The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law

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I. INTRODUCTION

The substantive area of law that made the least amount of sense to me during law school was property law. In particular, Anglo-American concepts of property law. The reason for my dismay was purely contextual. My frame of reference for property law was a thirty-acre plot of land near Ft. Gibson, Oklahoma,1 within the reservation boundaries of the Cherokee Nation. To my family, this parcel has always been referred to as “the ol’ home place.” Federal Indian law defines the parcel as an unrestricted Indian allotment with a fractionated ownership problem. In Anglo-American property terms, it is a tenancy in common.

The primary focus of this article is substantive tribal property law. Aspects of federal Indian law, or Federal Indian Control Law,2 are briefly recounted only to highlight the need for Indian Nations to define, articulate and implement tribal law as a crucial step toward preserving tribal ownership and promoting economically sound land use.3

II. THE PROBLEM CREATED BY FEDERAL INDIAN LAW

The most devastating blow to tribal land tenure was the federal allotment policy.4 Tribally held lands were allotted to individual tribal citizens in an attempt to assimilate Indians into the white agrarian culture.5 Once lands were allotted, federal and state law determined the descent and distribution of ownership interests within Indian country.6 Systems of tribal property laws, which had flourished for centuries prior to allotment, were set aside in favor of state and federal laws. It was not a simple case of pre-emption or choice of law priorities; rather, tribal law was blatantly ignored as if non-existent.

As a result of the allotment process and the forced abandonment of tribal control, remaining ownership interests7 in most Indian allotments have become

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highly fractionated. Congress offered a remedy to limit further fractionation in the Indian Lands Consolidation Act (ILCA). Some ILCA provisions recognized tribal authority to adopt property codes and land consolidation plans, subject to federal approval.

The most controversial component of the ILCA required a forced escheat of minute property interest in once-allotted lands to the tribal government. This congressional mandate applied only to Indian-owned trust or restricted lands representing less than two percent of a tract’s acreage. In order for the forced escheat mandates to apply, the total economic yield must be less than 100 dollars per year.

The United States Supreme Court held the forced escheat provision of the ILCA unconstitutional as a taking of individual property without just compensation. In response, Congress amended the ILCA, but the revised ILCA was stricken by the Supreme Court on the same grounds.

Irony is not new to federal Indian law, but seldom is it as striking as the present scenario. Congressional authority was upheld when Congress took millions of acres held by tribal governments and allotted those lands to individuals, yet the tribal governments were never compensated. However, Congress now lacks the authority to mandate an escheat from a tribal member back to the tribal government even of extremely small, economically worthless ownership interests. Congressional plenary power has often been upheld when it diminishes tribal land base, but seldom to restore it. In November 2000, Congress enacted a third pass at the ILCA.

Fractionated ownership continues to plague Indian country. Congress has been unable to present a remedy that will be upheld by the federal judiciary. Federal Indian law has reached a dead end with respect to fractionated ownership. But is there a remedy in tribal law to redress the fractionated ownership problem Congress created during allotment? Is there a body of substantive tribal property laws that would be responsive to the present situation in Indian country? Or, on a more hypothetical note, if inherent tribal authority to truly make their own laws and be ruled by them were recognized in the property law context, what would those tribal laws be?

III. CHEROKEE CONCEPTS OF PROPERTY

To address these questions, I turn to substantive Cherokee property law for two reasons. First, is the matter of convenience and the availability of a substantial body of recorded Cherokee property laws dating from the early nineteenth century to allotment. Second, as stated previously, my point of reference for property law is an unrestricted Cherokee allotment.

I cautiously consider my family’s approach to the allotment tract as representing traditional Cherokee law because, by most standards, my family is not “traditional,” but assimilated in many ways. But the more I study Cherokee property law, the more I am
convinced that my family’s approach to the allotted land is quite consistent with traditional Cherokee concepts of property.

Turning to Cherokee concepts of property, I address two issues. First, I dispel the misconception that all Cherokee lands were owned in common with no individual recognition of ownership. Second, I employ Cherokee property laws to offer some, perhaps controversial, solutions to the fractionated property problem.

