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Commentary: Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies

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COMMENTARY:
BORROWING FROM BLACKACRE:
EXPANDING TRIBAL LAND BASES THROUGH
THE CREATION OF FUTURE INTERESTS
AND JOINT TENANCIES

STACY L. LEEDS

Commentators:

Kristen Carpenter

Brad Myers

KRISTEN CARPENTER:¹ Thank you, Matthew. I want to thank both Matthew Fletcher and Winona Singel for their kind invitation to be here and really to congratulate the University of North Dakota for appointing both of them as full-time members of the faculty. It's a great thing.

I just wanted to make two general points on Professor Leeds' paper. It inspires a lot of excitement about its creative thinking. I particularly appreciate how Professor Leeds uses a common law property doctrine, or several common law property doctrines, to address problems of allotment.

We quite often think of property and common law property as being alien to Indian experiences and culture. After many decisions, like *Tahetan* and *Lone Wolf* and many more contemporary decisions where modern courts and where older courts have denied Indian property rights, you can see why advocates and Indian people would be really wary of making property arguments.

But since property contains that set of doctrines that in our Anglo-American law, you know that's the law we're faced [with] when we're in federal and state courts, since property law is that body that protects people and entities' relationships with land. Furthermore, since Indians have these incredibly deep and important relationships with land, it seems important to me that we find a way to use property law in a way that does protect Indian

1. Kristen Carpenter is an Assistant Professor at the University of Denver Sturm College of Law where she teaches Property and Indian Law, and is the faculty advisor to the Native American Law Students Association. Her scholarship focuses on reconceptualizing real property law to include and protect Indian interests in land. She previously served as a clerk for Judge John C. Porfilio, U.S. Court of Appeals for the 10th Circuit, practiced law at Hill & Barlow, P.C., and has represented Indian tribes on issues of federal recognition, cultural and intellectual property, subsistence rights, and jurisdiction. Professor Carpenter is a graduate of Dartmouth College (1994) and Harvard Law School (1998).

nations. So I think it's good, just at the outset, for scholars to try to be creative and find a place for Indians in property law and property doctrine.

Professor Leeds already has taken steps in this direction in her previous piece, *The Burning of Black Acre*. She succeeds in dispelling some of the myths about Indians not having their own property law systems in a really effective and much cited piece. Here, she goes another step in that direction using the common law property doctrines and pushing the envelope on them somewhat.

So that sort of goes to the point of property rights. I really like the general idea of using property rights to address these problems of allotment which after all are property problems in a significant respect, and they certainly implicate things like economic development.

The part where I wanted to be a little bit, I guess questioning, has to do with property relationships. And I think Professor Leeds, and I use the same property casebook.

Okay. So Joe Singer, who a lot of people in this room [I] know and have been influenced by, has a theoretical approach to property law which grows out of the legal realist's work where he insists that property is not just about rights over things, but also relationships among people, and that property has to do with a set of rules that expresses human values.

On the second part I can fully see and embrace how the reacquisition of future interests expresses Indian values with respect to land. It allows Indian communities to consolidate fractionated lands to create a more contiguous land base, exercise territorial sovereignty, bring people back to the community, [and] engage in economic development. Things that are really important and expressive of Indian values.

Professor Leeds alluded to one of the potential problems with respect to property in relationships when she said that critics might ask why non-Indians would be willing to alienate their future interests to an Indian tribe. I just wanted to raise that even if non-Indians might be willing to, out of economic need or trouble, we might consider what that transaction or non-Indians alienating their future interests to Indian tribes might do for relationships in the local community.

Hopefully, most optimistically, it could improve relationships in the local community. And Professor Leeds pointed out that a lot of non-Indians living close to Indian country are just as advantaged as tribal members are themselves.

I noticed that kind of justification lodged sometimes by gaming tribes who have said that they provide resources and benefits and employment and et cetera to local communities. But I've noticed too that sometimes the

local communities don't completely appreciate the Indian tribe becoming the resource in that way.

I worked for a very short time for one of those Connecticut tribes that people keep mentioning. There does seem to be quite a lot of resentment even though those Connecticut tribes have done a lot to lower the state of Connecticut's debt, or maybe wipe it out all together, provide employment in underemployed areas, and so on.

So I wonder a little bit about the relationships between non-Indians and tribes when tribes start taking the place of the banks, or the second or third or fourth mortgage provider. I don't know, and it's not just Indians and non-Indians.

I don't know how many of you have or remember *Pride and Prejudice*, Jane Austen's novel, but when I teach the states and future interests, and it is always a struggle and I have all of these diagrams up there, I try to bring it back to people's high school experiences and maybe they read *Pride and Prejudice*. But you might remember from that book that the Bennet family, which has four girls and no boys, grows up in this eternal fear of losing their home because it's entailed in this old-school detail male, such that only a male descendent of the dad's family can take possession of the property. So once the dad dies the girls and their mom are going to be without a house, and so forever after the mom tries to marry the girls off to somebody wealthy.

