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Comments

LIKE SNOW IN THE SPRING TIME: ALLOTMENT,  
FRACTIONATION, AND THE INDIAN LAND TENURE PROBLEM

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“The reservation doesn't sing anymore but the songs still hang in the air.”<sup>1</sup>

“Someone once said that for every person attacking the roots of evil there will be at least a hundred who are only attacking its leaves.”<sup>2</sup>

### Introduction

Fractionation describes the problem of multiple co-owners sharing many miniscule, undivided interests in a single tract of land. In Indian Country<sup>3</sup> today, fractionation has reached crisis proportions. Hundreds of co-owners share small pieces of land as tenants in common. Ownership interests held by individuals under these circumstances are represented as fractional shares of the whole parcel, and the average common denominator of these fractional interests today reaches into the millions.<sup>4</sup> Fractionation creates not just an oppressively complicated \*730 administrative burden, but more importantly and fundamentally, fractionation has effectuated a constructive dispossession<sup>5</sup> of Indians within Indian Country. Ownership of legal title may be staunchly protected,<sup>6</sup> but the result on the ground is realistic deprivation of any of the other potential benefits of that land ownership. Homelessness and poverty persist within the traditional homeland, and Indian Country continues to face critical obstacles to true economic, cultural, and political security.

Fractionation has existed in Indian Country for more than 100 years.<sup>7</sup> Congress recognized that fractionation is a direct consequence of its failed federal allotment policy of the nineteenth century,<sup>8</sup> by which the indigenous communities were first divided and separated into small squares of fenced-in private property parcels called allotments.<sup>9</sup> Although Congress has recognized this problem, no comprehensive or successful effort at reform has yet been realized. Fractionation not only persists but is worsening exponentially as already small interests continue to be subdivided into progressively smaller shares, usually through formulaic application of state intestacy laws. Meanwhile, the modern regulatory scheme in Indian Country-- with its roots firmly planted in that same failed federal land policy of the nineteenth century--continues to breed and even encourage further fractionation by \*731 placing burdensome restrictions on Indian landowners' rights to use and manage their interests during life.

The personal and political effects of fractionation are critical for both tribal governments and their citizens. Fractionation prevents efficient use of property, impedes individual and community economic development, and fundamentally bars realization of successful tribal self-determination and self-governance--the promotion of which is said to be the current national

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goal.<sup>10</sup> Fractionation also drains federal resources. An estimated 50 to 75% of the Bureau of Indian Affairs (BIA) realty budget is dedicated to administering these small fractional shares; however, the landowners-- theoretically, those for whom this administration is done--benefit very little.<sup>11</sup>

The purpose of this Comment is twofold. First, the Comment establishes that fractionation is more than just inconvenient or unfortunate, but is instead a serious problem with major implications for modern tribal sovereignty. Second, the Comment proposes major reform that would remove unnecessary federal regulation of intratribal transactions and abolish the formulaic intestate division of property in favor of a more flexible case-by-case model that I call equitable distribution, with little added administrative expense.

Part I starts at the roots of the problem by reviewing the ways federal policy has shaped the modern Indian reservation. Part II explores more specifically how fractionation has developed and the extent of the current crisis in Indian Country. Part III includes a fundamental discussion of why fractionation matters, focusing on its more insidious and often overlooked effects on modern tribal sovereignty. Part IV reviews the reasons this problem persists, noting how the modern federal regulatory regime in Indian Country perpetuates \*732 ever-increasing fractionation. Part V briefly reviews what attempts at a resolution have been made, including an overview of the Indian Land Consolidation Act (the "ILCA"). This Part establishes that any successful solution to fractionation must be expansive in its approach, relieving not only the immediate bureaucratic costs but also focusing on the long-range goals of achieving true tribal self-determination and enabling individuals to reconnect with and meaningfully use their land.

Finally, in Part VI, the Comment departs from existing proposals and offers a more radical--but more consistent and effective--approach. By first abolishing the current rigid distribution of intestate assets according to state statutes in favor of a more flexible equitable distribution approach, further fractionation could be prevented. In addition, in order to remedy the problem as it currently exists, intratribal land transactions should be freed from the current oppressive federal restrictions, making individual, proactive consolidation efforts feasible. By adding flexibility to both probate and intratribal transactions, a more solid and sustainable foundation for the future of Indian Country can be built.

## I. Formative Federal Policies

Fractionation is not a problem unique to Indian communities and Indian landowners.<sup>12</sup> On any given piece of property, fractionation can exist when a single tract of land is shared among multiple owners in undivided interests. The condition is compounded each time an owner--or an entire generation of owners--subsequently subdivides already fractional shares into progressively smaller interests, increasing the total number of owners in a given tract exponentially with each distribution.

The problem in Indian Country, however, is unique both because of its severity<sup>13</sup> and because its historical roots can be traced directly to the failed federal allotment policy, which was designed specifically to assimilate and dismantle Indian tribes by manipulating their existing land \*733 tenure systems.<sup>14</sup> Indian land equaled Indian power; the new federal government--struggling to establish and expand its own legitimacy-- realized this connection early on.<sup>15</sup> What remains today is not only less Indian land--though that is the case, with allotment alone responsible for the loss of approximately ninety million acres of Indian land between 1887 and 1934<sup>16</sup>--but also significant obstacles to success on the land that does remain.

### A. Sources of Federal Power

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Before contact with European settlers and the United States, Indian tribes were independent sovereign nations, both capable of and inherently entitled to govern their own lands and their own people. Despite the common perception that the land of this country was acquired by some monumental act of either robbery or force, the “historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.”<sup>17</sup>

In 1790, Congress took early steps toward formalizing its exclusive control over these government-to-government land transactions with Indians by passing an initial Trade and Intercourse Act in its very first volume of statutes.<sup>18</sup> This exercise of power was further developed in *Johnson v. McIntosh*, the first foundational Indian law decision from \*734 Chief Justice Marshall's Court.<sup>19</sup> In *Johnson*, the Court held that the United States had obtained the exclusive right to acquire all the lands of the new nation, as against other Europeans, subject only to the Indian right of use and occupancy--what came to be called Indian title--which the federal government could extinguish only through purchase or conquest.<sup>20</sup> In their negotiated treaties, Indian nations typically ceded portions of their lands, often in exchange for extended federal medical and education services, rather than a single lump-sum payment of cash.<sup>21</sup> Despite the sale of specific property interests, Indian tribes retained in their “reserved” territories whatever pre-existing sovereign rights and powers were not specifically delegated away.<sup>22</sup>

Despite early treaty promises and the theoretical consistency of subsequent government-to-government dealings,<sup>23</sup> the federal government did not always walk the good, straight road in dealing with Indian tribes. By 1886, the U.S. Supreme Court began to accept the introduction of a congressional plenary power in Indian Country. This \*735 power was not based on any democratic principle of consent.<sup>24</sup> Instead, the Court construed the trustee role of the federal government, as derived from its treaty responsibilities and promises,<sup>25</sup> to create a tribal “dependency” based on “weakness and helplessness.”<sup>26</sup> As the Court wrote, “the power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . . It must exist in that government, because it never has existed anywhere else.”<sup>27</sup>

### \*736 B. The Allotment Process

Whether anyone believed that such a raw power had actually sprung from a vacuum where no such power had been before is doubtful, especially after a century of consensual treaty-making.<sup>28</sup> Yet this same narrow conception of tribal autonomy and history, which ignored the inherent and retained sovereignty tribes derived from their people and their territories, also led reformers--including those who called themselves “Friends of the Indians”--to assert blindly but seriously that tribes had no private property systems in the late nineteenth century.<sup>29</sup> This, of course, was not true.<sup>30</sup> Instead, Indian tribes functioned with many distinctly evolving property systems, varying by culture, geography, history, and local resources.<sup>31</sup>

\*737 Nevertheless, these misperceptions at least in part facilitated the allotment policy, by which Congress sought to dismantle existing tribal systems and assimilate individual Indians.<sup>32</sup> The federal government conducted initial experiments with allotment in the early nineteenth century in individual treaties and unilaterally in special early statutes.<sup>33</sup> Allotment, however, did not become the official national policy until 1887,<sup>34</sup> and only after *Lone Wolf v. Hitchcock*<sup>35</sup> in 1903 did the Court clarify that the consent of affected tribes was not required to allot reserved territories.<sup>36</sup>

Using this new, practically spontaneous power, the federal government “allotted” land by reaching into the reserved areas that tribes had kept for themselves and their people and assumed near-exclusive land-management control.<sup>37</sup> Allotment wiped clean whatever ownership patterns were in place and redistributed the property, usually unilaterally and often without forethought or

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design, to individual tribal citizens in parcels ranging from 40 to 160 acres in size.<sup>38</sup> Individuals were to “own” these small allotments individually; however, allotments were seen as a special kind of property right that was not absolute but was instead conceptualized as a beneficial ownership interest over which the federal government acted as trustee.<sup>39</sup>

This special trust status was designed to “protect” these individual parcels while the Indian allottees completed their intended \*738 transformation, with the trust period intended to endure for just twenty-five years or until individual allottees were deemed “competent.”<sup>40</sup> While held in trust, allotments were to be subject to complete federal restraints on alienation, which meant that individual Indians could not transfer their property freely nor could tribes effectuate local property norms or apply their common law of descent.<sup>41</sup>

In addition to the rigid restrictions during life, allottees were denied the right to devise or otherwise determine the distribution of their allotments at death. Instead, all allotments necessarily passed by the intestacy laws of the state that surrounded them, often to multiple children and relatives.<sup>42</sup> Thus, allotment required sharing of land among an ever-increasing number of heirs, as the original allottees died, and left no means for flexible management, sale, or consolidation at any point in the process. This result practically mandated the start of fractionation. Whatever existing mechanisms for efficient and flexible use of property had been in place to meet local needs were completely barred. In their place, the federal government instituted its single dysfunctional system.<sup>43</sup>

The lack of forethought by the federal government in imposing such an impossible system is somewhat startling. George Manypenny, an infamously aggressive treaty negotiator for the United States who had experimented with **allotment** on individual reservations in the 1850s and had seen the subsequent loss of **Indian** landownership and the impoverishment of the **Indian** landowners, actually lobbied against this national **allotment** policy. Manypenny said, “[h]ad I known then, as I know now, what would result from those treaties, I would be compelled \*739 to admit that I had committed a high crime.”<sup>44</sup> Nevertheless, Senator Henry **Dawes**, the Republican senator from Massachusetts and author of the General **Allotment Act**, pushed ahead and predicted:

It seems to me that this is a self-**acting** machine that we have set going, and if we only run it on the track it will work itself all out, and all these difficulties that have troubled my friend will pass away like snow in the spring time, and we will never know when they go; we will only know they are gone.<sup>45</sup>

Of course, in practice, this self-**acting** machine did not so naturally work itself out.<sup>46</sup> Instead of melting away as predicted, the problems caused by **allotment** only snowballed--or created a muddy disaster, depending on how far one chooses to take the metaphor. **Allotment** imposed a grid-like cage fashioned out of square private property parcels over existing reservations. Today, fractionation--**allotment's** most immediate result--continues to crowd increasing numbers of co-owners within these already small boxes, locking many individual **Indians** and **Indian** tribes into a self-perpetuating cycle of frustration and rigid federal control.

