the imposition of the section 324 consent requirement as a "quasi-amendment" to the 1899 right-of-way Act (25 U.S.C. §§ 312-18 (1976)). The Court did not address this issue in its opinion. The "quasi-amendment" theory, if ac-

was intended to serve as a supplement and alternative to the earlier right-of-way provisions.[64] Others have argued that the earlier right-of-way provisions were intended only to remain in effect during a period of transition from the old to the new system and were otherwise repealed by implication.[65]

Judicial Gloss on the Statutory and Administrative Scheme

As noted previously, section 357 is phrased as a general grant of federal authority; it has been left to the courts to define and resolve the specific jurisdictional and procedural problems peculiar to these state condemnation proceedings. In particular, the courts have focused on three problem areas: the locus of jurisdiction, the effect of the doctrine of federal sovereign immunity on these actions, and the related question of whether the United States is an indispensable party in such proceedings.[66]

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cepted, would provide a statutory basis for the consent requirement presently imposed in section 311 and other pre-1948 right-of-way statutes by administrative regulation. See note 58 *supra*.

64. NATURAL RESOURCES LAW, *supra* note 12, at 142. *See also* Comment, *supra* note 17, at 105-06; COHEN, *supra* note 10, at 544; and *infra* notes 125-135 and accompanying text.

65. See *infra* notes 136-170 and accompanying text. *See also* Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 ROCKY MTN. MIN. L. INST. 217, 257 (1965).

66. Although examined in the context of state condemnation proceedings, the jurisdiction, sovereign immunity, and indispensable party issues apply with equal force to *tribal* condemnation proceedings, assuming that the power of tribal governments to condemn exists. These issues were addressed by the Eighth Circuit in Fredericks v. Mandel, 650 F.2d 144 (8th Cir. 1981). In that case the beneficial owner of a trust allotment brought an action in federal court for declaratory and injunctive relief seeking to enjoin the enforcement of a tribal court order that purported to condemn a portion of the trust allotment as a public right-of-way. The court held that under the rationale of Minnesota v. United States, 305 U.S. 382 (1939) (see *infra* notes 67-82 and accompanying text), the tribal court was without jurisdiction to condemn or to grant the right-of-way because such a suit must be brought in federal court and must join the United States as a party. 650 F.2d at 145. The court also held that the tribal court lacked jurisdiction because it did not comply with 25 U.S.C. §§ 323-28 (1976) and 25 C.F.R. §§ 161.1-.28 [now 25 C.F.R. §§ 169.1-.28 (1983)], which require that the approval of the Secretary of the Interior be obtained. *Id.* at 147.

The court expressly reserved the questions of whether a tribal government possesses the power of condemnation and whether it may sue the United States in federal court. *Id.* With regard to the former question, the court observed that the Solicitor of the Department of the Interior has taken the position that tribal governments do *not* have the power to condemn the trust lands of their individual members. *Id.* at 146 n.6 (citing Solicitor, Dep't of Interior, Tribal Condemnation of Purchased Trust Lands on the Fort Berthold Reservation (Oct. 18, 1979)). With respect to the latter question, even if the tribal power

These issues were addressed by the United States Supreme Court in the 1939 seminal decision of *Minnesota v. United States*.[67] The state of Minnesota had commenced a condemnation action in state court to appropriate for highway purposes certain trust allotments held by individual Chippewa Indians. The condemnation petition named the United States as a party defendant, alleging that the United States held the fee in trust. The action was then removed by stipulation to federal district court, wherein a motion to dismiss was filed by the United States on the grounds that (1) the United States was an indispensable party to the condemnation proceeding; (2) it had not given its consent to be sued; and (3) the state court originally had no jurisdiction over the action.[68] The Supreme Court agreed that the United States, by virtue of its ownership of the fee to the Indian allotted lands,[69] was an indispensable party and affirmed the dismissal of the proceeding on the basis of the state court's original lack of jurisdiction over the suit.[70]

In reaching its decision, the Court, in an opinion by Justice Brandeis, established that the locus of jurisdiction for actions brought under section 357 is exclusively in the federal courts. After noting that "it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought,"[71] Justice Brandeis pointed out that, although section 357 authorizes state condemnation for "any public purpose under the laws of the State or Territory where

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of eminent domain does exist, the doctrine of sovereign immunity, coupled with the indispensability of the United States as a party-defendant, may nevertheless bar tribal condemnation suits. The Supreme Court's holding in *Minnesota v. United States*, *supra*, that section 357 confers by implication the necessary consent to be sued, however, should apply to tribal as well as state condemnation. See *infra* note 75 and accompanying text. As noted by the court in *Fredericks v. Mandel*, section 357 "does not distinguish between Indian and non-Indian condemnors." 650 F.2d at 145 n.2.

67. 305 U.S. 382 (1939).

68. *Id.* at 384.

69. "As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party." *Id.* at 386. While the Court stressed the fact that the United States held legal title to the trust allotments in question, it also intimated that the same result should follow with respect to restricted allotments, in which the fee is in the allottee, subject to restraints on alienation. *Id.* at 386 n.1. This latter view was explicitly approved in Town of Okemah v. United States, 140 F.2d 963, 964-65 (10th Cir. 1944). *See also* Grand River Dam Auth. v. Parker, 40 F. Supp. 82, 85-86 (N.D. Okla. 1941). For the distinction between trust and restricted allotments, see *supra* notes 31-36 and accompanying text.

70. 305 U.S. 382, 391 (1939).

71. *Id.* at 388.

located,"[72] the words of the statute contain no permission to sue in state courts.[73] To support the conclusion of exclusive federal jurisdiction, Justice Brandeis relied on the fact that the subject of section 357—allotted Indian lands—is a subject within the exclusive control of the federal government.[74]

The second problem addressed by the *Minnesota* Court concerned the effect of the doctrine of federal sovereign immunity on section 357. Under this doctrine, a state or any other party may not maintain a suit against the United States without its consent unless authorized by Congress. In *Minnesota* the Court held that section 357, by permitting state condemnation, confers by implication the necessary authorization to sue the United States in the federal courts.[75]

The holding that section 357 impliedly confers consent to state condemnation suits in federal courts takes on added significance when it is examined in connection with the third problem addressed in *Minnesota:* the question of whether the United States must be named as an indispensable party-defendant in such state condemnation actions. Without the Court's finding of implied consent, the doctrine of sovereign immunity could serve as a potential bar to all state condemnation actions if the United States were deemed an indispensable party to the proceeding.[76]

Even with the finding of implied consent in section 357 actions, the indispensable party issue remains important with regard to the procedural aspects of the condemnation proceeding. The indispensability of the United States as a party in suits brought under section 357 has been viewed as an important component of the guardian-ward doctrine[77] that permeates the federal-Indian relationship. Indeed, it has been held that it is the presence of

72. 25 U.S.C. § 357 (1976) (*cited in* Minnesota v. United States, 305 U.S. 382, 389 (1939).