But it creates this specter of fear and worry. And of course Jane Austen has this whole social and class commentary that perhaps isn't directly applicable to contemporary United States society. However, I do imagine the kids of the parents who have decided to alienate their future interests growing up in a house with this incredible amount of fear, maybe resentment, toward the Indian tribe which is going to sweep in and take possession of the property later.

Now, I don't want to say that Indian nations should be acting out of a desire to mollify or appease non-Indian people and communities, because after all that would be probably paralyzing. Rather, I just want to raise the relationship aspect as maybe a counterpoint to the rights aspects, and not to underestimate my real respect and admiration for their creativity associated with using property rights. I think there's a lot of potential here. I also have a lot of confidence that Professor Leeds has already thought about the relational element of all of this, and I don't know if she'll have time to chime in afterwards, but I thought I would just raise it.

And finally, just really quickly in closing, I wanted to say Professor Leeds has done this amazing job of introducing all of us and serving as the reporter, and somehow she comes up with this great paper and presentation

in addition. I have to say really emerging as one of the leaders of our generation of Indian law scholars, and I express my appreciation to her in that regard. Thanks.

BRAD MYERS:² Good afternoon, or maybe it's night now. It's bothersome when you're the last person speaking before people are going to dinner. Keep it quick and short.

I just want to make a couple of commentaries on the paper more so than the presentation. I guess the first thing I noticed both in reading the paper and hearing the comments is I want to appreciate and show my appreciation to Professor Leeds for her remarkable restraint in discussing the allotment issue.

I teach trusts and estates, and *Hodel v. Irving* is the first case in the Dukeminier Johanson Trusts and Estates book. I deal with the allotment process by just introducing it, saying it's bad, let's just go on to what the case is about.

I guess I do want to mention *Hodel v. Irving* just briefly. One reason I like the extensive section on the allotment process in the paper is because there needs to be a continuing discussion of the problem of land ownership in Indian country since it is not a natural result of Indian performance. It's something that Congress did.

The *Hodel v. Irving* case dealt with a congressional attempt, albeit it ever so slightly, to try to fix their recognized mistake. The Supreme Court said, "gee, that little attempt you made, well, you can't even do that." Although I think within the case the Supreme Court actually left openings for Congress to go in and fix their errors.

Generally, getting Congress to visit a problem once is quite amazing, so expecting them to go back and visit it again is somewhat unrealistic. They really have not visited it again since *Hodel v. Irving* was decided. So we haven't found much of a congressional fix in the little attempt that they made.

Now, I'm really just recently out of practice, so the first thing I do whenever I read any article is talk about the practical realities here. Obviously, we have the ongoing question of whether the purchased land or

2. Brad Myers received both a BS and MS from the University of California, Los Angeles, a JD from the University of Oregon and an LL.M. in Taxation from New York University. While in law school Professor Myers served on the editorial staff of the Oregon Law Review and was elected to the Order of the Coif.

After law school, Professor Myers practiced six years in the states of Nevada, California and Oregon, with his practice focused primarily in business and estate planning with a special focus on the issues surrounding the development of low-income housing.

acquired land can become tribal land. For some reason since Tuesday, Professor Leeds hasn't done a complete analysis and briefing of *Sherrill* and how that would impact her discussion. We're expecting that by tomorrow morning, I think. So it's hard to mention. But that really is going to be the driving force of any solution if the lands can't become protected lands. If you can't get them out of the state property tax base we're probably not going to have a whole lot of solution.

I certainly would expect as of last Tuesday, states are now going to take a great interest in any application to move lands into trust lands because it's a real diminishment of their tax base. Where they might have been marginally interested before they should be very interested now. You may see fervent opposition to any proposal.

One of the problems I think with any acquisition is it requires some cash. Now acquiring a future interest will require less cash. If tribes had cash, so many of our problems would go away. So one of the things that I think about is are there ways we can do kind of creative financing in a way to even diminish the cash need further. One of the things that occurred to me was the ability to do annuity purchases rather than lump sum purchases. So rather than paying somebody in full what their future interest is, acquire that future interest but pay them on a monthly, or annual basis, in a way that will actually provide the individual security. You can structure this annuity so they will continue to get payments until they die. That way you can fit it in easier within the regular cash flow of the tribe, rather than trying to find a lump sum of funds right at beginning or at the outset of the purchase.

The annuity payment, because it would be entitled to installment reporting under the Internal Revenue Code, would probably be better off for the individual selling. This assuming that what's purchased does not qualify under Section 121 as a residence where the gain could be excluded if it's income property. I think a lot of these property estates would be. You can actually defer that; you can report that income over a longer period of time.

As I was sitting there I began to sketch another idea, and any proposal that you sketched out in five minutes while listening to a lecture is probably not the right thing to talk about in front of any group but I'm going to do it anyway. It is the possibility of using trust future interests in lieu of regular property future interests. So rather than purchasing a remainder from the individual, perhaps having the individual and the tribe as joint settlers with the tribe putting in cash or a promise to make cash payments in the future into a regular express trust with the land, and that trust document would provide for the life estate and then the remainder interest to the tribe.