With respect to the first issue, I posit that individual Cherokees did, in fact, own and value property of all types. The common misconception suggesting otherwise is merely an imperialistic mechanism aimed at soothing the collective white conscience. If individual Cherokees and other Indian tribes do not own or covet real property, then it is not as egregious if their property is taken from them outright or exchanged for inferior lands or cash.

Professor Bill Rice offers a poignant example rebutting the presumption that Indians did not, and do not, value individual property rights. The property at issue is Grandma’s camping spot at the powwow grounds. Grandma’s individual rights to property are best demonstrated when someone new tries to set up camp on Grandma’s camping grounds.

In this scenario, Grandma possesses something much more powerful than any fee simple absolute contemplated in Anglo-American law. A standard fee simple absolute would require Grandma to dispossess the squatter, perhaps by filing an action in state court. The state court would reaffirm Grandma’s rights to the property. But, under tribal law, Grandma’s rights are quickly reaffirmed by the tribal community before Grandma even arrives to see the squatter, as two of the biggest Indian guys in the vicinity come over and, sua sponte, issue a declaratory order for the squatter to vacate Grandma’s land grounds immediately. No formal quiet title action is necessary, and full faith and credit is guaranteed.

To test this example, I explore the earliest recorded Cherokee laws for a basis of support. The first written Cherokee law was enacted in September 1808, and related to — what else? — property law.

In particular, a police force was assembled to accomplish two objectives. First, to suppress the stealing of property in Cherokee Territory. Second, to protect the rights of Cherokee women and children to inherit property. For a society of individuals who allegedly did not value or prioritize property rights, this was among several interesting choices of laws recorded in the first Cherokee legal texts.

From reading these early laws, it is quite clear that they were not codified as a means of articulating or defining, in the fashion of Sir William Blackstone, a treatise of Cherokee common law. Instead, these provisions suggest the Cherokee Nation was reacting to the crisis of increased encroachment by white land speculators. These
property laws were simply a reactionary means of holding on to Cherokee lands, and thus protecting Cherokee sovereign integrity.

An 1819 Cherokee law, which was the result of a convention involving fifty-four Cherokee towns and villages, lends additional support for this proposition by addressing a number of property concerns. In addition to requiring unanimous consent for all subsequent laws affecting the nation's property, the 1819 law sets out two very fundamental principles of Cherokee property law. First, it requires individuals to surrender their claims to property when permanently leaving the boundaries of the nation. Second, it protects individual claims to property on which improvements have been made.

On the issue of whether the Cherokee Nation in fact held its lands in common, this 1819 law is quite persuasive. Whatever the phrase "our common property of lands" meant to the Cherokees, it was radically different from the way Anglo-American property law defines "common property."

Under Anglo-American property law, when one thinks of lands held in common, it generally means that one parcel of land is owned in common by a community and shared together by all. No unobstructed individual rights to property persist in the Anglo-American definition of common property. This is not what the Cherokee Nation meant when it used the phrase in these early laws as "our common property of lands." The Cherokee Nation used "common property" to be synonymous with territorial and political integrity. Or, translated to present day terms, the lands within a reservation boundary. "Our common property of lands" was a term of art to protect against encroachment and further territorial degradation. It was not intended to be synonymous with the Anglo-American counterpart.

If the Cherokee had truly meant common property in the Anglo-American sense, it would not have included in the very same law guarantees of protection of individual property rights. It would not have set up a regulatory scheme to be applied when citizens abandoned their individual claims to property by permanently leaving the Cherokee Nation.

For instance, an 1825 law — enacted "for the better security of the common property of the Cherokee Nation, and for the protection of the rights and privileges of the Cherokee people" contains an express distinction between "public property of the Nation," which the tribal government had the sole power to manage and dispose of, and "common property of the Nation."

Expressed in the 1825 Act was the admonition that the tribal government did not have the right to dispossess or divest citizens of their exclusive and indefeasible rights to their homes, their farms, or any other improvements. In this regard, Cherokee citizens had more of a right to their homes or farmsteads than their contemporary U.S. citizens, because there was an express prohibition against governmental takings of individual
property, without regard to the possibility of just compensation. The power of eminent domain was not expressly reserved to the Cherokee government.