73. 305 U.S. at 389.

74. *Id.* The appellate courts have consistently upheld this notion of exclusive federal jurisdiction over Indian land controversies. *See* Bennett County v. United States, 394 F.2d 8, 11 (8th Cir. 1968) ("All questions with respect to rights of occupancy in land, the manner, time and conditions of extinguishment of Indian title are solely for [the] consideration of the federal government"); United States v. Oklahoma Gas & Elec. Co., 127 F.2d 349, 352 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943) (interpretation and construction of section 357 held to be "peculiarly within the competence of the federal courts").

75. Minnesota v. United States, 305 U.S. 382, 388 (1939).

76. For a discussion of the "peculiar relationship between the doctrine of sovereign immunity and the doctrine of so-called indispensability of a party," *see* Wisconsin v. Baker, 464 F. Supp. 1377, 1386 (W.D. Wis. 1978).

77. See *supra* text accompanying notes 11-15.

restrictions on alienation of Indian lands—a direct emanation from the guardian-ward theory—that provides the basis for holding the United States as an indispensable party.[78] This view, expressed in *United States v. City of McAlester*,[79] a 1979 decision by the Tenth Circuit Court of Appeals, appears to be a logical extension of the rationale used in *Minnesota* for finding the United States to be an indispensable party. In *Minnesota*, Justice Brandeis emphasized the fee ownership by the United States of the trust allotments; as feeholder, the United States was indispensable.[80] In contrast, the *McAlester* approach, by focusing on the presence of restraints on alienation, encompasses not only the trust allotment situation but also the restricted allotment arrangement in which the individual Indian is the technical feeholder.[81] This latter approach is consistent with the spirit of Justice Brandeis' opinion, which stressed the importance of the federal government's guardian role in Indian affairs.[82]

78. United States v. City of McAlester, 604 F.2d 42, 46 (10th Cir. 1979).

79. *Id.*

80. Minnesota v. United States, 305 U.S. 382, 386 (1939).

81. In *McAlester* the United States was found *not* to be an indispensable party on the grounds that the restraints on the alienation of the lands involved had been removed by the special statute and agreements which dealt with the Indians involved. 604 F.2d at 50. The decision involved an analysis of the Curtis Act, Act of June 28, 1898, 30 Stat. 495, a special statute concerned with the Five Civilized Tribes. The court held that insofar as this special statute granted the consent of the United States to condemnation proceedings by municipalities for public improvements (thus distinguishing the case from *Minnesota*), "it [could] be reasonably inferred that the governmental interests were protected by means other than joining the United States as a party. . . ." *Id.*

82. As noted in note 69 *supra*, Justice Brandeis himself intimated in *Minnesota* that its holding should be extended to restrictive allotments. *See Minnesota*, 305 U.S. at 386 n.1. It should be pointed out, however, that the United States is not an indispensable party in *all* disputes involving Indian land. *See, e.g.*, United States v. City of McAlester, 604 F.2d 42 (10th Cir. 1979) (special statute involved); Bird Bear v. McLean County, 513 F.2d 190, 191 n.6 (8th Cir. 1975) (action by trust patentees under Highway Act of 1866 for unlawful diminishment of their allotment); Choctaw & Chickasaw Nations v. Seitz, 193 F.2d 456, 460 (10th Cir. 1952) (action by Indian tribes to establish title to and recover possession of certain lands); United States v. Cattaraugus County, 71 F. Supp. 413, 420 (W.D.N.Y. 1947) (land of Seneca Nation never allotted or owned by United States). In the "typical" section 357 condemnation proceeding, however, the United States will be deemed an indispensable party and must be joined.

In addition to the question of whether the United States must be joined as an indispensable party, an argument has been raised that the Secretary of the Interior is also an indispensable party in a section 357 condemnation action. This argument, however, was rejected in Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

III. *Remaining Issues in the Area of State Acquisition of Interests in Indian Lands*

Aside from the procedural issues discussed above with respect to what steps must be taken and what safeguards must be afforded before a state may condemn an allotment or acquire a right-of-way, there remain several unresolved questions with regard to the structural interplay among the various provisions that comprise the federal statutory and administrative scheme in these areas. In particular, the following questions have appeared: (1) whether the concept of inverse condemnation, found in the general law of eminent domain, applies in the specialized area of condemnation of Indian lands, and (2) whether the general grant of authority to states[83] to condemn "for any public purpose" found in section 357 may be used to acquire rights-of-way across allotted lands as an alternative to the more specific and detailed Indian right-of-way statutes.[84]

An opportunity to address and further delineate these issues was presented to the United States Supreme Court in the 1980 case of *United States v. Clarke*.[85] The immediate issue before the Court in *Clarke* concerned the former question, i.e., whether section 357 encompassed the general principle of "inverse condemnation"[86] recognized elsewhere in the field of eminent domain. In deciding this issue, however, the Court declined to address the additional question of whether the specific right-of-way provisions preclude states from acquiring rights-of-way across allotted lands by condemnation under section 357. Several lower courts, however, have recently addressed this issue.

Inverse Condemnation and Section 357

Facts of Clarke

The question before the Supreme Court in *Clarke* was whether a state may "inversely" condemn allotted Indian land under section 357. In 1956, Bertha Mae Tabbytite, an Indian, filed a homestead application with the Department of the Interior for a

83. Assuming that the power of *tribal* governments to condemn exists, it would appear that tribes as well as states could utilize section 357 as an alternative method of acquiring rights-of-way across allotted lands. See note 66 *supra*.

84. See *supra* notes 45-65 and accompanying text.

85. 445 U.S. 253 (1980).

86. See *infra* notes 93-94 and accompanying text.

160-acre plot of land in the Chugach Mountains southeast of Anchorage, Alaska.[87] Two years later the defendant Glen Clarke applied for a homestead on an adjoining 80-acre parcel. To secure access to a public highway, Clarke shortly thereafter constructed a road across Tabbytite's land without obtaining a grant of easement from either Tabbytite or the United States.

Although Clarke was successful in securing his homestead patent and began to subdivide his land for development purposes, the application of Tabbytite (contested by Clarke) was never accepted. In 1966, therefore, the homestead application was finally abandoned and Tabbytite elected instead to take the land as an Indian trust allotment.