That would have the advantage, particularly if the tribe served as trustee in maintaining all legal ownership in the tribe. I don't know that we can still get that property into the trust plan because you can't double up on your trusts by contributing it in, but it would certainly create ownership and make it kind of easier to think of the land as owned in one piece. It may make it easier for the tribe to get some financing for that property since they own it in one lump sum.

Some of the other things I was thinking about in terms of creative financing might include acquiring the interest what you acquire it for is participation right. Particularly if that land is something that's going to be usable, it's going to produce income. If you have somebody who might be retiring, somebody who maybe doesn't want to use that land anymore, sell them a participation right in whatever the tribe's going to do with that land.

If you're building a gas station and convenience store that's going to produce some income. Sell them the right to a percentage of the income from that property in the future. That really requires no money up front, but would enable the recipient to get something in return for the property, and would actually accelerate the movement of the land into the tribe and kind of get the fee ownerships which can qualify as trust land in short term.

And another thing, again, ideas popping through your head in the presentation was the possibility of offering land in exchanges; acquiring land in other desirable areas.

I think a lot of North Dakota, because we have a whole lot of elderly landowners, may be thinking that February would be a good time to move to Arizona, Florida, Texas, someplace that's a little better. Well, go ahead and buy land down there and then offer 1031 exchanges. Just swap the property. So essentially just move the property interest away from where it is now in tribal land to a new location that might be far removed. Again a way to consolidate the ownership in one place, at least with the tribe, and getting the individual something that they want. I think a general summation of what our goal is to find some way to freeze the value of this land now, and kind of pay for it later. Back when we had an estate tax, and we still did estate planning, of course we still have an estate tax for a couple of more years until it goes away for a year and comes back, is one of the primary motives for doing estate planning was to freeze the value of the estate.

The JR Simplot family north of town moved a billion dollar business into the hands of the second and third generations for half that transaction cost through the use of various freeze mechanisms. It may be possible to adapt some of those mechanisms now that they're kind of not used in estate planning anymore.

I guess the last comment I'd make on ability to use property is finding some way to use a charitable trust to acquire the land. If we can actually get a charitable trust recognized by the exempt organizations division of the IRS. This has proven to be remarkably difficult over the last few years, as I have worked over the years trying to qualify nonprofit entities to build low income housing. I find the IRS is suspicious of people who want to build low income housing and approving it. As such, it may be equally difficult to qualify as a charity for an entity that is simply going to acquire land for purposes of working with the tribe and making benefits that way.

If we could actually qualify a charity that way you could do something akin to what we're dealing with in environmental easements and environmental acquisitions. That results in getting charitable deductions for property and will perhaps motivate individuals who are looking for charitable deductions to do the acquisition on behalf of the tribe. Then contribute the property into a charitable trust, with perhaps the tribe as the primary trustees of that charitable trust. That way you get access and use of the property. Even if it's not direct ownership it's certainly direct control.

I think I'll leave this open for questions so everybody can get off to meals.

STACY LEEDS:³ Two real quick response to Kristen's comment, I circulated this paper among a couple of my friends and colleagues and the joke was have you read Stacy's predatory lending fees. And in some context I can see that.

But the people that I'm talking about acquiring property from at this point are not the people who can easily make their mortgage payments and are going to keep their house for the rest of their lives to send to their kids. In fact, I think that the tribe could be the hero in this because I'm talking about people who are about to get their houses foreclosed on or have such exorbitant debt that they're about to go into bankruptcy. So instead of that

3. Stacy Leeds currently serves as Associate Professor of Law at the University of Kansas and Director of the Tribal Law and Government Center. Prior to joining the KU faculty, she served as Assistant Professor and Director of the Northern Plains Indian Law Center at the University of North Dakota School of Law. She began her law teaching career at the University of Wisconsin School of Law where she received her LL.M. as a William H. Hastie Fellow. She received her bachelor's degree from Washington University in St. Louis and her law degree from the University of Tulsa.

Professor Leeds has served as a judge for several tribal courts. In August 2002, she became the first women confirmed to the highest court of the Cherokee Nation, where she is currently serving a six year appointment. She is also serving a five year term as Chief Justice for the Kickapoo Tribe of Oklahoma. Other tribal court appointments include: Special District Court Judge for the Muscogee (Creek) Nation; Associate Justice, Turtle Mountain Band of Chippewa Court of Appeals, and Associate Justice, Kaw Nation Supreme Court.

bad tribe that took mom and dad's house and I can't get it now in inheritance it's thank God the tribe came in and mom and dad can live in their house for the rest of their life. So I think that there are two pieces of that.

As to Brad's comment on the annuities, I think that that's brilliant. That was something that I was trying to work through because I thought well, what do you do about the tribe acquiring one of these pieces of property? Then as soon as you acquire this future interest and the mortgage is caught up or the second mortgage is paid off then they stop paying their mortgage payments. If there is an existing security interest in that land how is the tribe going to deal with that?

I think if you set it up in the annuity system where the private property owner was just passive, and that the agreement was that the tribe paid the mortgage payments, then that would take care of the delinquency issues that I was struggling with. So I really appreciate those comments. That will help me, you know maybe, work in some more creative angles in terms of the financing side of this paper. So I appreciate that.