The pervasive principle of substantive Cherokee law that recurs throughout this time period is the relentless recognition of individual Cherokee rights to the lands they were already occupying. Cherokee lands could only be sold or inherited by other Cherokee citizens. The only time governmental authority intervened in property matters was to require citizens to forfeit property interests upon permanent departure from the Cherokee Nation. It is important to note that Cherokee citizens did not necessarily relinquish property interests to the nation to become public property. Citizens were free to devise or grant ownership interests to other Cherokee citizens prior to leaving.

Notable in the Cherokee experience is a progression, or de-evolution, from strong individual Cherokee property rights in favor of more governmental regulation. But the reasoning behind the tribal governmental regulation differs radically from Anglo-American rationales favoring governmental regulation.

When States pass property laws, the compelling governmental interest is generally in promoting predictability in land transactions for market concerns.\(^48\) When the Cherokee Nation passed these property laws, the compelling governmental interest was to protect Cherokee lands from outside alienation. The Cherokee Nation sought to keep Cherokee lands under Cherokee ownership. Colonial pressures necessitated this reactionary approach to property laws.

Prior to the written laws and prior to sustained efforts to dispossess the Cherokees of land, the state of individual property rights was consistent with Professor Rice’s Grandma example. The Cherokee government had no need to implement land ownership regulations because individual rights to property were more absolute than the fee simple of contemporary Anglo-American property law. Only as non-Indian pressures intensified did the Cherokee Nation officially proclaim their lands common “property.” As a practical matter, the Cherokee property system likely experienced little change until forced allotment.

As pressures intensified, and with no alternative option, the Cherokee Nation’s governmental interest in preserving territorial integrity began impacting private property rights. For the first time, the tribal government began regulating Cherokee property transactions, including property sales and conveyances.\(^49\) The regulations dictated the parties to whom property interests could be conveyed, and evolved in seriousness to an express prohibition, punishable by death,\(^50\) against conveying Cherokee lands to non-Cherokees.

Cherokee law contained no prohibitions against Cherokees selling, trading or granting interest among citizens within the nation.\(^51\) Ultimately, a right of first refusal to other Cherokees, with a secondary priority to the nation itself, became a prevailing principle of Cherokee property law.
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With the historical property concepts in mind, I return to the contemporary problem of fractionated ownership in Indian country to determine whether the reclamation of tribal laws, specifically Cherokee property laws, could offer a viable remedy to modern fractionation.

Indian communities are now three or more generations past the forced allotment. As a result, a growing number of individuals are inheriting fractional property interests. The United States Supreme Court provides an excellent example of the legacy of allotment, by describing ownership interests in one tract of land:

Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1.... The common denominator used to compute fractional interests in the property is [3 trillion, 394 billion, 923 million, 840 thousand]. The smallest heir receives $.01 every 177 years.... The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.52

Luckily, my family’s allotment does not suffer from a problem of such magnitude. One reason is the adherence to a list of undocumented rules, or perhaps tribal property laws, that have been applied for the past ninety-four years.53 The number of co-tenants remains relatively low and, despite the loss of restricted trust status, the land remains under Indian ownership.

These basic rules, as translated into Anglo-American concepts, are as follows:54 (1) co-tenants who permanently move away from the area and no longer maintain meaningful contact with the property shall sell or convey their interests to a remaining co-tenant; (2) offers for the sale of ownership interests and other conveyances are made to other co-tenants or other Indian members of the family and not to outsiders; (3) ownership interests of any surviving non-Indian spouse are no greater than a life estate, with actual ownership interests passing to the Indian children;55 and (4) one co-tenant may not employ a new use for the land without the consensus of other co-tenants.56

If these rules sound familiar, it is because these family rules essentially embody the Cherokee laws of the 1800s.57 Among other Cherokee property laws, the family rules demonstrate that principles such as the prohibition against conveying lands to non-Indians and the relinquishment of property rights upon permanent departure prevail into the twenty-first century.

IV. PROPOSED REMEDIES

Returning to the original inquiry of whether tribal property laws can be reclaimed to remedy the problem of fractionated ownership, I am met with optimism. Why not exercise tribal sovereignty to implement property laws applicable to all tribal member
lands located within the Cherokee reservation boundaries, regardless of whether the lands are held in trust or in unrestricted fee status?