Reduced to its most essential elements, **allotment** stands out as an anomaly in a democracy justified by the principle of participatory consent. **Allotment** tests the legitimacy of federal power. For the tribal governments and the citizens most directly affected, it was devastating as a fundamental failure of recognition at the most human level.<sup>47</sup> In \*740 **Indian** Country today, **allotment** has been blamed for the significant land loss, poverty, and divestitures of tribal jurisdiction within reserved territories that ultimately resulted. However, it is fractionation, **allotment's** current incarnation, which continues to do much of this work.

## II. Allotment's Long Shadow

### A. The Development of Fractionation

Fractionation ensued directly from **allotment** for three main reasons. First, the complete restrictions that originally accompanied any flexible transfer of ownership interests in **allotments**, even among tribal citizens, clearly mandated the division of property among an extended group of intestate heirs, regardless of any individual wishes or circumstances. Then, even if these new heirs later wanted to transfer or consolidate their interests, the newly imposed system either forbade it or was so unduly cumbersome as to make that effort unrealistic.<sup>48</sup>

Second, the **allotment** policy also provided that whatever tribal lands not divided for individual **allotment**--the euphemistically titled "surplus" lands--were to be opened for non-**Indian** settlement.<sup>49</sup> This practice left no reservation land on which future generations of **Indian** owners could spread out and develop as their numbers grew.<sup>50</sup> Instead, the descendants of the original individual allottees had no choice but to \*741 share what their ancestors had held individually--which was often too small to support individual families even at that time.<sup>51</sup>

Finally, the start of fractionation is also indirectly rooted in the federal government's decision to begin leasing **allotments** during this period. Originally, the General **Allotment Act** contained no language to permit allottees to lease their lands. This was apparently because leasing to non-**Indians** would be counterproductive and inconsistent with the original purpose of transforming **Indians** into assimilated farmers.<sup>52</sup> However, many non-**Indians** grew impatient with land lying fallow and with the new-to-farming **Indians**' often unproductive yields, which resulted both from lack of training and the common condition of **allotted** land being inherently unsuitable for farming.<sup>53</sup>

In 1891, the **Dawes Act** was amended to first allow leasing for allottees who could not personally "occupy or improve" the land "by reason of age or other disability," with the Secretary of the Interior overseeing and managing the process.<sup>54</sup> In 1910, this authorization was extended to permit all leasing so long as the Secretary supervised the expenditure of the rent income.<sup>55</sup> Essentially, this made it "easier for **Indians** to transfer land to whites, harder for them to transfer it to other **Indians**, and much more difficult to reorganize **Indian** land holdings to increase efficiency."<sup>56</sup> While leasing provided allottees an immediate source of income, it left many effectively landless and living off meager rent incomes. Additionally, leasing represented another step toward the psychological disconnection from the land resulting from the growing treatment of **Indian** land as a commodity, all of which perpetuated the ultimate constructive dispossession and inertia in regard to fractionation.<sup>57</sup>

Aside from recognizing the right of individual **Indians** to write federally approved wills in 1910<sup>58</sup>--a concept culturally foreign and even \*742 repulsive to some tribal citizens<sup>59</sup>--little else changed. The problems inherent in the imposed system began to surface, and in 1934, John Collier, the new Secretary of **Indian** Affairs, told the Senate:

The [fractionated] conditions force some of the **Indian allotted** land out of any profitable use whatsoever, and they force nearly all of it into the condition of land rented to whites [non-**Indians**], and rented under conditions disadvantageous to the **Indians**. The denial of financial credit to **Indians** is, of course, an added influence.

The **Indians** are practically compelled to become absentee landlords with petty and fast-dwindling estates, living upon the always diminishing pittance of lease money.

And here becomes apparent the administrative impossibility created by the **allotment** system.

....

The operation gets nowhere at all; under the existing system of law it cannot get anywhere; it creates between the **Indians** and the Government a relationship barren, embittered, full of contempt and despair; it keeps the **Indians'** own minds focused upon petty and dwindling equities which inexorably vanish to nothing at all.

For the **Indians** the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.<sup>60</sup> \*743 Senator **Dawes's** plan to create independent, prosperous, and assimilated **Indian** farmers clearly failed. Instead, that springtime snow, rather than disappearing quietly away, melted into a muddy mess.

## B. Recognizing the Problem

By 1934, the disaster of **allotment** was widely acknowledged. In addition to fractionation, **allotment** had caused the loss of 90 million acres of **Indian** land, with **Indian** landownership dropping from 138 million acres to only 48 million, of which approximately 20 million were considered desert and undesirable for non-**Indian** settlement anyway.<sup>61</sup> Such significant land loss resulted both from the opening of the “surplus” lands<sup>62</sup> and from the fact that as individual allottees were deemed “competent”—often without the ability to speak English or fully participate in the foreign legal system to which their new grant of an unrestricted fee patent would yield—the protective trust status was removed and alienation of **Indian** land to non-**Indians** or tax foreclosures prevailed.<sup>63</sup>

This land loss was an especially devastating blow for the sovereign tribes who had already ceded the majority of their other lands to their treaty partner, the United States, and who had, literally, no place else to go. Cut off from familiar systems of sustenance and forced to “farm” where others could not and they had not, poverty and its related problems of hunger, poor health, and homelessness became rampant in many **Indian** communities.<sup>64</sup> **Allotment** forced **Indian** communities to rely on the federal government's administration of their assets, a move that devastated not only existing tenure systems but many other aspects of traditional cultures as well.<sup>65</sup> This increasingly dominant federal \*744 bureaucracy also compromised, at least for a time, the practical capacity of tribal governments to represent effectively the needs of their now separated citizens in essential aspects.

Congress responded in 1934 by passing the **Indian** Reorganization **Act**, instituting an arguably more pro-**Indian** policy by extending the trust period over remaining **allotments** (and the restrictions on alienation and resulting federal control) indefinitely and formally renouncing the **allotment** policy.<sup>66</sup> The purpose of this **Act** was primarily to reestablish, with federal support, tribal governments.<sup>67</sup> The **Act** also established a \$10 million revolving loan fund for the repurchase of land that had been taken out of trust,<sup>68</sup> and provided for the return of “surplus” lands not homesteaded by non-**Indians**.<sup>69</sup> However, the continual taking of **Indian** lands under eminent domain combined with inadequate resources \*745 produced negative results—still more land was taken than was returned.<sup>70</sup>

## C. Extent of Current Fractionation

While talk of buy-back efforts and better recognition of tribal governments were steps in a positive direction, the essential problem remained that none of these efforts adequately addressed the fractionation of the land base, which was already one of

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the most persistent, complex, and dangerous challenges to any locally defined progress in **Indian** Country. The fractionation that began in 1887 was not alleviated and, instead, continued to worsen.

By 1960, fractionation was so severe that the House Committee on Interior and Insular Affairs published a two-volume study of the problem, including the results of 9,000 survey responses from individual **Indians**.<sup>71</sup> The report articulated the “rule of heirship land” that increased fractionation equaled increased federal administrative costs and decreased heir income.<sup>72</sup> Comments from individual landowners expressed genuine frustration,<sup>73</sup> and in 1971 an often-cited law review comment described the conditions as “alarming by any standard” and \*746 noted that “at least a dozen bills” had been introduced in Congress “to halt the fractionation process, but none has been enacted.”<sup>74</sup>

In 1972 and again in 1975, the American Bar Association Committee on Probate Problems of the American **Indian** issued two reports on the fractionation problem, ultimately concluding that “[f]urther study and a great deal of discussion with the Administrative Law Judges and representatives of the [Department of Interior's] Office of Hearings and Appeals indicated that the scope of this project is far beyond the resources available to this committee in terms either of time or finances.”<sup>75</sup>

Today, the problem persists. Statistics of the current conditions often defy imagination, precisely because of the monstrous proportions. However, one now-standard example, reported by the U.S. Supreme Court in 1987, helps bring this situation to life:

Tract 1305 [on the Sisseton-Wahpeton Lake Traverse Sioux Reservation] 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 largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of **Indian** Affairs at \$17,560 annually.<sup>76</sup> Today, Tract 1305 more closely resembles the rule in **Indian** Country than any exception.

Federal law requires that the BIA maintain ownership records for remaining **Indian allotments**, which are still defined by a protective trust status and administered under the government's trust responsibility to individual **Indians** and **Indian** tribes.<sup>77</sup> Accordingly, the U.S. General \*747 Accounting Office (GAO) was able to conduct a study of the scope of the problem in 1992. The GAO report, the most recent on the subject, revealed that the BIA maintained 1.1 million separate ownership records on just the twelve reservations it used for its study and discovered that, on these reservations, 20% of the land still held in trust was characterized by “fractional ownership,” meaning that there existed at least one ownership interest equivalent to 2% or less of the total tract size.<sup>78</sup>

The report also revealed that of all the ownership interests recorded for individual **Indians**, 67% were equivalent to less than 2% of their total tract size,<sup>79</sup> and some were “as small as one four-hundred-thousandth of 1 percent.”<sup>80</sup> If these small interests were physically partitioned out, at least three out of the twelve reservations would have had at least one parcel of land smaller in size than the paper the report was printed on.<sup>81</sup> However, in their calculations, the report's authors “did not attempt to identify ownership interests smaller than one ten-millionth of one percent.”<sup>82</sup> Perhaps most disturbingly, the study indicated that between 1984 and 1991 the number of these small interests<sup>83</sup> had more than doubled--from 305,000 to 620,000--despite the application of provisions of the ILCA specifically designed to solve the problem.<sup>84</sup>

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Since this report, things have not improved. In July of 2001, the BIA's Land Records Information System indicated it still maintained approximately 3.15 million records, compared with 1.5 million in 1994.<sup>85</sup> \*748 for all regions in the country.<sup>86</sup> These records covered just over 180,000 tracts of land, indicating that the typical tract had an average of 17.4 co-owners.<sup>87</sup>

In addition to the detrimental effects this form of ownership has on the actual interest holders, the 1992 report estimated that maintaining these landownership records cost the BIA between \$40 and \$50 per record per year.<sup>88</sup> Evidence suggests this estimated cost might be a significant understatement--not only because it reflects 1984 figures but also because it does not include the cost of the judicial resolution of the ultimate probate of these interests,<sup>89</sup> which the BIA also oversees.<sup>90</sup> In 1999, the BIA reported that management of undivided fractional interests absorbed 50 to 75% of its total land management budget.<sup>91</sup>

Finally, while it cost at least \$40 to \$50 per record annually to document these interests in 1984, the average lease income in 1992 for a 2% interest in a 200-acre allotment ranged from \$10 to \$100 a year, if the interest was even leased.<sup>92</sup> Most tracts are significantly smaller than 200 acres, and the income from leasing and permitting varies dramatically by location of the land and type of use. For example, only 3% of subsurface resources were actively being leased in 1992.<sup>93</sup> Clearly, the current system's accounting liabilities often far exceed the asset's earning potential or appraised value. The problems that have resulted are felt much deeper and more broadly than can be easily seen on any balance sheet.