After several unsuccessful attempts to bar persons from utilizing the road that crossed her land, Tabbytite turned to the Bureau of Indian Affairs. In 1969 the United States, as holder of the legal title to the allotment, filed an action in federal district court, seeking damages and to enjoin further use of the road. The district court, in an unreported opinion, held that the road constituted an easement of necessity and denied the injunction.[88] This decision was subsequently reversed and remanded by the Ninth Circuit on the ground that no easement had arisen because, at the time of her entry, Tabbytite's title was good against everyone except the United States, and because Clarke was not a successor in interest to any easement implicitly retained by the government.[89]

On remand, the municipality of Anchorage, which had annexed the area in 1975 and since that time had maintained the road, entered the proceedings and opposed the injunction request, arguing that by maintaining the road it had already effectively exercised its power of eminent domain by "inverse condemnation."[90] The district court agreed with the municipality, rejecting the government's position that section 357 does not authorize inverse condemnation. The court instead held that a taking did in fact occur at the time of annexation and that Tabbytite was "limited to an action for compensation resulting from inverse

87. The factual summary is drawn in large part from the dissenting opinion in *Clarke* by Justice Blackmun. *See* United States v. Clarke, 590 F.2d 765, 766 (9th Cir. 1979); United States v. Clarke, 529 F.2d 984, 985-86 (9th Cir. 1976).

88. *See Clarke*, 529 F.2d at 985. Compensatory damages, however, were granted for both past and prospective trespasses. *Id.*

89. *Id.* at 986.

90. United States v. Clarke, 445 U.S. 253, 260 (1980) (Blackmun, J., dissenting).

condemnation."[91] The Ninth Circuit affirmed on the subsequent appeal.[92]

The United States Supreme Court thereupon granted the government's petition for certiorari to decide the issue of whether section 357 authorizes state or local governments to "condemn" individual Indian trust allotments by resort to the process of inverse condemnation.[93] In an opinion by Justice Rehnquist, the Court held that section 357 does *not* authorize condemnation by physical occupation—the essence of inverse condemnation—but instead requires a formal judicial proceeding instituted by the condemning authority in the exercise of its power of eminent domain.[94]

Rationale of Clarke

In deciding that section 357 does not extend to a taking by inverse condemnation as well as by the affirmative exercise of the eminent domain power, the Court emphasized the "important legal and practical differences between an inverse condemnation suit and a condemnation proceeding."[95] The term "inverse condemnation" is a popular description of the landowner's cause of action against a governmental defendant to recover the value of property taken by the physical intrusion[96] of the defendant where no formal exercise of the power of eminent domain has been attempted.[97] A condemnation proceeding, as the Court points out, is by contrast "commonly understood to be an action brought *by* a condemning authority. . . ."[98]

In addition to the legal distinctions between condemnation suits and inverse condemnation actions, the Court noted two important practical differences. Initially, it observed that in the in-

91. *Clarke*, 590 F.2d at 766 (summarizes holding of district court below).

92. *Id.* at 768.

93. Of course, if takings in the nature of inverse condemnation are prohibited in a particular state, section 357 cannot authorize what is not permitted by state law. Inverse condemnation, however, is recognized by Alaska law. *See* State Dep't of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

94. United States v. Clarke, 445 U.S. 253, 258 (1980).

95. *Id.* at 255.

96. *Id.*

97. *Id.* at 257.

98. *Id.* at 255 (emphasis added). The Court cites several cases that have noted the legal distinctions between condemnation actions and inverse condemnation proceedings. *See, e.g.*, Dugan v. Rank, 372 U.S. 609, 619 (1963); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291 (1958); United States v. Dickinson, 331 U.S. 745, 749 (1947). 445 U.S. at 256.

verse condemnation situation, where the condemning authority has not instituted legal action but instead has "taken" the land by physical occupation, the burden of taking affirmative action to recover just compensation is shifted to the landowner.[99] Placing the initiative on the landowner, the government argued, creates serious problems with respect to allotted lands because it "imposes a substantial burden on the United States, as trustee, to discover and challenge action that may constitute a taking of allotted lands."[100]

The difficulty of discovering possible takings gives rise to the second practical difference between condemnation and inverse condemnation actions. It is well-settled that the value of property taken by a governmental body is ascertained as of the date of taking.[101] Hence, in a condemnation proceeding, where the taking is generally held to have occurred sometime during the course of the proceeding, the allottee's compensation is based on the current value of the land.[102] On the other hand, in the inverse condemnation situation, "the usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued. . . .' "[103] Obviously, if takings of allotted lands by inverse condemnation are to be allowed, there will be significant delays between the time the state takes possession and the time the landowners institute legal action, resulting in significant discrepancies in the amounts of the compensation awards.[104]

99. 445 U.S. at 257.

100. *Id.*, Petitioner's Brief for Certiorari at 17. In its brief, the government points out that prompt discovery of trespasses by state and local governments would be difficult in light of the "thousands of scattered Indian allotments," the proportionated ownership of the allotments by nonresident Indians, and the absence of a requirement that the allottee reside on the allotted lands or make use of them. *Id.* at 17-18 (quoting Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 374 (1968)).

Furthermore, an argument has been made that taking property without notifying the landowner under such circumstances "constitutes a blatant violation of the procedural due process that is guaranteed by the Fifth and Fourteenth Amendments." Brief for Intervenor at 30-31, United States v. Clarke, 445 U.S. 253 (1980). This argument, which relies on the line of cases that have emanated from Fuentes v. Shevin, 407 U.S. 67 (1972), was not addressed in the Court's opinion and was mooted by its holding that section 357 does not encompass the general principle of inverse condemnation.

101. *Clarke*, 445 U.S. at 258, *citing* United States v. Miller, 317 U.S. 369, 374 (1942).

102. *Id.*, *citing* 1 L. ORGEL, VALUATION IN EMINENT DOMAIN § 21 n.29 (2d ed. 1953).

103. *Id.*, *quoting* United States v. Dow, 357 U.S. 17, 22 (1958).