The first proposal is a program to convert unrestricted Cherokee allotments from fee simple to trust status. Cherokee property holders would have the option of transferring their property interests to the Cherokee Nation on the condition that the Cherokee Nation immediately re-issue the deed to the property holder. The property would then be held by the Cherokee Nation for the benefit of the tribal members, in the same fashion as the United States holds lands in trust for individual Indians.

The second proposal is to implement a modern Cherokee property system based, in part, on the Cherokee laws of the 1800s. The following three-part approach is offered as an example of how those older laws might be implemented in the fourteen-county jurisdiction of the present-day Cherokee Nation. The suggestion of enacting new laws comes with the caveat that Cherokee laws of the 1800s should be considered effective today unless they have been affirmatively overruled or replaced with new Cherokee law. Perhaps the only legislative action that need be taken is to amend the laws of the 1800s to reflect contemporary concerns.\textsuperscript{58}

The Cherokee Nation could enact a tribal law prohibiting tribal members from selling their real property interests to non-members. The Cherokee Nation, and many other Indian nations, presently face a similar critical phase in the protection of political integrity and autonomy as they were in 1825. This type of law will ensure that not another single acre of Cherokee land passes into non-Cherokee hands.

To achieve the same purpose, the Cherokee Nation could enact a tribal law requiring tribal members to sell or convey their property interests should they choose to permanently leave the jurisdictional boundaries. This is consistent with “use it or lose it” economic concerns of land management and it will halt further fractionation of ownership. To carry out this regulation, the Cherokee Nation might prescribe a fixed time period, as do states in adverse possession law,\textsuperscript{59} to determine what constitutes permanently leaving the territory. There would be nothing to preclude the individual tribal member from regaining property interests if a return to the territory materializes. The Cherokee Nation could also enact, as a means of carrying out the previous laws, a preferential right of first refusal scheme to preserve familial, and ultimately Cherokee, interests in land should that interest have to be transferred. An analogous example would be the placement preferences set forth in the Indian Child Welfare Act.\textsuperscript{60} Tribal law would, of course, dictate these preferences.

Under Cherokee law, it might be that the right of first refusal be extended to other existing tribal member co-tenants to reduce fractionated ownership. Second right of refusal might be granted to tribal members in the maternal family or clan. Perhaps third right of refusal to tribal members in the paternal family and fourth right of refusal to any other tribal member. At the end of the preference list, the final right of refusal would be
reserves to the tribal government to purchase the ownership interest, be it a fractional interest or an entire estate.

This preferential scheme could be used both in intestate probate proceedings as well as instances where an individual is permanently leaving the tribal jurisdiction. The problem arises, of course, when an individual would have to sell lands to the tribe when they might receive a higher price from a non-Indian buyer. Forced restrictions on alienation may lead some tribal members to challenge this exercise of Cherokee authority. In an indirect manner, this raises the issue of governmental takings, in instances where tribal members refuse to abide by the Cherokee property scheme. Could the tribal government simply take the land and compensate the property owner for her fractional interest?61

The idea of governmental taking by the Cherokee government, I must admit, is not a concept supported by early sources of Cherokee law. But, why not exercise the inherent government power of eminent domain, and compensate tribal members for their fractional ownership interests in the allotment? The idea embodies a cyclical irony, in that the tribe is essentially buying back its own land; but perhaps it is time to embrace that possibility. Although I find no early source in Cherokee law that would have traditionally given the tribal government these types of powers, I raise this option to note that tribal laws are, and should be, continually evolving. We should not embrace, or subconsciously adhere to, the idea that our laws have to be “traditional” in order to be considered our “common law.” Tribal governments will continue encountering issues that our ancestors never contemplated.

State and federal governments constantly re-invent and redefine law, particularly those relating to governmental authority. But, somehow it is perceived that tribal governments, in the application of tribal laws, have a solid historical root for any exercise of governmental authority. We must put an end to such tunnel vision.

V. CONCLUSION

In all the scenarios I have explored, my strongest conclusion is that my suggested tribal legislation will be better received in the sterile law review article setting than in a coffee shop in the Cherokee capital of Tahlequah, Oklahoma. I am convinced that many of my elders considering these potential remedies would be skeptical, at best. They would tell me in no uncertain terms that the tribal government is not going to force THEM to sell THEIR lands if they decide to move to California or Texas. The consideration of such proposals will, and should, bring a passionate political debate quite similar to the on-going debates throughout Indian country on issues such as blood quantum requirements and non-resident tribal member voting rights.