### \*749 III. Why Fractionation Matters

#### A. The Direct Effects

In general, the problems associated with having hundreds or even thousands of co-owners sharing a single piece of property are not difficult to imagine. By making realistic use of the property virtually impossible in many circumstances, fractionation decreases the market value and overall earning potential of the whole tract.<sup>94</sup> This decreased value cuts off fractional interest owners from many of the economic benefits of typical landownership, including access to credit,<sup>95</sup> reliable returns on investments and improvements, and the potential for wealth accumulation. In addition to economic damages, Indians often become physically separated from the land, a constructive dispossession despite maintenance of record title. Even landowners are impoverished and homeless, in their homeland, in this current situation.<sup>96</sup>

Fractionation not only separates individual owners from physical use of the land but, perhaps more importantly, also separates them from the many intangible benefits of ownership. This separation frustrates the sense of enfranchisement and belonging that typically ensues from landownership. An emotional, as well as physical, disconnect occurs when "land" becomes nothing more than a "fractional interest" on a computer printout from the BIA, which can be identified only by indecipherable codes and numbers.

Although individual interest holders may feel the consequences of fractionation most directly, the effects are far-reaching. The federal government no doubt bears a tremendously expensive bureaucratic burden,<sup>97</sup> draining resources that could be spent more beneficially \*750 elsewhere, and frustrating the nation's own goal of tribal self-governance.<sup>98</sup> The complexity of the problem also subjects the federal government to liability for failure to live up to its trust responsibilities when even the tiniest of interests cannot be accounted for.<sup>99</sup>

Meanwhile, the persistent and pervasive federal presence in tribal territories hinders tribal development politically, economically, and culturally. Traditional tribal tenure systems and property concepts remain largely ignored, and fractionation

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makes continued federal control of **Indian** land not only accepted but often desired, even in cultures where land is traditionally of utmost importance.<sup>100</sup> Fractionation not only makes BIA management the least complicated alternative, but also creates and perpetuates reliance on this ineffective system. Many tribal citizens are so accustomed to BIA control that they now fear that their own tribal government's involvement--against which tribal citizens have direct political recourse-- would be parochial and subject to risks of capture and corruption.<sup>101</sup>

Similarly, in light of the high stakes involved, significant restrictions on land use can even be seen as desirable to the extent they address the important risk of losing more land to non-**Indian** \*751 ownership--and consequently tribal jurisdiction over that land in modern jurisprudence.<sup>102</sup> Unlike other communities where the lack of restrictions on fractional interest holders has resulted in continued modern land loss through partition sales,<sup>103</sup> in **Indian** Country the modern regulatory scheme has at least prevented further technical loss of title despite the fractionation. Nevertheless, much of the landownership ostensibly retained has become largely theoretical. The BIA's management role, combined with the tangle of negotiations required for any independent action with so many co-owners involved, clearly extinguishes most meaningful connections to tangible pieces of **Indian** land, regardless of what BIA records say.<sup>104</sup> In most instances, the income from outside leasing, which is parceled out into tiny shares based on the fractions that remain on official inventories, and the long and paper-producing probate process, stand out as the only real evidence that vestiges of **Indian** ownership actually remain.<sup>105</sup> This constructive dispossession from continued fractionation is often accepted merely as the price that must be paid for maintaining technical **Indian** ownership.

Finally, fractionation has been so destructive to the essential economic development and prosperity of the tribal community that tribes' abilities to create a sophisticated, competent, and responsible government are significantly hampered. In the end, many **Indian** communities are deprived not only of the cultural and economic rewards of beneficial land use, but also of the prosperous and independent citizenry needed to develop self-sufficiency and effective self-governance.

## B. The Bigger Picture: Where Fractionation Fits

Taking a step back, it is important to consider where fractionation fits into what are often considered the bigger, more pressing problems in **Indian** Country today: poverty and the loss of tribal jurisdiction within reserved territories by a series of recent Supreme Court decisions. Traditionally, despite fractionation's clear consequences for economic development and tribal self-governance, it is merely added to a laundry list of problems caused by **allotment**. This view focuses attention narrowly on simply finding solutions to these symptoms as they already \*752 exist. While this may be an accurate prioritizing in terms of visibility and immediate effect, it overlooks the fact that fractionation is not just another symptom of **allotment** but is instead a continuing cause of these same concerns.

Fractionation causes poverty, unemployment, substandard housing, and poor health in many **Indian** communities. Fractionation is also a major, if not the underlying reason for recent Supreme Court decisions divesting tribes of jurisdiction within their reserved territories. It perpetuates an unnecessary and disheartening dependence on the federal government, separates tribes from their citizens, attenuates the relation between owners and their land, and thwarts creative, tribe-driven attempts at progress and development.

### 1. impoverished conditions

When former President Clinton visited the Oglala Sioux Nation in Pine Ridge, South Dakota in 1999, he emerged from his helicopter into what was literally the poorest census tract in the nation. Pine Ridge had a 4,000-person waiting list for reservation homes (which was also more than eleven years long), and an unemployment rate of seventy-three percent.<sup>106</sup> Clinton, the first

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sitting president to visit an **Indian** reservation since Franklin Delano Roosevelt passed through one while on a vacation,<sup>107</sup> arrived ceremoniously to deem the area a “federal empowerment zone” as part of a national tour of “pockets of poverty.”<sup>108</sup> Andrew Cuomo, Clinton's Secretary of Housing and Urban Development, called the place “a metaphor for the poverty tour,” a result of “generations of poverty” that would “take years” to combat.<sup>109</sup>

Although overlooked in this rhetoric of empowerment, perhaps most startling is the fact that this grinding poverty exists despite the fact that Pine Ridge is actually the third richest **Indian** reservation in the United States in terms of landholdings, with more than two million acres still held in trust for individual **Indians** and the tribe.<sup>110</sup> Although landownership elsewhere is linked to wealth and self-sufficiency, this relationship does not hold in modern **Indian** Country--especially at Pine Ridge Reservation, which, by no coincidence, is also among the twelve \*753 worst cases of fractionation in the country.<sup>111</sup> As of 1992, trust land at Pine Ridge Reservation was divided into 10,611 separate tracts, with 138,742 ownership interests on record, meaning the average tract at that time had more than 13 owners and the worst example had 407 owners.<sup>112</sup>

The poverty Clinton witnessed at Pine Ridge is mirrored elsewhere in **Indian** Country.<sup>113</sup> Overall, reservation unemployment is 50.42% compared to 6.3% in the United States.<sup>114</sup> **Indians** have the worst housing problems in the United States, with 44% of the housing substandard as compared to 27% elsewhere.<sup>115</sup> Twenty percent of reservation housing has no plumbing, compared to 1% in the United States, and 61% of houses have no phones, compared to 6% in the United States.<sup>116</sup> Finally, nearly a third of **Indians** live below the poverty level, with the lowest per capita income of any racial group.<sup>117</sup> Life expectancy is also significantly shorter than the rest of the population.<sup>118</sup>

By creating a property system that prevented transfer of land to more efficient **Indian** users and placing enduring alienation restrictions on the land, **allotment** prevented tribal citizens from reaping any real economic benefit from the land.<sup>119</sup> Fractionation continues to do the same today. The need to get the consent of multiple co-owners before \*754 undertaking almost any activity on the land and the pervasive federal control discourage, if not bar, investment and use.<sup>120</sup> At least in large part, fractionation is the reason that poverty persists.

## 2. loss of tribal jurisdiction

In the face of a fractionated land base and increasing poverty, many tribal governments are still prevented from meaningfully effectuating the positive self-determination they seek.<sup>121</sup> Despite tribes' inherent sovereignty, treaty promises of reserved rights, and the current federal policy of promoting self-governance, the Rehnquist Court continues to diligently erode the abilities of tribes to govern within their own territories by recognizing a rapidly dwindling definition of tribal jurisdiction.

For example, even within original reservation boundaries, tribes have been prevented from regulating non-**Indian** fishing rights on a reservation river,<sup>122</sup> from adjudicating a case arising from an automobile accident on a state highway running across tribal land,<sup>123</sup> from regulating access to land taken by the federal government to build a dam,<sup>124</sup> and from enacting zoning ordinances in a “diminished” area characterized by a concentration of non-**Indian** ownership.<sup>125</sup> Most recently, the Court denied tribal court jurisdiction over a civil rights claim filed by a tribal citizen against a state official for an incident occurring on an individual **Indian's** land within the reservation.<sup>126</sup>

\*755 The developing doctrine seems to be something of presumptive state jurisdiction, with the question of who governs where in **Indian** Country determined largely by who owns what.<sup>127</sup> In the current state of **Indian** Country, the tribal land base

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is so eroded that the courts now consider it a “checkerboard” with just a small percentage of the land still held by **Indians** or the tribe.<sup>128</sup> Meanwhile, the land that **Indians** do own is so fractionated as to be practically unusable. Under these circumstances, a jurisdictional standard based on actual control of land is a test that tribal governments, whatever their sovereign status and whatever the current federal policy, are not likely to win with any frequency.

**Allotment** is the easy villain because it directly attacked tribal control over pre-existing territories. The introduction of non-**Indian** settlers in **Indian** Country, as well as the reduced land mass itself, ultimately provided justification for the modern judicial divestiture of the tribes' inherent rights to govern.<sup>129</sup> The rationale for this divestiture assumes that non-**Indians** typically cannot become citizens of the tribal government, and that the original settlers reasonably relied on the promise that their **Indian** neighbors would be assimilated by **allotment**.<sup>130</sup> \*756 Furthermore, the fact that the land base has become “diminished” by non-**Indian** ownership resulted in the equivalent of a judicial reapportionment of territorial boundaries in some cases.<sup>131</sup> Additionally, the pervasiveness of the asserted federal control made it easier to see tribes more as membership organizations or homeowner associations than the sovereign nations they are.

Currently, fractionation continues to have the same effect. By emphasizing maintenance of **Indian** ownership, even if largely theoretical when highly fractionated, BIA regulations and intrusions are continually accepted--and even desired in the more complicated cases. But these same restrictions that are accepted because they maintain **Indian** ownership of the land--and thus, the theory goes, protect tribal sovereignty--may also have the reverse effect. For example, when there are too many co-owners realistically to negotiate a consensual agreement as to a specific proposed use, the Secretary of Interior can unilaterally consent to the change, potentially granting rights-of-way over which the states may later assume jurisdiction.<sup>132</sup>

Additionally, there is something inherently inconsistent about basing tribal sovereignty on property ownership. As one commentator points out, “**Indian** Tribes should not own title to property. Why not? Because individuals own title to property; sovereigns hold dominion over territory.”<sup>133</sup> Furthermore, courts still question the capacity of tribal governments to govern their territories fairly and predictably, and \*757 refuse to make landownership absolutely determinative.<sup>134</sup> Thus, the prevention of further jurisdictional divestment is not guaranteed merely by preserving land holdings, however fractionated, in trust status.<sup>135</sup> It is reasonable to imagine the Court looking increasingly to other factors to divest jurisdiction over fractionated land, especially as actual **Indian** ownership becomes more remote through continued fractionation, and non-**Indian** use through leasing and BIA management more predominant in tribal territory.<sup>136</sup>

### 3. overall implications for sovereignty

As a scholar of the subject recently said, “[t]he word ‘sovereignty’ makes only for effective political speeches . . . using the word has little to do with its vital meaning: you are only ‘sovereign’ to the extent you **act** with independence.”<sup>137</sup> Tribal sovereignty derives from two fundamental sources: **Indian** people and **Indian** land. **Allotment** effectively separated tribes from both in the nineteenth century. Fractionation, **allotment's** current incarnation, continues to do the same today.