104. Petitioner's Brief for Certiorari, *supra* note 100, at 16. The Brief goes on to point out that the greater the length of the delay, the more inadequate the award will be

In light of these legal and practical differences, the Court reversed the judgment of the court of appeals and held that "when § 357 authorizes the condemnation of lands pursuant to the laws of a State or Territory, the term 'condemned' refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority."[105] Because the "indispensable prerequisite" of a formal condemnation action was lacking, the federal grant of permission to condemn allotted Indian lands contained in section 357 could not be relied upon in this instance.[106]

Right-of-Way Statutes and Section 357

The Court in *Clarke* did not address the question of whether the specific provisions for acquiring rights-of-way across allotted Indian lands[107] preclude states from obtaining such rights-of-way by condemnation under section 357.[108] The question can be further divided into two related but separate issues: (1) whether section 357 when enacted encompassed condemnation of rights-of-way, and (2) whether subsequently enacted right-of-way statutes, particularly the 1948 Indian Right of Way Act, effected a partial implied repeal of section 357 to the extent it had applied to rights-of-way.[109] These issues have produced two different interpretations of the interplay of the statutory and administrative schemes in the area of Indian allotted lands. Under one interpretation, generally advocated by the Indians,[110] the ostensible absolute

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to compensate the allottee. *Id.* at 18. For example, in *Clarke*, it is claimed that the taking occurred either in 1961, when the unincorporated city of Glen Alps began to maintain the road, or in 1975, when Anchorage annexed Glen Alps and assumed maintenance operations. If the award granted is based on either date, the government states, it will be only a fraction of the property's present value, given the rapid escalation of real estate values in the area. *Id.* at 16. The end result, it is argued, is that an expressed federal Indian policy will be contravened: "The consequence is that the policy of the Act of June 30, 1932, 25 U.S.C. § 409a—which authorizes the Secretary to reinvest the allottee's condemnation award in other lands—will be frustrated, since it will not be possible to purchase equivalent lands for the amount of the award." *Id.* at 17.

105. *Clarke*, 445 U.S. at 258.

106. *Id.* at 259.

107. See *supra* notes 46-65 and accompanying text.

108. This issue was raised for the first time in the Intervenor's Brief. *See* Brief for Intervenor, *supra* note 100, at 9-30.

109. *See* COHEN, *supra* note 10, at 622 n.109.

110. Although this interpretation has been consistently advocated by the Indians, the United States has switched its position and now follows the view that the right-of-way statutes and section 357 constitute alternative acquisition methods. *Compare* United

general right of condemnation granted to states by section 357 is in reality modified by the enactment of the various right-of-way statutes, which control when applicable and require that the administrative regulations of the Secretary of the Interior be followed. Under the other interpretation, generally advocated by the states, the right-of-way statutes, with their accompanying regulations, and section 357, with its judicial features, constitute alternative methods authorized by Congress for the acquisition of rights-of-way by states across allotted lands. The courts, in attempting to resolve these issues, have focused primarily on the legislative histories of the statutes in question, the pertinent maxims of statutory construction, and the current congressional policies toward Indians.

Section 357 and the Right-of-Way Statutes as Alternative Acquisition Methods Available to States

The issue of whether section 357 encompasses condemnation of rights-of-way was presented to the Supreme Court in *Minnesota v. United States*,[111] where it was expressly left open.[112] Throughout the litigation of the *Minnesota* case, the United States took the position that section 357 does *not* provide an alternative to section 311 with regard to acquiring highway rights-of-way.[113] The Court of Appeals for the Eighth Circuit agreed, and held that section 357 "does not and was not intended to conflict with or to withdraw the conditions laid down in [section 311], upon which the United States consented to proceedings to open up highways through allotted Indian lands."[114] However, after the Supreme Court affirmed this decision on other grounds, expressly leaving the "alternative methods" issue open, an identical case involving

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States v. Minnesota, 113 F.2d 770 (8th Cir. 1940), Minnesota v. United States, 305 U.S. 382 (1939), *and* United States v. Minnesota, 95 F.2d 468 (8th Cir. 1938) *with* Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 2087 (1983) *and* Nebraska Pub. Power Dist. v. 100.95 Acres, 540 F. Supp. 592 (D. Neb. 1982), *aff'd in part and rev'd in part*, 719 F.2d 956 (8th Cir. 1983).

111. 305 U.S. 382 (1939). See *supra* notes 67-82 and accompanying text.

112. 305 U.S. at 391.

113. The government, represented by Solicitor General Robert H. Jackson, argued that "applying the Section 357 condemnation procedure to highway rights of way across allotted lands would render Section 311 'self-contradictory' and 'largely inoperative.' " Respondent's Brief in Opposition to Petition for Certiorari at 8, Minnesota v. United States, 305 U.S. 382 (1939).

114. United States v. Minnesota, 95 F.2d 468, 472 (8th Cir. 1938), *aff'd on other grounds*, 305 U.S. 382 (1939).

a different allotment came a year later to the Eighth Circuit. In that case, *United States v. Minnesota*,[115] the court of appeals reversed itself and held that "each of these sections [sections 311 and 357] is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other."[116] In support of this abrupt reversal, the court stated that its previous decision had rested in large part on the mistaken belief that an earlier Fourth Circuit decision,[117] which held that the right-of-way in question had to be acquired pursuant to the applicable right-of-way statute, involved allotted rather than tribal lands.[118]

The cases that have subsequently addressed the "alternative methods" question have for the most part held that the right-of-way statutes are not the exclusive means by which states may obtain rights-of-way across allotted lands. In *United States v. Oklahoma Gas & Elec. Co.*,[119] the Tenth Circuit, while addressing the issue of whether a state must obtain the permission of the Secretary of the Interior to erect electric lines upon a right-of-way previously granted pursuant to section 311,[120] noted that sections 311 and 357 constitute alternative procedures authorized by Congress for the acquisition of rights-of-way for highway purposes.[121] The Supreme Court, on appeal, agreed with this view in dicta. The Court was faced with the contention that 43 U.S.C. § 959 (1976)[122] and 43 U.S.C. § 961 (1976),[123] which authorize the Secretary of the Interior to grant various types of rights-of-way under specific conditions through, *inter alia*, "Indian or other reservations," governed the grant of rights-of-way over allotted lands. The Court's rejection of this argument focused on section 357:

115. 113 F.2d 770 (8th Cir. 1940).

116. *Id.* at 773. In support of its holding, the court cited a Land Decision of the Department of the Interior which held that "the remedy [under section 357] is simply an alternative one rather than a concurrent or an exclusive procedure." *Id.* at 774, *quoting* 49 L.D. 396 (Jan. 2, 1926).

117. United States v. Colvard, 89 F.2d 312 (4th Cir. 1937).

118. United States v. Minnesota, 113 F.2d 770, 772-73 (8th Cir. 1940). Because tribal lands were involved, section 357 was inapplicable. The decision hence was not authority on the issue of whether the right-of-way statutes and section 357 are alternative acquisition methods.

119. 127 F.2d 349 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943).

120. 25 U.S.C. § 311 (1976). *See supra* note 48.

121. 127 F.2d at 354-55.