Tribal communities are at a critical point of protecting dwindling land bases and dwindling regulatory and adjudicatory jurisdiction. The federal courts are solidly
entrenched in a trend to equate tribal ownership with tribal jurisdiction with no room for expansion. If federal Indian law tells us that if land ever passes into non-Indian hands, the tribe forever loses its gate-keeping authority over that land, then perhaps we are forced to respond with measures to keep that from happening.

In their collective memories, oral traditions, or maybe dusty old law books, tribal communities have some potentially meaningful solutions to real problems — problems that will remain unsolvable if our thought processes remain confined within the restrictive walls of an Anglo-American property regime. Perhaps it is time that we, once and for all, conceptually set fire to Blackacre.

Notes

1. This land was allotted to my great-grandmother, Edith (Yates) Leeds. In 1906, the land was transferred from the Cherokee Nation to Leeds as an individual Cherokee citizen pursuant to 32 Stat. 716 (July 1, 1902).
4. General Allotment Act 25 U.S.C. § 331 (also referred to as the “Dawes Act”). Not all tribal lands were allotted under the GAA, but some allotment policies were implemented through treaties and tribally specific legislation. See note 2, supra. See also Vine Deloria, Jr. and Clifford M. Lytle, American Indians, American Justice 8-12 (1983); Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1 (1995).
5. “[I]n the 1800’s and early 1900’s, the United States sought to assimilate Indian people into the surrounding non-Indian culture by allotting tribal lands to individual members of Indian tribes.” § 101(1) of 2000 ILCA Amendment; see also 1982 U.S.C.C.A.N. (96 Stat. 2515) 4415.
6. See Guzman, supra note 3, at 598.
7. That is, lands that remain within Indian ownership. Between 1887 and 1934, over 90 million acres of land passed out of Indian ownership. See § 101(2). These 90 million acres constituted two-thirds of the total Indian land heritage. See Francis Paul Prucha, Documents of United States Indian Policy 225 (2d ed. 1990) (extract from Annual Report of the Commissioner of Indian Affairs, 1934).
8. See discussion infra at 9.
22. See id. at § 101(6).
23. I use the term “hypothetical” because even in the most recent ILCA amendments, tribal codes are subject, as a matter of federal law, to the approval of the Secretary of the Interior. See § 6(b) of 2000 Amendments.
25. This is not to suggest that tribal property laws, particularly those of old, need to be written down to be valid or accepted and applied. It merely makes the inquiry, in this instance, easier. Note also that there are a number of traditional Cherokee laws, both in the property arena and in other areas of the law, that were never written down, yet are as substantive and pervasive as those I cite in this article.
26. This type of land is very crucial to the protection of a tribal land base because, once in fee, tribal lands are arguably subject to alienation, creditor’s causes of action, state taxation and eminent domain powers.
27. I also cautiously approach what is and is not “traditional” behavior for tribal members. The Supreme Court and numerous lower court decisions engage in a debate of what is and is not “traditional” Indian behavior by trying to determine whether the Indian character is retained. Brendale v. Yakima Indian Nation, 492 U.S. 408, 422-25 (1989). This notion of placing Indians in a time capsule of what is and is not traditional behavior was recently conveyed in the sentiments Governor Ventura of Minnesota stated regarding treaty fishing rights. He reportedly stated that Indians who assert treaty rights “ought to be back in birch bark canoes.” Philip Brasher, Why Sovereignty is Winning, SEATTLE TIMES, (March 24, 1999, at 1) (also available at Associated Press On-Line, 1999 WL 14514311).
28. This misconception is referenced, if not created, by early opinions of the Supreme Court. "The law of every dominion affects all persons and property situate within it: and the Indians never had any idea of individual property in lands." Johnson v. M'Intosh, 21 U.S. 543, 568 (1823) (emphasis added).


30. For an outline summary of these early laws, see Rennard Strickland, Fire and the Spirits: Cherokee Law from Clan to Court 211-26 (1975).