In the end, a trinity of barriers to success in **Indian** Country persists, and this trinity cannot be easily separated. Poverty is perpetuated as much by the extreme fractionation of the remaining land base as it is by the ambiguity about who governs where in **Indian** Country. This ambiguity discourages investment and permits gaps in government services.<sup>138</sup> Similarly, just as fractionation can facilitate the divestiture of tribal jurisdiction by preempting genuine tribal control over reserved territories, so too do the economic challenges divert \*758 attention and test the resources of tribal governments. Harsh conditions of raging poverty may facilitate federal courts' decisions to question--warranted or not--the realistic ability of these tribal governments to govern more generally.<sup>139</sup>

Nevertheless, fractionation is the one problem that can be fixed, and it is the problem, traced back to **allotment**, that is truly at the root of it all. A solution has thus far proven so elusive not because fractionation is too abstract or difficult but because it does its damage quietly and has not yet stirred enough concerted attention to generate support for a comprehensive solution. This general inattention has led, in many instances, to tremendous inertia and a general sense of fatalism about the topic. Considering fractionation more carefully, however, creates great problem-solving potential.

#### IV. Why Fractionation Persists: Modern Regulatory Regime

Ultimately, fractionation was caused by the imposition of a single, poorly designed property system where multiple flexible and evolving tribal tenure systems had previously existed. Fractionation is perpetuated today under a similarly alien code of unilaterally imposed federal regulations, proving that the statements “[n]o American comes within the sweep of as many laws as the **Indian** living on a reservation”<sup>140</sup> and that “law dominates **Indian** life” hold true today.<sup>141</sup>

##### A. Inter Vivos Regulations

The pervasive federal control of **Indian** land transactions, originally intended only to protect the land while owners assimilated and tribes dismantled, has been continually renewed and extended. Ironically, federal control has been justified primarily by the importance federal courts have placed on what land is maintained in technical **Indian** ownership for determining where the tribe's ability to govern will be recognized, and also because of the complexity of the recordkeeping now required to manage the fractionated ownership patterns that exist as a result. This circular reasoning should be familiar: Congress claimed the power to reach in and **allot** the tribes' reserved areas because of tribes' “dependent” status, yet the dependency itself was established by \*759 the fact that Congress was exerting just that power.<sup>142</sup> The same is true here: The rigidity of federal control of **Indian** land caused fractionation and now fractionation excuses the continuation of this control.

The current system is highly oppressive, with only minor advancements made since the land was originally placed in trust at **allotment**. The federal government, through a power allocated primarily to the BIA, continues to maintain ownership records, manage, and require the Secretary of Interior's approval for almost any land transaction.<sup>143</sup> **Allotments** are essentially still subject to a federal restraint against alienation as a matter of law. It is a criminal offense to induce an **Indian** to convey any land held in trust, regardless of its size or purpose.<sup>144</sup> The Secretary of Interior approves almost every sale, gift, lease, exchange, right of way, or mortgage on a case-by-case basis after requiring appraisals and lengthy documentation.<sup>145</sup> The BIA also generally administers leases, monitors rights-of-way, and collects and distributes lease incomes.<sup>146</sup>

Delays in doing anything with one's land can be lengthy, both due to the BIA's inability to complete its gigantic task promptly<sup>147</sup> and \*760 because of the difficulty of getting so many co-owners to agree. Co-owner consent is especially problematic. In leasing, for example, the BIA requires any **Indian** owner of a fractional interest in a tract to get a lease from all the other co-owners to use or possess the land, allowing only an “**Indian** landowner who owns 100% of the trust or restricted interests in a tract [to] take possession without a lease or any other prior authorization from us.”<sup>148</sup> Frequently, unanimous consent is needed to execute any lease.<sup>149</sup> This task is nearly impossible when missing, minor, incompetent, or recalcitrant heirs exist.<sup>150</sup> However, the Secretary of Interior has authority to impose some flexibility when the heirs cannot or will not agree.<sup>151</sup> The Secretary can also grant rights of way across all trust and restricted lands, usually with majority consent but also unilaterally in cases where “owners . . . are so numerous that the Secretary finds it would be impracticable to obtain their consent.”<sup>152</sup>

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Finally, a few miscellaneous regulations also prevent, or at least discourage, consolidation.<sup>153</sup> No adverse possession claims may be made against allotments,<sup>154</sup> partition actions require a petition by all the co-owners,<sup>155</sup> and the absence of tax on individual allotments<sup>156</sup> prevents §761 the potential for tax sale losses and the incentive to sell when the tax burden exceeds the value of the property.

Overall, the existence of such a cumbersome regulatory system discourages individuals to actively consolidate.<sup>157</sup> Any informed land transaction now requires not only careful knowledge of what assets one does own, which can be accomplished only if accurate records can be acquired and understood, but also the ability to interpret comprehensive BIA regulations and inventory printouts with increasingly infinitesimal fractions involved. There is no cost to the individual owner—even if there is no benefit—associated with maintaining such small interests, and in many cases, rent incomes are already so small that some owners may have little tangible stake in what happens next.

## B. Distribution upon Death

In addition to managing interests during life, the BIA also probates all the trust property of individual Indians, applying state law when approved tribal codes or specific federal laws are not in place.<sup>158</sup> Every trust estate receives a special hearing in front of either a hearing examiner or an administrative law judge, who carries out extensive duties of providing notice, determining heirs, approving wills, paying claims, and distributing an accurate inventory of the decedent's trust assets—regardless of value<sup>159</sup>—based on a probate package prepared in advance by a BIA probate specialist.<sup>160</sup> The entire process imposes on the federal government a great financial burden, and it also bleeds tribes and their citizens of a crucial aspect of self-determination and cultural consistency.

Most estates pass under state intestacy laws, and the average number of heirs per estate, based on rough estimates provided by perceptions of the examiners of inheritance in 1960, is seven.<sup>161</sup> Aside from the potential for executing disclaimers if approved by the Secretary of Interior,<sup>162</sup> there are no existing mechanisms for more flexible distribution.<sup>163</sup> Thus, already minuscule interests are usually §762 mechanically divided into progressively smaller shares.<sup>164</sup> In 1910, any person age twenty-one or older was granted the right to dispose of trust property by will. These wills, however, are still subject to the approval of the Secretary of Interior, which is another potentially long and tedious process.<sup>165</sup>

In 1998, the Department of Interior's Deputy Solicitor testified before a House committee that administration costs had reached \$8.00 per account per month for fractional interests, and the probate of one individual interest holder's estate averaged between \$1,500 and \$2,000.<sup>166</sup> At that time, 9,000 backlogged probates were pending; many of these probates were still unresolved for individuals who had died more than eight years earlier, and the BIA held \$48.3 million in more than 18,244 individual accounts for estates still in the probate process.<sup>167</sup>

## V. Ineffective “Solutions”: The Indian Land Consolidation Act

### A. Initial Reactions: A Brief Response to the “Easy Answers”

Given that fractionation was caused by taking land out of traditional and flexible tribal tenure systems and that it is now perpetuated by an §763 overly burdensome federal regulatory scheme,<sup>168</sup> two obvious responses emerge. First, removing the federal “trustee” role entirely, and all of the resulting restrictions on Indian land transactions, is appealing because it would stop the drain on federal resources, erase many of the logistical barriers to individual consolidation, and also alleviate the difficult

psychology of the federal government's "trustee" or "guardian" role in **Indian** communities. This approach, it seems, would be more consistent with self-determination.

However, at this stage, indiscriminate removal of federal administrative support would likely cause greater **Indian** land loss and possibly further discourage efficient use and investment of presently fractionated parcels, especially now that sophisticated computer software is required just to allocate the fractional rent incomes. Additionally, the federal government owes a fiduciary duty to **Indian** tribes and their citizens based on treaties, historical dealings, and its assertions of plenary power.<sup>169</sup> Merely walking away from the problem now would surely breach that duty. Finally, though increasing local control of land use and administration is clearly desirable to promote self-determination, the difficulty of the task--defining and implementing a new property system more than a century after **allotment**, with an inherited fractionation problem of these proportions--should not be underestimated.

Second, "reversing **allotment**" by returning all the land, or all the fractional interests, to the tribe also has immediate appeal. It would bolster tribal resources and reduce the number of accounts the BIA must manage. However, this strategy might not adequately protect the vested interests of individual owners more than 100 years after **allotment**<sup>170</sup> and could alienate tribal citizens from their tribal government, which would be damaging to tribal self-determination in the long run.<sup>171</sup> Ultimately, \*764 there are serious questions about the wisdom for tribal economies of concentrating so much of the landownership in the tribal government.<sup>172</sup>

A more considered and comprehensive solution to fractionation would recognize that the problem affects individual tribal citizens, **Indian** tribes, and the federal government in three very distinct ways. Therefore, its resolution must do more than just ease one party's burden. Instead, it must ease the federal bureaucratic burden while also ensuring the interests of current landowners are protected, the remaining **Indian** land base is secured, and perhaps most importantly, any changes made are consistent with the policy of promoting tribal self-determination politically, economically, and culturally.

## B. The **Indian Land Consolidation Act**

The modern response to the fractionation problem has been the **Indian Land Consolidation Act** (the "ILCA"), first passed in 1983,<sup>173</sup> modified in 1984,<sup>174</sup> and then amended again in 2000.<sup>175</sup> However, fractionation remains and continues to worsen because the ILCA has failed to address systematically the multiple layers of the problem. Instead the ILCA attempts to superimpose yet another uniform--and only slightly different-- property system in **Indian** Country without significant input from those most directly impacted, leaving little room for local control and flexibility in its application.<sup>176</sup>

### \*765 1. creating mechanisms for tribal land exchanges

The ILCA originally began as a piece of special legislation developed to address fractionation and encourage economic development on the Devils Lake Sioux Reservation in North Dakota by allowing the tribe to purchase individual fractional interests and allowing individuals to exchange their interests for comparable pieces of consolidated tribal land.<sup>177</sup> The ILCA ultimately recognized that all tribes had the ability to create and carry out similar efforts, subject to Secretary of Interior approval, in order to eliminate fractional interests and consolidate tribal holdings.<sup>178</sup> Tribes were authorized to purchase, through the Secretary \*766 of Interior individual **allotment** interests at fair market value with the consent of a majority of ownership in the tract.<sup>179</sup>

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While persuasive in theory, the prospect of exchanging several fractional interests for a single equivalent piece of tribal land is still hindered, and even deterred, by all the other restrictions that remain on **Indian** land transactions. These restrictions include the requirements of federal approvals and appraisals. Under current conditions, the effort required for such an exchange is often more than the small benefit may be worth for most individual owners of already tiny shares.<sup>180</sup>

The Pine Ridge Reservation, the site of President Clinton's visit in 1999, incorporated a consolidation plan under the ILCA. However, the plan was not without its conditions. The director of the Land Office at Pine Ridge reported in June of 1995 that the procedure included the following steps:

(1) the landowner must check the map in the Tribal land office to verify if the proposed land can actually be exchanged; (2) the landowner must then apply at the BIA office at Pine Ridge; (3) the lease income for the land is then determined and must be verified by the BIA; (4) then a field check is arranged by BIA; (5) next the Tribal Land Committee must approve the application for appraisal; (6) the application then returns to BIA and an appraisal is ordered; (7) after the land is appraised, the application returns to the Tribal Land Office to compare the worth of the properties in the proposed exchange; (8) the Land Office then brings the application to the Finance Committee, the Executive Committee and to FMHA (to determine if there is a lien on the property income) for their approval; (9) if all is approved, the Land Office then sends the application back to BIA to execute the deed.<sup>181</sup> \*767 The burdensome process required assertiveness and commitment, as well as up to six years, to navigate. The process has remained unrealistically time-consuming and labor-intensive. Ultimately, the system failed to eliminate the heirship problem at Pine Ridge, or elsewhere for that matter, and the tribe has not moved to consolidate, recommending instead that more "radical" solutions be imagined and pursued.<sup>182</sup>

## 2. mandating the escheat of fractional interests to tribe

The innovation of the original ILCA was that it also forced small interests with limited income earning potential to "escheat" back to the tribe upon the death of the fractional interest holder.<sup>183</sup> The original version prohibited descent or devise of interests that amounted to less than 2% of the total tract and that produced less than \$100 in the year preceding the decedent's death.<sup>184</sup> In 1984, Congress amended the statute to prohibit descent and devise only if the interest had not produced \$100 in any of the five years preceding death.<sup>185</sup>

Both the original and the amended versions of this escheat provision were found to be unconstitutional takings without just compensation by the Supreme Court.<sup>186</sup> This struck many as ironic. It was not, after all, a compensable taking when titles were redistributed under **allotment** or when surplus lands were subsequently taken and opened for non-**Indian** settlement.<sup>187</sup> Some commentators also found these decisions difficult to reconcile with the Court's regulatory takings jurisprudence--because the market value of the small interests was minimal, congressional plenary power over **Indian** affairs so broad, and the decedent's rights to use and possession during life, at least theoretically, left unimpaired.<sup>188</sup>

\*768 However, more important for the fractionation debate, the mandatory escheat solution did not work. During a seven-year period between 1984 and 1991, when the escheat provision was applied, the number of fractional interests in the twelve-reservation GAO sample actually increased from 305,000 to 620,000--meaning the number of fractional interests more than doubled despite the application of the so-called escheat solution.<sup>189</sup> The failure of this escheat mechanism, not just legally but also empirically, establishes that addressing fractionation only at the point when interests are already so small and after the decedents have already suffered a lifetime of fractionation's effects is clearly not the answer. Additionally, a forced escheat

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risks alienating tribal citizens from their tribal governments by placing the burden of a solution to a national problem squarely on individuals' shoulders and failing to reflect what individual owners might actually want.<sup>190</sup> Notably, this provision was implemented against the objection of nine out of eleven tribal governments and two important **Indian** land tenure groups who testified before the Senate on the subject.<sup>191</sup>

3. purchasing small interests from individual owners

Originally, the ILCA simply clarified the authority of tribes to purchase, with federal approval and at fair market value, **allotments** by majority consent.<sup>192</sup> In 2000, the ILCA amendments went further, **\*769** implementing a three-year pilot project by which the Secretary of the Interior could purchase fractional interests at fair market value<sup>193</sup> and hold them in trust for the tribe, while collecting whatever revenues derived from the land until the purchase price was repaid in full.<sup>194</sup> Congress appropriated \$5 million in fiscal year 2000.<sup>195</sup> Three northern Wisconsin tribes--on the Lac du Flambeau, Bad River, and Lac Courte Oreilles Reservations--were selected recipients of the original program, and more than 36,000 fractional interests have been purchased thus far.<sup>196</sup>

Proposals to purchase fractional interests, or even for a provisional or optional escheat, are generally well received because they preserve individuals' control over vested property rights. Additionally, the investment for the purchase of such small, often unusable interests usually costs less in the long run than continuing to meet its excessive management burden.<sup>197</sup>

However, the solution has not been perfect. Once an individual has sold his or her fractional interests to the federal government to be held for the tribe, that individual may lose an important cultural connection and not have other realistic opportunities to acquire or invest in another consolidated holding.<sup>198</sup> Purchasing already small interests is also **\*770** another reactive solution, especially when the BIA selects the interests to purchase, often regardless of tribal economics or development plans.<sup>199</sup>

The implications are potentially dangerous for tribal jurisdiction jurisprudence as well, with the federal government asserting ever-increasing authority over tribal land and in this case holding all management rights until the small rent incomes from the small interest can some day "pay back" the federal purchase price. Ultimately, the approach lacks local control, essential for self-determination, and is funded so as to foreclose the option for tribes or tribal citizens to leverage additional resources or use more discretionary individual or tribal loans.<sup>200</sup>

4. modified consent requirements for land transactions

The 2000 ILCA amendments<sup>201</sup> were intended to encourage and assist the consolidation of landownership by making transactions among individual **Indians** and tribal governments more flexible, without threatening the trust status or authorizing sales to non-**Indians**.<sup>202</sup> Instead of providing individual **Indians** and **Indian** tribes with more flexibility, the amendments actually increased the Secretary of Interior's flexibility, giving her considerably more discretion and authority to consent on behalf of some silent owners and to make some unilateral determinations based on a best-interest standard.<sup>203</sup> In addition, instead of streamlining consolidation, in many instances the amendments simply add new layers of oversight to the federal bureaucracy. The Secretary may now approve a sale, exchange, or conveyance by gift deed to another **Indian** or **Indian** tribe for less than fair market value if the original **Indian** landowner was provided a formal estimate of its actual value first.<sup>204</sup> The **Indian** landowner may waive in writing this appraisal requirement, **\*771** but only if the transfer is to a spouse, brother, sister, lineal ancestor, descendant, or collateral heir.<sup>205</sup>

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The amendments are also supposed to make information about other fractional interest holders in a given **allotment** more readily available<sup>206</sup> and relax the minimum percentage of ownership interests that must give consent for some transactions.<sup>207</sup> Tracts with more than twenty owners, for example, require just a majority of consent, while tracts with five or fewer owners still require unanimous agreement.<sup>208</sup>

While these amendments do add some flexibility, extensive federal bureaucracy still controls. The process for any transaction is still incredibly arduous. **Indian** owners may now enjoy the theoretical possibility of executing a written waiver and then getting it approved. However, this option is merely added as one more arm of the current bureaucratic tangle, and no significant other requirements for approvals or appraisals are alleviated. Similarly, the requirement of consent from only half, rather than all, of hundreds of co-owners is unlikely to go far enough to encourage investment and efficient use.

#### 5. developing probate reform

The 2000 ILCA amendments also included a new section recognizing a broader tribal authority to enact tribal probate codes to govern the intestate disposition of trust interests within their jurisdiction.<sup>209</sup> However, these codes are still subject to the approval of the Secretary of Interior.<sup>210</sup> They must also comport with federal law, promote consolidation of fractional interests, allow an **Indian** to inherit an interest in an **allotment** originally **allotted** to his or her lineal ancestor, and bar devises by will to non-**Indian** beneficiaries only if providing compensation or an alternative life estate.<sup>211</sup>

\*772 As of this writing, the Secretary of Interior has not yet completed the necessary certification to implement this portion of the amendments,<sup>212</sup> and significant questions about their substance remain. When—or if—these mechanisms for tribal probate codes are ever instituted, tribes may be able to control more flexibly the descent and distribution of trust lands within their reserved territories. The scope of that flexibility is an open question. Under *Santa Clara Pueblo v. Martinez*,<sup>213</sup> tribal government actions should be reviewed in tribal court. However, the ability of a tribe to adopt its own code to achieve more radical probate reform is untested, and may be subjected to restrictions by the requirement of federal approval and the continuation of ultimate administration by BIA probate adjudicators.<sup>214</sup>

In the absence of an approved tribal code, the amendments imagine the implementation of uniform federal rules of descent and distribution, all of which require detailing by some subsequent legislative **act**.<sup>215</sup> Thus far, the specifics are illuminated only by the asserted purpose of easing the department's own probate burden. In order to further this same objective, the rules also suggest a sharp restriction on the ability of non-**Indian** takers to become owners, in part by giving "**Indian**" a much \*773 more narrow definition.<sup>216</sup> This is politically possible, in that familiar circular logic, only because of the perceived need to keep property in "true **Indian**" ownership for tribal jurisdictional purposes in the Supreme Court.

Other major aspects of probate reform in the 2000 ILCA amendments, which still await certification before becoming effective, are technically complex.<sup>217</sup> Most importantly, if certified, the amendments will convert any interest constituting less than 5% of the total tract size that passes to more than one person into a presumed joint tenancy with the right of survivorship.<sup>218</sup> Therefore, only interests that are larger than 5% of the tract will continue to be distributed to multiple new owners in the traditional undivided, tenancy-in-common form.<sup>219</sup> Similarly, class bequests of small interests in wills will be presumed to pass in the same survivorship manner unless the testator specifies otherwise.<sup>220</sup>

The amendments also allow the Department of Interior's probate adjudicator to approve an agreement among a decedent's heirs or devisees to consolidate interests.<sup>221</sup> The Secretary of Interior "may" promulgate regulations in this regard; however, no

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mechanism or \*774 procedure for effectuating such a possibility has yet been created. Though estate planning assistance is encouraged “to the extent amounts are appropriated,”<sup>222</sup> no such investment has meaningfully been made. Both of these tools require, in addition to expertise, access to accurate records.<sup>223</sup> Furthermore, significant questions about substance, as well as the timeline for implementation, remain--despite the frustrating fact that confusing notices of these new amendments and their speculated effects have already been sent, presumably at great expense, to every individual **Indian** with an interest in trust property.<sup>224</sup>

\*775 Ultimately these rules, once implemented, will not address fractionation.<sup>225</sup> Survivorship schemes still require keeping multiple accounts open and allocating income into small shares during life. The survivorship feature itself, while possibly eliminating some probates, does nothing to help reconnect individuals to their land or promote tribal self-governance. Additionally, uniform default schemes continue to pass property formulaically to multiple children and relatives, lack flexibility at the individual estate level, and are extremely complicated and difficult to understand. The emphasis on preventing descent to non-**Indians**, and the presumed subsequent loss of tribal jurisdiction, as well as uniformity for federal convenience, has no effect on fractionation itself.

### C. What Went Wrong

The lesson of fractionation is that things overlap.<sup>226</sup> Therefore, attempts to cure from only one direction, or only at one level, have not worked. The ILCA failed because it did not provide meaningful mechanisms for a sustainable return to true tribal control of land choices, and it did not include realistic incentives for individuals to pursue consolidation efforts. The extent of fractionated conditions in **Indian** Country is inextricably tied to the ability of tribes effectively to express and carry out their inherent sovereignty, the pursuit of economic justice, and the quantity and the quality of **Indian** land tenure and cultural security. This more comprehensive view of the relationships involved in fractionation must be considered in crafting a workable solution.

#### 1. need to meaningfully implement tribal self-determination

The ILCA failed to provide the kind of meaningful local flexibility necessary to effectuate individual and tribal empowerment in crafting a \*776 solution.<sup>227</sup> Realizing greater tribal control over land transactions should be anchored as a central priority in any attempt at a solution, both because of its importance for the shared goal of tribal self-determination<sup>228</sup> and also because of the benefits to individual landowners of direct, local accountability in land management.