122. See note 56 *supra*.

123. See note 55 *supra*.

> It is rather difficult to believe that Congress ever intended to exact such conditions [found in 43 U.S.C. §§ 959, 961 (1976)] as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee. It is particularly difficult in the context of [sections 959 and 961], for if such were the intent it was defeated by giving an option to obtain the same rights by condemnation under state law and free of such restrictions. § 3 of the Act of March 3, 1901 [section 357].[124]

The Ninth Circuit, in *Nicodemus v. Washington Water Power Co.*,[125] and the Tenth Circuit, in *Transok Pipeline Co. v. Darks*,[126] have followed the view of the Eighth Circuit[127] that the

124. United States v. Oklahoma Gas & Elec. Co., 127 F.2d 349 (10th Cir. 1942), *aff'd* 318 U.S. 206, 214 (1943). It has been argued that the Court's conclusion in *Oklahoma Gas & Elec. Co.* that any intent to apply 43 U.S.C. §§ 959, 961 (1976) to allotted lands was "defeated" by the existence of section 357 supports by analogy the position that the right-of-way statutes and section 357 are not alternative acquisition methods. *See* Brief for Intervenor, *supra* note 100, at 17-20. This argument notes that the right-of-way statutes, like 43 U.S.C. §§ 959, 961 (1976), authorize the imposition of conditions that would be "defeated" if the same rights could be condemned free of such restrictions. *Id.* at 19.

The problem with this argument is that the Court in *Oklahoma Gas & Elec. Co.* expressly found section 3 (section 311) and section 4 (section 357) of the Act of Mar. 3, 1901, to be compatible: "Section 3 made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 made both reservations and allotted lands subject to highway permits by the Secretary." 318 U.S. at 214-15. This description of sections 311 and 357, coupled with the Court's characterization of section 357 as an "option" for obtaining a right-of-way across allotted lands, undercuts the argument that the Court's decision in *Oklahoma Gas & Elec. Co.* may be viewed as supporting the position that the right-of-way statutes and section 357 are not alternative acquisition methods.

125. 264 F.2d 614, 618 (9th Cir. 1959).

126. 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

127. The holding of the court in *Nicodemus* is supported by a quotation from United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940). The Ninth Circuit, however, seemed to take the opposite position in United States v. 10.69 Acres of Land, More or Less, in Yakima County, 425 F.2d 317 (9th Cir. 1970). The issue before the court in *10.69 Acres* was whether Indian tribal lands could be secured for interstate highway use by condemnation, under 23 U.S.C. § 107(a) (1976), as well as by administrative appropriation, under 23 U.S.C. §§ 107(d), 317 (1976). The court, in finding that condemnation was not an available alternative, examined the relationship between sections 311, 323-28, and 357 of Title 25, noting that these sections "reflect essentially the same distinction as that found in the Title 23 provisions." *Id.* at 319. The court's tacit conclusion that the right-of-way statutes and section 357 are not alternative acquisition methods was not essential to the court's decision. *Id.* at 323 (Kilkenny, J., dissenting) ("I am convinced that [sections 311 and 357] are completely irrelevant and have no application to the problem before us"). The Ninth Circuit has subsequently held that *10.69 Acres* does not contradict

right-of-way statutes and section 357 constitute alternative acquisition methods. In *Transok Pipeline Co.*, the court offered the following rationale for its position: "Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required."[128] The court's observation that Congress was cognizant of the judicial safeguards inherent in section 357 condemnation actions responds to the primary argument raised for the exclusivity of the right-of-way statutes, i.e., that by interpreting section 357 to encompass condemnation of rights-of-way across allotted lands, the states will be allowed to circumvent the right-of-way statutes and regulations. This argument focuses on the following maxims of statutory construction:

(1) Specific terms prevail over general terms in the same or another statute which otherwise might be controlling;[129]

(2) Statutes should be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant;[130] and

(3) Statutes passed for the benefit of Indians are to be liberally construed with doubtful expressions being resolved in their favor.[131]

By holding that Congress considered the safeguards available in a judicial condemnation proceeding to be a sufficient substitute for the regulations promulgated under the right-of-way statutes, the court in *Transok Pipeline Co.* implicitly found that Congress was aware that, by authorizing states to condemn rights-of-way under section 357, the possibility existed that states would elect to bypass the administrative scheme for obtaining

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Nicodemus insofar as it involved tribal as opposed to allotted lands. Southern California Edison Co. v. Rice, 685 F.2d 354, 357 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1497 (1983). The court in *Rice* extended the holding in *Nicodemus* by finding section 357 and the 1948 Indian Right of Way Act to be alternative methods for obtaining rights-of-way across allotted lands. *Id.*

The Eighth Circuit has reaffirmed its position in Bennett County, South Dakota v. United States, 394 F.2d 8, 15 (8th Cir. 1968) (county's right to enter land is contingent upon either permission of the Secretary of the Interior under section 311 or a right obtained through lawful condemnation proceedings under section 357).

128. 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). This rationale was followed in Eastern Band of Cherokee Indians v. Griffin, 502 F. Supp. 924, 930 (W.D.N.C. 1980) (agreed in *dicta* with the "alternative acquisition method" position).

129. MacEvoy v. United States, 322 U.S. 102, 107 (1944).

130. United States v. Campos-Serrano, 404 U.S. 293, 301 n.14 (1971).

131. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

rights-of-way.[132] That Congress accepted this possibility does not render the right-of-way statutes insignificant; states may wish to avoid judicial proceedings and seek to obtain rights-of-way under the alternative administrative scheme.[133] The acceptance of the "alternative acquisition methods" interpretation also undercuts the argument that the specific terms of the right-of-way statutes must control over the general condemnation provision. Finally, although it is arguable that this interpretation is not "favorable" to Indians, especially because it enables states to avoid the necessity of obtaining the consent of the allottee and the Secretary of the Interior,[134] the interpretation has been held to be a reasonable one in light of the judicial safeguards available.[135]

Section 357 and the Effect of the 1948 Indian Right-of-Way Act

Judicial acceptance of the view that section 357, when enacted, encompassed condemnation of rights-of-way across allotted lands has not ended the dispute over whether the Indian right-of-way statutes and section 357 constitute alternative acquisition methods. Proponents of the exclusivity of the right-of-way statutes have argued in several recent cases that section 357 was implicitly repealed, to the extent (if any) it applied to rights-of-

132. *Cf.* Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976). The Tenth Circuit in *Pueblo of Laguna*, in support of its finding that a 1926 general condemnation provision was repealed by a 1928 Act (codified at 25 U.S.C. § 322 (1976)) applying the administrative right-of-way regulations to Pueblo lands, held that Congress did *not* intend to allow the state of New Mexico to circumvent the administrative scheme:

> It is abundantly clear that [section 322] was amended to give the Secretary of the Interior the power to control rights of way across Pueblo land. If the 1926 Act continues in effect, that power is only illusory. Whenever the Secretary objects to any proposed right of way, a condemnation under the 1926 Act would nullify the Secretary's objection . . . . We believe this would be a plain contradiction of the intent of Congress.