33. See id. This provision specifically addressed "horse stealing and robbery of other property" within the Cherokee Nation.

34. See id. This provision extended "protection to children as heirs to their father's property, and to the widow's share whom he may have had children by or cohabited with, as his wife, at the time of his decease...."


38. See id. at Art 2d ("The affairs of the Cherokee Nation shall be committed to the care of the Standing Committee; but the acts of this body shall not be binding on the Nation in our common property and without the unanimous consent of the members and Chiefs of the Council, which they shall present for their acceptance or dissent").

39. See id. at Art. 3d ("The authority and claim of our common property shall cease with the person or persons who shall think proper to remove themselves without the limits of the Cherokee Nation").

40. See id. at Art. 4 ("The improvements and labors of our people by the mother's side shall be inviolate during the time of their occupancy").

41. See Black's Law Dictionary 277 (6th ed. 1990) ("Property held by two or more persons in common with each other").

42. See supra note 29.


44. Id.

45. Id. at Art. 3d ("The legislative Council of the Nation shall alone possess the legal power to manage and dispose of, in any manner by law, the public property of the Nation . . .").
46. *Id.* at Art. 1 ("The lands within the sovereign limits of the Cherokee Nation, as defined by treaties, are, and shall be, the common property of the Nation").

47. *See id.* at Art. 3 ("The legislative Council of the Nation shall alone possess the legal power to manage and dispose of, in any manner by law, the public property of the Nation, Provided, nothing shall be construed in this article, so as to extend that right and power to dispossess or divest the citizens of the Nation of their just rights to the houses, farms and other improvements in their possession").


51. *See id.* The Cherokee death sentence for disposal of land speaks generally of conveying lands to the U.S. in treaties or otherwise disposing of Cherokee lands to outsiders.


54. There are, of course, a few isolated exceptions, but the effect has remained the same B that the property is supermajority owned by Indian descendants who regularly take an active role in the management of the property.

55. The original allottee, Edith Yates, solidified this trend by conveying ownership, in 1934, to her children during her lifetime in lieu of allowing her interest to pass at death to her non-Indian husband, Thomas Leeds. This conveyance not only preserved Indian ownership of the allotment, but was a reaffirmation of Cherokee property law. In the Anglo-American property scheme during that time period, it would have been highly unlikely that a woman would own real property, much less that she would be able to by-pass her husband to convey the real property to children.

56. An important observation is made in comparing my family's rules to Anglo-American tenancy in common laws. Under Anglo-American law, a group of tenants could never require a co-tenant to sell or give up property interests because that tenants chooses to relocate to another State. Under Anglo-American law, co-tenants are guaranteed that interests will not be marketed to outside entities without a right of first refusal to all co-tenants. Under Anglo-American law, one co-tenant could decide to use the property as she saw fit without permission or consultation with the others.

57. *See discussion, supra Section III text and accompanying notes 26-52.*
58. I am of the opinion that each of the constitutions and legislative enactments of the 1800s continue to be good law and caution an approach to ignore the instruction of prior Cherokee governments. If there are provisions of the earlier constitutions and laws which have not been expressly overruled or implicitly amended through inconsistent subsequent acts, we should tread lightly and avoid simply ignoring the old enactments. To ignore the existence of the prior laws is the same thing that the federal government did when it chose to ignore the existence of our property system of allotment.

59. States vary significantly in the fixed time period required to adversely possess land. For example, California requires only a five-year period, contrasted with ten to fifteen years in Washington and Minnesota, respectively. See, e.g., CA. CIV. PROC. § 318 (5 years); W.A. Stat. see also WASH. REV. CODE. ANN § 4.16.020 (West 1988) (10 years); M.S.A. see also MINN. STAT. ANN. § 541.02 (West 2000) (15 years).


63. See e.g., Strate v. A-I Contractors, 520 U.S. 438, 456 (1997) (tribe retained “no gatekeeping authority” to allow them jurisdiction); Burlington Northern see also Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1063 (9th Cir. 1999); see also Big Horn Elec. Coop., Inc. v. Adams, 2000 WL 977674, *4 (9th Cir. 2000) (“tribe had failed to reserve its rights to exercise dominion and control over a right-of-way” and therefore had no jurisdiction).