Under current law, tribes who meet certain eligibility requirements may contract with the federal government to take over its probate and land management responsibilities.<sup>229</sup> However, while the tribe takes on this unique surrogate agency role to oust--at least symbolically--the federal presence from the reservation, the Secretary of Interior retains ultimate authority to administer land transactions, requires the same approvals and appraisals, and dictates the chosen procedures and policies.<sup>230</sup> Realistically, then, the tribes are still deprived of any flexible local control.

Tribes are sovereign entities with inherent powers of self-government. However difficult the current federal system may make it to express this reality meaningfully,<sup>231</sup> tribes could assert more local control in creative ways. For example, tribes could create and apply their own legislation to land taken out of the federal trust, as in the case \*777 of a tribal non-user statute that would require a sale or conveyance if an **Indian** owner ever chose to leave the reservation permanently, with a series of rights of first purchase going to co-owners and then to the tribe.<sup>232</sup>

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At least one concrete proposal exists and is being contemplated in this regard, but it is intended only for **Indian**-owned fee lands in tribal territories over which the federal trust responsibilities have already been removed or never applied. In this context, creative tribal property laws could be applied to tribal citizens who own unrestricted fee simple land by having them transfer their interests to the tribe to then be re-issued as beneficial interests held in trust by the tribe.<sup>233</sup> Creating this tribal trust paradigm would enable the tribe easily to enact an entirely new tenure system, using historical tribal laws as a starting point while allowing freedom “to re-invent and redefine the law” based on current conditions.<sup>234</sup> For tribes in a position to take this responsibility on, the idea could theoretically be extended to assets currently held in trust by the federal government. By first requesting fee patents and the removal of the federal trust status,<sup>235</sup> tribal citizens could then freely convey their interests to the tribe to be reissued in the new tribal trust status.

However, even if non-trust private property owned by **Indians** in **Indian** Country already passes according to tribal laws,<sup>236</sup> the creation of a tribal system to address and administer the current fractionation mess, and also the resources to implement it, would require tremendous investment and cooperation. Additionally, the federal government's responsibility to support a solution to fractionation runs deep, especially based on equitable principles deriving from its culpability for the problem.<sup>237</sup> Collaboration with the federal government in making a transition to total tribal control may be helpful,<sup>238</sup> but the burden assumed by a tribe in choosing to cut off the federal trust status, and so too the federal liabilities, is great.

**\*778** Instead, the federal government should envision ways to become more advisory in its trustee role, without shirking its fiduciary duty, and allow greater local control and flexibility.<sup>239</sup> If this potential for greater expression of local control were meaningfully acknowledged and supported, other more extensive and creative functions could be imagined to address fractionation. In addition to non-user statutes, elected tribal governments could consider developing creative adverse possession doctrines, liberalizing disclaimer rules, utilizing inherent eminent domain authority,<sup>240</sup> or implementing other culturally consistent policies and priorities in the best interests of their particular constituents. Any drastic measure would likely cause a great debate, which could be just the kind of attention this problem requires.<sup>241</sup>

**\*779** 2. need to create realistic incentives for individual response

In addition to allowing for more control at the tribal level, a proper solution to fractionation also requires protection of individual landowners' interests. While in theory at least, all the necessary mechanisms for the resolution of fractionation currently exist, the possibilities matter not as much as their feasibilities, as evidenced by the fact that fractionation persists despite tribal consolidation plans and buy-back authority. Essentially, a solution that requires thousands of individuals to execute a process taking several years and promises only negligible immediate individual rewards will not work.

As an alternate source of incentives for individual consolidation, proposals to liberalize partition-in-kind actions were made in the most recent Senate bill on the issue, which failed to get House action at the end of 2002.<sup>242</sup> Partition, in theory, would allow interest holders to separate out their share in a given parcel to create a tangible, if smaller, piece of property for exclusive use. This option could encourage more consolidation efforts than the result now, which is often just a different allocation of shared leasing incomes. At least one case suggests that partition may be sought by any one co-owner and granted by the Secretary of Interior if found to be in the **Indians'** best interests.<sup>243</sup> Modern regulations, however, still seem to require unanimous consent.<sup>244</sup> However, partition itself is a scary proposition because of its historic use by land speculators to force sales elsewhere and the resulting land loss.<sup>245</sup> Nevertheless, existing protections preventing unilateral sale to non-**Indians** and making criminal such inducements may be protective here.

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In general, educating individual landowners about the importance of consolidation--and the consequent benefits for tribal sovereignty and self-sufficiency--can also be used as a method of motivating more assertive responses. This type of education could encourage not only inter vivos consolidation but also wise estate planning, all of which would require cultural sensitivity and access to accurate ownership inventories.<sup>246</sup> Education that is individualized and tribally delivered is the focus of grassroots **Indian** land tenure groups, including the **Indian** \*780 Land Working Group and the new **Indian** Land Tenure Foundation.<sup>247</sup> These groups are also working on the development of an aggressive **Indian** financial institution, which would leverage monies and provide fair loans to individual tribal citizen owners and tribes looking to purchase and consolidate fractional interests on their own.<sup>248</sup>

Finally, a logical response might seem to be transferring some of the administrative costs of fractionation to the owners of multiple fractional interests so as to create a consolidation incentive, similar to the function of tax burdens elsewhere.<sup>249</sup> However, just one example quickly illustrates the potential futility of such a task. In a typical Sacramento-area probate in 1960, when the BIA charged a \$15 probate fee per estate, the \$15 was collected pro rata from among thirty-nine heirs in amounts between \$.02 and \$7.50, and figuring the worksheet for the distribution took three BIA employees two days to complete.<sup>250</sup> Ultimately, the cost of calculating its distribution was greater than the fee itself.<sup>251</sup>

## VI. A New Proposal for Real Reform

When [imagination] is in short supply, the manifest injustice of so much of **Indian** law remains entombed in perfunctory formalism and manipulated precedent and a tyranny of technique threatens to eradicate the humanistic impulse to do the right thing.<sup>252</sup>

In the detail and minutiae of technical, bureaucratic responses, the real people and real effects of fractionation can get lost, much like the benefits of landownership when reduced to the millionth decimal point or multi-digit common denominators. However, fractionation deserves concerted attention now, precisely because it is so curable and because it continues to damage tribal sovereignty deeply and needlessly.

### \*781 A. Eliminate Federal Control of Transactions Among Tribal Citizens

**Allotment** and fractionation both perfectly illustrate the central importance of a sovereign nation's ability to control its own tenure choices and the need for local flexibility in the administration of its property system.<sup>253</sup> Without either of these foundational rights, genuine tribal self-determination suffered after **allotment**, and so too did individual tribal citizens. The first necessary repair work now is to restore tribal autonomy in these crucial areas. Proposals, such as those discussed earlier for tribal trust paradigms or even for the complete withdrawal of federal control are appealing. However, a more responsible and realistic approach would encourage local control in the management of the consolidation efforts without relieving the federal government of its responsibility to assist in finding a solution and in the meantime to manage the fractionation problem as it currently exists.

Accordingly, the restrictions on inter vivos transactions in **Indian** Country should be reviewed and simplified so that only those actually necessary for the most basic federal recordkeeping and administrative responsibilities are left in place.<sup>254</sup> The primary rationale for the lengthy federal restrictions remaining at this point has been to ensure the **Indian** land base is maintained in the face of such fractionation and to prevent further land loss to non-**Indians**. On this basis, however, there is no reason for the federal government to continue to approve, oversee, or dictate any terms of transfers among tribal citizens. The only possible

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reason that the government continues to do so is to maintain its own \*782 administrative functions and control, which is clearly contrary to the asserted policy of promoting tribal self-determination.<sup>255</sup>

On the other hand, the BIA should continue to maintain accurate records and accounts, so that the functions necessary to manage the fractionation problem as it currently exists (such as calculating and allocating proportional lease incomes) would be preserved. However, narrowly drafting a regulation to achieve just this result--requiring a notice filing for any intratribal ownership changes, for example, rather than requiring Secretary approval and appraisal before that transaction--would make more sense, eliminate undue bureaucracy, and encourage consolidation and efficient use.

As necessary, tribal laws should govern tribal citizens' behavior, and, in this manner, tribal governments could police tribal land transactions. These laws, enacted by a locally accountable government, are likely to be more targeted and helpful than the potentially arbitrary federal appraisal and transaction approval requirements. In addition, these laws will provide a ripe opportunity for tribes meaningfully to control the development of an appropriate property doctrine, which will allow more cultural consonance without risking total withdrawal of federal administrative resources or tribes inheriting the liabilities of a fundamentally flawed, federally caused fractionation problem. Meanwhile, this reform will also focus more attention on these local land issues, providing an excellent opportunity for further landowner education and involvement.

### B. Eliminate the Intestacy Default

The forced application of formulaic state intestate statutes, which were designed with other cultures and property norms in mind, is blamed for first planting the seeds for generations of fractionation. The same default intestacy schemes are used today, whether from the surrounding state or ultimately from some future uniform federal succession statute. Application of these schemes continues to multiply the problem. Creating a more flexible, case-by-case distribution mechanism, though somewhat radical, would not only stop robotic subdivision of already miniscule fractional interests but would also make more efficient use of existing resources, create incentives for careful individual land management and consolidation, and potentially produce \*783 the most equitable and tribally driven results to fit on local circumstances.<sup>256</sup>

The right to a single default estate plan under a law of intestate succession is neither natural nor fundamental to property ownership; intestacy is, instead, a statutory convention for the convenient disposition of estates in the absence of individualized governing instruments.<sup>257</sup> While the creation of a single statutory default may make sense for the typical non-Indian landowner,<sup>258</sup> it does not match current needs in Indian Country. An equitable distribution alternative to intestacy, on the other hand, would look very much like statutes governing property division at divorce.<sup>259</sup> Valid wills would trump other considerations, and tribal statements of policy and tribal laws would shape what other principles might factor into individual estate distributions.<sup>260</sup>

\*784 Consider, for example, that the average allotment in Indian Country now is shared by 17.4 co-owners, the average Indian decedent owns interests in at least ten allotments, and the average estate gets divided among seven heirs. In the case of the most typical probate, then, the result in Indian Country would look something like this: after lengthy notice, an expensive hearing, and an extensive family history inquiry, the decedent's 1/17.4 interests in ten different allotments would each be formulaically subdivided into seven additional new undivided shares for each of the seven heirs. In other words, what had been ten 1/17.4 interests is methodically turned into seventy 1/121.8 shares.<sup>261</sup> All of these shares must now be maintained in seven new accounts, requiring seven more rent checks, adding seven new parties to any lease or other transaction on any of the ten tracts involved, and shifting the balance of the ten different co-owners groups otherwise already in place.

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Under the current system, the deciding official has no flexibility to distribute, for example, two of the entire 1/17.4 shares to each of the five heirs who still live in the area and no real property shares to the sixth and seventh heirs, who might be missing, have no connection to the reservation, want to accept the decedent's last rent check in place of a real property interest, or have already received substantial non-trust property from the decedent's estate. These possible considerations of individual heirs' connections to particular property, likely use, tribal custom, and the desire to stop further fractionation find no place in a state intestacy formula, but they would in an equitable distribution model.