Id. at 1379. See *infra* notes 139-143 and accompanying text. *Pueblo of Laguna* involved tribal, not allotted lands.

133. In addition, the existence of an alternative method for acquiring rights-of-way across allotted lands does not render the right-of-way statutes insignificant with regard to *tribal* lands.

134. See *supra* notes 48 and 62 and accompanying text. *See also* City of Stillwater v. An Easement and Right-of-Way, 552 F. Supp. 64, 65 (W.D. Okla. 1981), *aff'd*, 691 F.2d 926 (10th Cir.1982), *cert. denied*, 103 S.Ct. 2087 (1983).

135. As previously noted (see *supra* notes 71-82 and accompanying text), condemnation proceedings under section 357 have the additional safeguards of requiring that the United States be named as a party-defendant and that the action be brought in federal court.

way, by the passage of the 1948 Indian Right of Way Act.[136] In support of this argument, which has met with little success, proponents have cited the shift in congressional policy toward Indians from the assimilationist approach,[137] prevalent at the time of the enactment of section 357, to the current policy of self-determination, exemplified by the 1934 Indian Reorganization Act.[138]

Although not directly on point, the 1976 decision of *Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna*[139] by the Tenth Circuit has been cited in support of the argument that section 357 was implicitly repealed in part by the enactment of the 1948 Indian Right of Way Act. The issue before the court in *Pueblo of Laguna* was whether the Act of May 10, 1926,[140] which authorized state condemnation of Pueblo Indian lands for any public purpose, was repealed by either the Act of April 21, 1928,[141] or the 1948 Indian Right of Way Act. The court held that both the 1928 Act and the Indian Right of Way Act repealed the 1926 Act by implication.[142] The court's latter holding focused on the inconsistency between the 1926 Act and the Right of Way Act:

> As we view the statutes governing acquisition of rights of way over Indian lands contained in 25 U.S.C. §§ 311-328, they constitute a comprehensive scheme which completely covers the subject of rights of way. Sections 311-322 permit grants of right of way for specific purposes; sections 323-328 permit grants of right of way for all purposes while preserving the sections applicable to specific purposes. . . .
>
> The protection afforded by sections 311-328 would be nullified by the continued validity of the Act of May 10, 1926, which permits condemnation suits at any time for any public purpose without the consent of the Secretary or the Indians. . . .

136. See *supra* notes 59-65 and accompanying text.

137. See *supra* notes 26-29 and accompanying text.

138. See *supra* notes 37-40 and accompanying text.

139. 542 F.2d 1375 (10th Cir. 1976).

140. 44 Stat. 498 (1926).

141. 45 Stat. 442, 25 U.S.C. § 322 (1976). See note 43 *supra*.

142. 542 F.2d 1375, 1380 (10th Cir. 1976). The holding that the 1926 Act was repealed by the 1948 Indian Right of Way Act overruled an earlier decision, State *ex rel.* State Highway Comm'n v. United States, 148 F. Supp. 508 (D.N.M. 1957), which had found the statutes to be separate and independent means by which to obtain rights-of-way over Pueblo lands. The court noted that the opinion in *State Highway Comm'n* did not discuss the issues of legislative history and congressional intent. *Id.*

> This plain inconsistency with the later statutes leads to the inescapable conclusion that the 1926 Act has been repealed by implication.[143]

Proponents of the exclusivity of the right-of-way statutes have argued that the logic of *Pueblo of Laguna* applies with equal force with respect to section 357 and provides persuasive authority for the proposition that the Indian Right of Way Act effected a partial repeal of section 357. This argument, however, was recently rejected by the Tenth Circuit, which had decided *Pueblo of Laguna*, in *Yellowfish v. City of Stillwater*.[144] In that case, the city of Stillwater, Oklahoma filed a petition to condemn a right-of-way over trust allotments of nine Indians for the purpose of constructing a municipal water supply pipeline. Jurisdiction was predicated on section 357, which the Indians contended had been impliedly repealed by the Indian Right of Way Act. The Tenth Circuit disagreed and upheld the city's right to proceed under section 357 and condemn the rights-of-way without secretarial or Indian consent.[145] The court distinguished *Pueblo of Laguna* on the ground that the 1926 Act in issue in that case authorized condemnation of lands communally owned by the Pueblo Indians, whereas section 357 applies only to allotted lands:

> While *Plains Electric* [*Pueblo of Laguna*] supports the proposition that Congress distinguished between tribal and allotted lands and did not intend to permit condemnation of *tribal* or communally owned land, it is silent on the subject of allotted lands. Consequently, that case does not compel the conclusion that Congress also partially repealed section 357 by implication.[146]

The court further distinguished *Pueblo of Laguna* on the ground that, whereas in that case the 1928 Act's legislative history was found to have indicated that Congress intended to repeal the 1926 general condemnation provision, the legislative history for the

143. *Id.* at 1380-81. The court also noted that "[t]he continued existence of a general condemnation statute is repugnant to the later statutes which do not purport to authorize condemnation." *Id.* at 1380 n.5.

144. 691 F.2d 926 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 2087 (1983).

145. *Id.* at 927.

146. *Id.* at 929 (emphasis in the original). *Accord*, Southern California Edison Co. v. Rice, 685 F.2d 354, 357 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1497 (1983).

1948 Act was not found to contain a similar congressional intent.[147]

In addition to relying on *Pueblo of Laguna*, the Indian allottees in *Yellowfish* argued that condemnation of rights-of-way under section 357 conflicts with the current congressional policy toward Indians. The assimilation policy in force at the time of the passage of section 357 was repudiated in 1934 by the Indian Reorganization Act. Both the Indian Reorganization Act and the Indian Right of Way Act, it is argued, evince a policy of preventing the alienation or transfer of allotted lands without consent, and section 357 therefore should be deemed repealed to the extent it conflicts with this policy.[148]

The court did not find the shift in congressional policy to be persuasive evidence of an implied repeal of section 357. In support of this holding, the court noted that in 1976, in a statute passed to repeal the 1926 Act at issue in *Pueblo of Laguna*, Congress included a provision amending the 1928 Act to extend section 357 to the Pueblo Indians of New Mexico.[149] The continued application of section 357 in face of the current congressional policy may also be explained by the tribal/allotted land distinction used to distinguish *Yellowfish* from *Pueblo of Laguna*: whereas the Indian Reorganization Act's strong policy of maintaining the *tribal* land base supports the view that the 1926 Act authorizing condemnation of communally owned Pueblo land should be deemed repealed in light of the Indian Right of Way Act, the Indian Reorganization Act's policy toward allotments is less strong and may not overcome the presumption against implied repeals. As noted by the court in *Yellowfish*, although the Indian Reorganization Act prohibited further allotment of reservation land in order to protect the tribal land base, existing allotments remained in effect and allotments were still allowed to be made to Indians not residing on reservations.[150]

The argument that the shift in congressional policy away from

147. *Id.* at 929 n.5.

148. *Id.* at 930. *See also* Brief for Intervenor, *supra* note 100, at 28.

149. Yellowfish v. City of Stillwater, 691 F.2d at 930. The statute, Act of Sept. 17, 1976, Pub. L. 94-416, 90 Stat. 1275, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2368-76, amended the 1928 Act (25 U.S.C. § 322 (1976)), which previously applied sections 311-15, 317-19, and 321 to Pueblo Indians, to also apply sections 323-28 and section 357 to the Pueblos. The 1976 Act also deleted a reference in section 322 to 43 U.S.C. § 935 (1976).

150. *Yellowfish*, 691 F.2d at 930.

assimilation supports the view that section 357 was implicitly repealed by the 1948 Indian Right of Way Act was also recently rejected by the Ninth Circuit in *Southern California Edison Co. v. Rice*.[151] The condemning authority in *Rice* sought to obtain a right-of-way under section 357 for electrical transmission lines over allotted lands. In upholding the right of the condemning authority to proceed under section 357, the court found that Congress, with respect to state condemnation actions, chose "to have Indian allottees remain in virtually the same position as those who privately own land for their sole use and benefit. . . ."[152] The court's analysis of the effect of the change in congressional policy toward Indians followed the analysis of the Tenth Circuit in *Yellowfish:*

> With respect to condemnation actions by state authorities, Congress explicitly afforded no special protection to allotted lands beyond that which land owned in fee already received under the state laws of eminent domain. *See* 25 U.S.C. § 357. Thus, consistent with its assimilation policy, Congress placed Indian allottees in the same position as any other private landowner *vis-a-vis* condemnation actions, with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds. . . . Although the United States policy toward Indians [has] shifted away from an assimilationist approach in the years since the allotments were made, . . . the fact that Congress has not amended or repealed section 357 shows that the position of Indian allottees with respect to condemnation actions under state law has not changed.[153]

Proponents of the argument that section 357 was partially repealed by the 1948 Indian Right of Way Act did achieve short-lived success recently in *Nebraska Public Power District v. 100.95 Acres*.[154] The district court in *100.95 Acres*, which concerned the authority of a public utility to condemn tracts of land held in trust by the United States either for individual Indians or for the tribe, found, with respect to the individually held tracts, that the

151. 685 F.2d 354 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1497 (1983).

152. *Id.* at 356.

153. *Id.* The court cites the Act of Sept. 17, 1976, *supra* note 149, as an indication that section 357 is still in force.

154. 540 F. Supp. 592 (D. Neb. 1982), *aff'd in part and rev'd in part*, 719 F.2d 956 (8th Cir. 1983).

Indian Right of Way Act "may properly be considered to have supplanted 25 U.S.C.A. § 357 insofar as the acquisition of electric transmission line rights-of-way across trust land is concerned."[155] In reaching its decision that section 357 cannot be used to condemn rights-of-way,[156] the district court either distinguished or disagreed with the body of case law that has held otherwise.[157] The

155. *Id.* at 600. In support of its holding that section 357 has been partially superseded, the district court cited the maxim of statutory construction, which states that statutes passed for the benefit of Indians are to be liberally construed in favor of Indians. *Id.* at 597. See *supra* note 131 and accompanying text. The court also stressed the shift in federal policy from assimilation to "preservation of the Indians' land base and the encouragement of tribal self-sufficiency . . . ." *Id.* This new federal policy, the court held, was embodied in the 1948 Indian Rights of Way Act, which the court found "was intended to satisfy the need for simplification and uniformity in the administration of easements over the various categories of Indian lands." *Id.* The court noted that "the apparent reason for preserving certain existing [right-of-way] legislation was to avoid possible confusion, particularly during the period of transition from the old to the new system." *Id.* (citing S. REP. No. 823, 80th Cong., 2d Sess., *reprinted in* [1948] U.S. CODE CONG. SERV. 1033, 1036). The court also noted that 25 U.S.C. § 326 (1976), part of the 1948 Act, did not include section 357 in its designation of statutes expressly saved from amendment or repeal. *Id.* See note 63 *supra.*

156. The court concluded that the acquisition of easements or rights-of-way across allotted land was controlled by 25 U.S.C. §§ 323 to 328, but held that 25 U.S.C. § 357 still applied to interests other than rights-of-way in allotted lands. *Id.* at 601. The court also found that section 357 applied to all interests—including rights-of-way—in "patented lands." *Id.* By the term "patented lands" the court meant land held by individual Indians free of trust or alienation restrictions. See notes 35-36 *supra* and accompanying text.

157. The Eighth Circuit decision of United States v. Minnesota, 133 F.2d 770 (8th Cir. 1940) (see notes 115-118 *supra* and accompanying text), which originally set forth the "alternative acquisition methods" theory, was distinguished as being decided prior to the Indian Right of Way Act. 540 F. Supp. at 599. The Ninth Circuit decision of Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959) (see note 125 *supra* and accompanying text), which did consider the impact of the 1948 Act on section 357, was not followed on the ground that it "did not focus closely on the impact of passage of the 1948 Act nor did it indicate recognition of the evolving federal policy which strongly favors preservation of the Indian land base and encouragement of tribal self-government." 540 F. Supp. at 600. The Tenth Circuit decision of Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978) (see notes 126-128 *supra* and accompanying text), was also distinguished. *Id.* at 599-600. The district court chose instead to follow the analysis of the statutory and administrative scheme for acquiring rights-of-way across Indian lands found in the Tenth Circuit decision of Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976) (see notes 139-143 *supra* and accompanying text), which supports the view that the 1948 Indian Right of Way Act effected a partial implied repeal of section 357. Although the Tenth Circuit itself declined in Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 2087 (1983) (see notes 144-150 *supra* and accompanying text), to extend the reasoning of *Pueblo of Laguna* under similar circumstances, the district court in *100.95 Acres*, which did not discuss *Yellowfish*, found the decision to be persuasive authority on the issue. The court further found that the protective provisions of the 1948

court also held that the 1948 Act was intended to supersede the "special purpose access" statutes; i.e., 25 U.S.C. §§ 312-22 (1976) and 43 U.S.C. §§ 959, 961 (1976).[158]

The Eighth Circuit, however, reversed the decision of the district court to the extent it held that section 357 could not be applied to condemn a right-of-way across allotted land.[159] The court found "no clearly expressed congressional intent to repeal section 357,"[160] and held that "[s]ubsequent congressional action affirms [its] continued vitality. . . ."[161] The court, unlike the district court, found the body of case law holding that no irreconcilable conflict exists between the 1948 Act and section 357 to be persuasive.[162]

Act would be nullified and the power of the Secretary of the Interior over rights-of-way would be illusory if section 357 remained in effect as an alternative acquisition method. 540 F. Supp. at 601. Compare notes 132-135 *supra* and accompanying text.