Determining the distribution of probate property on a case-by-case basis, rather than applying a strict intestacy statute, would achieve the goals of tribes and the federal government in preventing, and even reducing, fractionation in interests of all sizes--not just the already small interests. The rights of individuals would also be unimpaired as they could easily avoid these individualized distributions by creating an estate plan<sup>262</sup> or conveying property during life, especially after the flexibility \*785 outlined above is added by the removal of federal intratribal restrictions.<sup>263</sup> Ultimately, the somewhat unpredictable nature of an equitable distribution result would actually encourage more proactive estate planning, and landowner assertiveness.

While difficult issues are raised by increased discretion in property distribution--not the least of which is how to choose which policies to promote--the fact is that probate hearings are already happening. Family members and BIA officials are already testifying to determine family history, and estimates of property value and records of income are kept to verify the inventory of the decedent's estate. The deciding officials already write individualized decisions with findings of facts and controlling conclusions of law.<sup>264</sup> Rather than robotically applying a strict, external intestate code--which only exacerbates the problem--these mechanisms and resources already in place should be implemented as part of the solution.

Once more discretion is given, probate hearings may be less efficient and more costly. However, the reduced monitoring of intratribal land transactions, detailed above, combined with the money saved by reducing further fractionation in the long run, could more than make up for this. Additionally, assuming remote or even missing heirs would be unlikely to receive the decedent's property under the chosen distribution policies, resources could actually be saved by requiring individual notice, in addition to the standard publication, only for those individuals who are likely to inherit. A "reasonable diligence" standard could be applied so that remote, distant heirs with no emotional or personal connection to the decedent or the land no longer have to be searched for and notified.<sup>265</sup>

\*786 Also, to expedite the hearing process, a local tribal official might choose to propose a recommended distribution to the deciding official before each hearing.<sup>266</sup> Contests could then be made at the hearing, as claims and family history disputes currently are, with the burden on the person challenging the proposed distribution to show good cause why a different distribution would better meet the equitable criteria chosen. Additionally, the potential uncertainty of a given result could encourage "likely heirs"-- immediate family members and close relatives, as defined by the local tribe's policies or, as a default, state or federal intestacy laws--to negotiate fairly and flexibly their own distribution agreement, with the probate adjudicator **acting** more like an arbiter of this important, potential-laden process. Right now, such agreements can theoretically be approved, but there is no mechanism for their encouragement in the process and no impetus for heirs to so negotiate.<sup>267</sup>

In all of this, the greatest concern may be a risk corruption or unchecked discretion. However, at least in this circumstance, human beings will be doing the distributing flexibly, rather than merely applying blind and inflexible intestacy rules. Tribal policies can also be more flexibly implemented, with the ordinances and tribal customs, which are articulated with genuine political accountability by stakeholders themselves, becoming highly persuasive as distributive factors rather than blatantly ignored.<sup>268</sup> Also, a mechanism for appeal would be required,<sup>269</sup> and tribes who elect to administer federal \*787 responsibility under an existing self-governance compact could choose to assert more meaningful direct control without eliminating other important federal functions.<sup>270</sup>

## VII. Conclusion

Looking back with more than a century of hindsight, it is nearly impossible to imagine now that the crafters of **allotment** actually believed the difficulties created by such a static private property system would work themselves out, that the problems of **allotment** would merely melt away like that fabled springtime snow.<sup>271</sup> Of course, in practice, this did not happen. Instead, making land inalienable during life and subjecting it to a foreign, fixed intestacy scheme at death ultimately resulted in land loss, poverty, impaired self-governance, and, most directly, ever-increasing fractionation of the land base. The fact that the federal government so blatantly ignored tribes' reserved rights also caused great emotional and cultural damage, arousing even more poignantly the need for recognizing first the harm that was caused and then, more importantly, the damage that is still being done and endorsed by the current system.<sup>272</sup>

\*788 Ultimately, of all of **allotment's** negative effects, it is fractionation that is the most damaging precisely because it gets perpetuated under the current system and because it continually causes additional difficulties in **Indian** Country. The severity of fractionation embodies **allotment's** other effects, including poverty and recent jurisdictional divestitures, ultimately futile and superficial without a more comprehensive solution to fractionation first.

Eliminating unnecessary federal regulation of tribal citizens' land transactions during life and providing for a more flexible estate distribution at death are two critical components of such a solution. Even more important, however, is a fundamental recognition of the multiple interests involved and the layers of fractionation's many complex effects. Though potentially daunting in one respect, the centrality of the fractionation problem ultimately presents a terrific opportunity. Although fractionation, like **allotment** before it, will not simply melt away, concerted efforts to end its persistent cycle can produce a positive result. By working together to resolve the problem, individual landowners, **Indian** tribes, and the federal government can finally realize the shared goal of true tribal self-determination,<sup>273</sup> allowing the future of **Indian** Country to be built on what will literally be a more solid and sustainable base.

### Footnotes

a1 B.A., University of Iowa, 1999; J.D. Candidate, University of Wisconsin Law School, Class of 2004. Special thanks to the Land Tenure Center at the University of Wisconsin for enabling me to spend the summer of 2002 studying and experiencing firsthand the conditions of **Indian** land in North and South Dakota, to all the kind people who hosted my time there, and especially to **Indian** Probate Judge George Tah-bone, a true believer who pushed me to understand the problem before attempting to fix it. I am also grateful to Del Laverdure, Stacy Leeds, Jess Gilbert, Jane Larson, William Whitford, and Brenda Haskins for generous support at various stages of this process. Finally, thanks to Marilyn Abildskov for writing lessons, and to my family, for putting up with me and the crates of research I hid under our holiday dinner table.

1 Sherman Alexie, *The Lone Ranger and Tonto Fistfight in Heaven* 150 (HarperPerennial 1994).

2 Ben Nighthorse Campbell, *Rolling Up Our Sleeves on Indian Trust Reform, Indian Country Today* (Lakota Times), July 3, 2002, at A5.

3 The term **Indian** Country technically refers to "all land within the limits of any **Indian** reservation," "all dependent **Indian** communities," and "all **Indian allotments**, the **Indian** titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. §1151 (2000); see also *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975) (clarifying that this **Indian** Country definition "generally applies as well to questions of civil jurisdiction" though codified as a criminal statute).

- 4 Katheleen R. Guzman, [Give or Take an Acre: Property Norms and the Indian Land Consolidation Act](#), 85 Iowa L. Rev. 595, 598 (1999). For example:  
Consider an 1898 allotment of 80 acres, where the allottee and two successive generations die intestate leaving five heirs apiece. Roughly 125 tenants in common would each own a 1/125th equitable interest in one half of a quarter section. [In reality,] many allotments exceed several hundred owners. As a result, ‘common denominators have reached 54 trillion, billions are not uncommon, and millions [approach the norm].’”  
Id. See also infra text accompanying note 76.
- 5 The term constructive dispossession is mine. I use it to refer to the disconnect between the legal and factual reality of Indian land tenure. Though Indians retain technical legal title to fractional interests, the thesis of this Comment is that for all practical purposes, Indians retain few, if any, of the beneficial aspects of property ownership because of the fractionated conditions.
- 6 See infra text accompanying notes 102-03.
- 7 See Kenneth H. Bobroff, [Retelling Allotment: Indian Property Rights and the Myth of Common Ownership](#), 54 Vand. L. Rev. 1559, 1616 (2001) (“As early as 1892, Indian Agents were reporting problems of fractionated heirship.”). One agent reported that:  
upon the death of the original grantees the right to the land gets so divided and subdivided that no one has sufficient preponderance of property in the land to make it to his interest to improve it. After a few subsequent deaths of the heirs the title becomes so interminably mixed that it is next to impossible to clear it up. Not being alienable there can nothing be done.  
Id. (quoting 1892 Ann. Rep. of the Sec’y of the Interior 193).
- 8 In 2000, Congress specifically found that “the problem of the fractionation of Indian lands...is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal law.” Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, §101(13), 114 Stat. 1991, 1991-92 (codified at 25 U.S.C. §2201 (2000) (“Congressional Findings”)). See also infra Part II.A.
- 9 See infra notes 34-39 and accompanying text.
- 10 The current federal Indian policy was first articulated by President Richard Nixon: “The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.” Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363 (1970). In the last three decades, Congress has continually reaffirmed this policy. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, §§103, 104(b), 88 Stat. 2203 (codified at 25 U.S.C. §§450f, 450h (2000)) (giving Secretaries of Interior and Health and Human Services express authority, upon request of any Indian tribe, to contract with that Indian tribe to provide its own federal services); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, §§3, 101, 108, 92 Stat. 3069 (codified at 25 U.S.C. §§1902, 1911, 1918 (2000)) (providing deference to tribal governments for resolution of Indian child custody cases).
- 11 Indian Lands Consolidation: Hearing on H.R. 2743 Before the House Committee on Resources to Reduce the Fractionated Ownership of Indian Lands, and for Other Purposes, 108th Cong. (July 29, 1998) [hereinafter 1998 ILCA Hearings] (statement of Edward B. Cohen, Deputy Solicitor, Dep’t of Interior), available at [1998 WL 425978 \(Fed. Doc. Clearing House\)](#).
- 12 However, fractionation typically exists in communities where political, social, and cultural conditions create a disconnect between local property norms and the larger American legal system. In these communities, barriers, including access to estate planning and fairly and flexibly negotiated land transactions, exist to prevent entry into the dominant political system and its traditional property law mechanisms for dealing with fractionation. See Thomas W. Mitchell, [From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common](#), 95 Nw. U. L. Rev. 505, 517-21 (2001) (discussing how “the low incidence of estate planning among poor, rural African Americans” has fractionated the community’s ownership structure and made “much black-owned land a target for land speculators”).
- 13 See infra Part II.C. Recent reports suggest that “the lowest common denominator for some fractional ownership interests has reached a googol--a number containing 101 digits, or 10<sup>100</sup> power.” Guzman, supra note 4, at 598 n.9.