158. 540 F. Supp. at 597 n.3, 600.

159. Nebraska Public Power Dist. v. 100.95 Acres, 719 F.2d 956, 958 (8th Cir. 1983). The court did not directly reach the issues, addressed by the district court, of whether the 1948 Act superseded the "special purpose access" statutes (see text accompanying note 158 *supra*), and whether section 357 authorizes states to condemn only "patented lands," i.e., allotted lands held free of trust or alienation restrictions. See note 156 *supra*. Although the first issue appears to be *dictum*, the latter holding of the district court was characterized by the court as "a somewhat separate ground [requiring] denial of [the power utility's] authority to condemn . . . ." 540 F. Supp. at 602. The district court's restrictive interpretation of section 357, however, appears to have been implicitly overruled by the Eighth Circuit's holding that "pursuant to 25 U.S.C.A. § 357 the utility has the authority to condemn land allotted in severalty to Indians . . . ." *Nebraska Public Power Dist. v. 100.95 Acres*, *supra*, at 957.

160. *Id.* at 960. The court concluded its analysis of the legislative history of the 1948 Indian Right of Way Act as follows:

> In sum, it is apparent from the legislative history that the 1948 Act was not enacted as a restrictive measure in response to problems engendered by section 357, which authorized condemnation pursuant to state law without secretarial consent. Rather, the 1948 Act was a response to quite the opposite problems; the limited nature of rights-of-way authorized by statute, and the difficulty of obtaining easement deeds from all the various owners. Conditioning rights-of-way in certain cases upon consent of only the Secretary was intended to make the law more lenient in situations where consent of all the owners previously had to be obtained. Thus, it is not consistent with the legislative history of the 1948 Act expansively to interpret the secretarial consent provision as an intended restriction upon obtaining all rights-of-way across Indian lands.

Id. at 959.

161. *Id.* at 959. The court was referring to the Act of Sept. 17, 1976, Pub. L. 94-416, 90 Stat. 1275, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2368-76. See *supra* notes 43 and 149 and accompanying text.

162. *Id.* at 960-61. The court also agreed with the Ninth and Tenth circuits that *Pueblo of Laguna* is distinguishable because it involved tribal, not allotted, land. *Id.* See *supra* note 146 and accompanying text. The court refused to distinguish the previous deci-

Although the district court's finding in *100.95 Acres* that section 357 was partially repealed by the 1948 Indian Right of Way Act was reversed on appeal, the district court opinion contains an additional holding of potentially great interest in the area of condemnation of Indian land. Prior to the commencement of the condemnation action, several individual Indians deeded undivided interests in their land to the United States in trust for the tribe, while retaining life estates.[163] The condemnor, while conceding that it had no authority to condemn tribal lands,[164] asserted that the interests obtained by the tribe did not create tribal lands, but instead remained allotted lands subject to section 357.[165] The district court rejected this argument, holding that "the term tribal lands properly includes land in which the tribe has a protectable interest."[166] Consequently, the court held that the tracts, as tribal lands, were not subject to section 357.[167]

Under the district court's holding, which was affirmed by the Eighth Circuit,[168] individual Indians seeking to avoid having their land taken by condemnation may remove any possibility of jurisdiction being asserted under section 357 by deeding their land to the United States in trust for their tribe. The individual Indian, who may retain a life estate in the land,[169] thus forces the con-

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sions on the ground that, in contrast to the earlier cases, the allotted land in the present case was located inside the reservation, noting that to make such a distinction would ignore the "plain meaning" of the statute. *Id.* at 961 (*citing* United States v. Clarke, 445 U.S. 253, 254 (1980)).

163. 540 F. Supp. at 595.

164. See *supra* notes 41-43 and accompanying text.

165. 540 F. Supp. at 603.

166. *Id.* at 603-04 (*citing* 25 C.F.R. § 161.1(d) (1981) [now 25 C.F.R. § 169.1(d) (1983)].

167. 540 F. Supp. at 604. In light of the inapplicability of section 357, in order to acquire a right-of-way over the tracts in which the tribe holds an interest, the consent of the tribe and the Secretary must be obtained. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.3(a) (1983). See *supra* note 62 and accompanying text.

168. The court of appeals agreed with the district court that the conveyances in question need not conform to the requirements of state law, that the conveyances were valid under federal law, and that the future interests conveyed constitute "tribal land" as defined in 25 C.F.R. § 169.1(d) (1983). Nebraska Public Power Dist. v. 100.95 Acres, 719 F.2d 956, 961-62 (8th Cir. 1983).

169. The tribe in *100.95 Acres* received an indefeasibly vested remainder in fee simple which becomes a fee simple absolute upon the death of the individual owner. *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY 115-17 (3d ed. 1981). Under such circumstances, it appears reasonable to require the consent of the tribe in order to obtain a right-of-way across land which could at any time become tribal land in fee with concomitant full possessory rights. The rationale of *100.95 Acres*, however, applies to "any interest" in

demning authority to proceed under the administrative regulations (with their accompanying consent requirements) for obtaining rights-of-way across tribal lands. The only apparent restriction placed upon such conveyances is that they must be approved by the Secretary of the Interior.[170]

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land conveyed to the tribe, and hence appears to apply to any valid future interest, no matter how contingent or remote.

170. 25 C.F.R. § 152.22 (1983) provides that "[t]rust or restricted lands . . . or any interest therein, may not be conveyed without the approval of the Secretary." The approval may also be made by an authorized representative of the Secretary acting under delegated authority. 25 C.F.R. § 152.1(a) (1983). *See* Nebraska Public Power Dist. v. 100.95 Acres, 719 F.2d 956, 961 (8th Cir. 1983) (Bureau of Indian Affairs is authorized to approve conveyances). The requirement that the conveyance of an interest in allotted land to the tribe be approved by the Secretary safeguards against "sham" conveyances designed to shield allotted land from condemnation.