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- 14 See *infra* Parts I.B-II.A; see also David H. Getches et al., Federal **Indian** Law 174-75 (4th ed. 1998). See generally Bobroff, *supra* note 7.
- 15 Judith V. Royster, The **Legacy of Allotment**, 27 *Ariz. St. L.J.* 1, 5 (1995).
- 16 Guzman, *supra* note 4, at 605 & n.43 (citing Felix S. Cohen, Handbook of Federal **Indian** Law 138 (1982) [hereinafter Cohen Handbook]). Land loss was due to the opening of “surplus” reservation land for non-**Indian** settlement as well as from tax foreclosures and sales by **Indians** who were deemed “competent” to take property without restrictions, often without speaking English or understanding the system. *Id.*; see notes 40, 49-50, 62-63.
- 17 Felix S. Cohen, Original **Indian** Title, 32 *Minn. L. Rev.* 28, 35 (1947) [hereinafter Cohen, **Indian** Title].
- 18 Cohen Handbook, *supra* note 16, at 109-10 & n.388 (discussing the history of the Trade and Intercourse **Act**). The **Act** stated that: [N]o sale of lands made by any **Indians**, or any nation or tribe of **Indians** within the United States, shall be valid to any person or persons, or to any state,...unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.  
*Id.* at 110 & n.391; cf. 25 U.S.C. §177 (stating the same policy that “[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any **Indian** nation or tribe of **Indians**, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution”); see also I Francis Paul Prucha, *The Great Father: The United States Government and the American **Indians*** 89-92 (1995).
- 19 21 U.S. (8 Wheat.) 543, 543 (1823).
- 20 *Id.* at 545. Marshall also acknowledged that the reliance of the United States and its new citizens on the validity of its title to the new territory motivated the Court's decision. *Id.* at 600; cf. *Tee-Hit-Ton **Indians** v. United States*, 348 U.S. 272, 289-90 (1955). In a somewhat rare example of applying the Johnson conquest prong, the Court in *Tee-Hit-Ton* stated:  
Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the **Indians** ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.  
*Id.*
- 21 Cohen, **Indian** Title, *supra* note 17, at 42.
- 22 See *United States v. Winans*, 198 U.S. 371, 381 (1905) (“In other words, the treaty was not a grant of rights to the **Indians**, but a grant of rights from them--a reservation of those not granted.”); see also *Minnesota v. Mille Lacs Band of Chippewa **Indians***, 526 U.S. 172, 193 (1999) (concluding that “President Taylor's 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights under the 1837 treaty”).
- 23 This followed the general practice of earlier European settlers including the Spanish, Dutch, and the English, who treated tribes as sovereign owners and required at least the theoretical consent of **Indians** to obtain possession of the land. Cohen Handbook, *supra* note 16, at 50-55. The Constitution also recognized **Indian** tribes as separate, pre-existing sovereigns in the Commerce Clause. U.S. Const. art. I, §8, cl. 3 (providing that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the **Indian** Tribes”). Similarly, one of the very first **acts** of Congress reaffirmed the language of the Northwest Ordinance of July 13, 1787, that “[t]he utmost good faith shall always be observed toward the **Indians**; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed.” Northwest Ordinance **Act** of 1789, ch. 8, art. 3, 1 Stat. 50, 52, quoted in Cohen Handbook, *supra* note 16, at 108 n.383.
- 24 **Indians** were the last racial group to be collectively made American citizens in a unilateral decision made by Congress in 1924. The **Indian** Citizenship **Act** of 1924, Pub. L. No. 175, 43 Stat. 253 (codified at 8 U.S.C. §1401(b) (2000)); see also Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal **Act** of Forcing American Citizenship Upon Indigenous Peoples*, 15 *Harv. BlackLetter L.J.* 107, 123-28 (1999) (clarifying that the **act** of bestowing American citizenship upon **Indians** in 1924 was not premised on “consent or any other precondition” and instead most **Indians** “had long resisted efforts to confer citizenship upon them and continued to think of themselves only as members of their Indigenous nation”).

- 25 See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (holding that the United States has “charged itself with moral obligations of the highest responsibility and trust” and that its conduct toward tribes should be “judged by the most exacting fiduciary standards”); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831) (indicating that the source of “dependent” characterization comes from a description of tribes as “domestic, dependent nations” to mean essentially they were unable to execute treaties with foreign nations).
- 26 *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (sustaining the constitutionality of federal assertions of jurisdiction over certain major crimes committed by **Indians**, against **Indians**, in **Indian** Country). Of course, this was not an instant turnaround as the history of western expansion is wrought with its share of violence. In *Kagama*, for example, the Court describes the tribe as “[d]ependent largely for their daily food” but fails to mention the torrid history of sending federal buffalo hunters to the Plains or the role of European diseases such as smallpox in reducing the tribe's numbers. *Id.* at 384; see, e.g., Wade Davis, *One River: Explorations and Discoveries in the Amazon Rain Forest* 80-81 (1996) (highlighting history of Kiowa tribe as providing one example of an **Indian** community experiencing the devastating effects of food source depletion and disease). The litigants in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), were citizens of the Kiowa tribe. See *infra* notes 35-36 and accompanying text.
- 27 *Kagama*, 118 U.S. at 384. In 1903, the Court construed the language of the Northwest Ordinance as a reason to defer to Congress almost completely. See *Lone Wolf*, 187 U.S. at 566, 568 (“When, therefore, treaties were entered into between the United States and a tribe of **Indians** it was never doubted that the power to abrogate existed in Congress....We must presume that Congress **acted** in perfect good faith in the dealings with the **Indians**.”). But see *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (“[A] reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that ‘this power to control and manage [is] not absolute.’” (citation omitted)).
- 28 See generally, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113 (2002) (arguing persuasively that the breadth of authority claimed by the federal government over **Indian** nations is unconstitutional--or at least extra-constitutional--and inconsistent with original treaty arrangements, government-to-government relationships, and fundamental notions of consent required to delegate power to the federal government); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 *U. Mich. J.L. Reform* 899 (1998) (arguing federal **Indian** law is equivalent to colonization and is detrimental to world community and human rights). Federal treaty-making with **Indian** nations ended with a unilateral **act** of Congress, attached as a rider to the **Indian** Appropriations **Act** of 1871. **Indian** Appropriations **Act**, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. §71), cited in Cohen Handbook, *supra* note 16, at 107, 127-28.
- 29 Bobroff, *supra* note 7, at 1564-71, 1614 (summarizing the story told by “The Friends of the **Indians**” at the time to justify **allotment** as a humanitarian civilizing agent, which was based on a false premise that all **Indians** had no concept of private property and thus experienced no loss by the tribal divestiture); see also Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 *Kan. J. L. & Pub. Pol'y* 491, 493 (2001) (“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.”); Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73, 87 (1985) (“It is doubtful whether the claims of any nomadic population could ever meet the common law requirements for establishing property in land [by possession].”).
- 30 Bobroff, *supra* note 7, at 1572. Fundamental differences in **Indian** and Anglo-American property systems made such significant misunderstandings possible:  
Given the central importance of the land to native societies--indeed to most native peoples' very identities--it is not surprising that almost all **Indian** property systems restricted the decision to transfer land rights outside the tribe to tribal leaders. This led many outsiders, including nineteenth and twentieth-century reformers, to conclude that title to **Indian** lands was invariably held by the tribe in common.  
*Id.*
- 31 See Readjustment of **Indian** Affairs--History of the **Allotment** Policy: Hearing on H.R. 7902 Before the House Comm. on **Indian** Affairs, 73d Cong. 431 (1934) [hereinafter 1934 **Allotment** Hearing] (report by D.S. Otis); Leonard A. Carlson, *Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act*, in *Property Rights and Indian Economies* 69-73 (Terry L. Anderson ed.,

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1992); Robert J. Miller, [Economic Development in Indian Country: Will Capitalism or Socialism Succeed?](#), 80 Or. L. Rev. 757, 767-73 (2001) (reviewing history of **Indian** property rights in land).

32 General **Allotment (Dawes) Act** of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§331-334, 339, 341-342, 348-349, 354, 381). The key section was codified at 25 U.S.C. § 331, which provided that “[i]n all cases where any tribe or band of **Indians** has been or shall be located upon any reservation created for their use...the President shall be authorized to...cause **allotment** to each **Indian** located thereon to be made.” 25 U.S.C. §331 (1994) (repealed by 25 U.S.C. §2202 (2000)). This section was finally repealed by the **Indian Land Consolidation Act** Amendments of 2000. See Pub. L. No. 106-462 §106(a)(1), 114 Stat. at 2007.

33 See Getches, supra note 14, at 174-75.

34 General **Allotment (Dawes) Act**, ch. 119.

35 187 U.S. at 564-68.

36 Id. In this case, Lone Wolf, a Kiowa tribal leader, argued that according to his tribe's treaty with the United States, any cessations of tribal lands required the approval of at least three-fourths of the adult male **Indians**; and that, without a fair vote on the issue, the implementation of **allotment** on his reservation was a violation of that treaty. Id. The Court held that Congress, when **acting** within its authority as “guardian” over the tribes, could pass laws in conflict with treaties and that it would “presume that Congress **acted** in perfect good faith...and that the legislative branch of the government exercised its best judgment.” Id. at 565, 568.

37 General **Allotment (Dawes) Act**, ch. 119.

38 Cohen Handbook, supra note 16, at 132-34; see also Royster, supra note 15, at 10-12.

39 General **Allotment (Dawes) Act**, ch. 119, §5; see also 25 U.S.C. §348; [Tooahnippah v. Hickel](#), 397 U.S. 598, 609 (1970).

40 See General **Allotment (Dawes) Act**, ch. 119, §5 (providing for original twenty-five year trust period); Burke **Act** of 1906, ch. 2348, 34 Stat. 182 (amending §6 of the General **Allotment Act**) (codified at 25 U.S.C. §349) (authorizing early issuance of a fee (unrestricted) patent to any **Indian** allottee upon determination that the individual is “competent and capable of managing his or her affairs”).

41 See Leeds, supra note 29, at 493.

42 General **Allotment (Dawes) Act**, ch. 119, §5; see also Cohen Handbook, supra note 16, at 230-31, 618-19. Before **allotment**, tribal land passed by tribal inheritance systems. See, e.g., [Jones v. Meehan](#), 175 U.S. 1, 29 (1899) (determining that right to inherit unrestricted land owned by **Indian** chief “was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Montana, nor by any action of the Secretary of the Interior”). These varied by tribe, with some carried out in existing family or clan organizations or in other more tribal mechanisms. Bobroff, supra note 7, at 1615; see also Robert D. Cooter & Wolfgang Fikentscher, **Indian Common Law: The Role of Custom in American Indian Trial Courts**, Part II, 46 Amer. J. Comp. Law 509, 530-35 (1998) (describing various traditional inheritance patterns).

43 Bobroff, supra note 7, at 1562-63 (summarizing conclusions of economic scholarship that **allotment** failed because it “replaced numerous tribal systems of property rights in land with a single, badly flawed regime designed in Washington, D.C.” and imposed a “static version of Anglo-American property and inheritance law on **Indian** lands [and thus] froze **Indian** property law in place”).

44 Id. at n.290 (citation omitted).

45 Monroe E. Price, *Law and the American Indian* 544 (1973).

46 Exactly which problems Senator **Dawes** believed would work out naturally is, of course, open for debate. Presumably, he was referring to the “**Indian Problem**” to be “solved” by assimilation; however, a more positive reading would suggest the problems of poverty, land loss, and government-to-government relations should also have been relevant.

47 See [United States ex rel. Standing Bear v. Crook](#), 25 F.Cas. 695, 697 (D. Neb. 1879) (No. 14,891), cited in Getches, supra note 14, at 190 (judging whether an **Indian** defendant was entitled to legal rights in a post-Civil War federal habeas corpus case by looking to

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the dictionary definition of “person” and concluding it was “comprehensive enough...to include even an **Indian**”); cf. *United States v. Dann*, 865 F.2d 1528, 1538 (9th Cir. 1989); Deborah Schaaf & Julie Fishel, *Mary and Carrie Dann v. United States at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment*, 16 Tulane Env. L.J. 175, 181-86 (Winter 2002) (describing Commission finding that United States had violated human rights of individual **Indians** denied equality, due process, and the right to property). The assertion that federal **Indian** law is in effect an exercise in colonialism has been made in multiple contexts. See Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections From the Edge of the Prairie*, 31 *Ariz. St. L.J.* 439, 448-53 (1999) (“The march of colonialism leads to the ‘disintegration of society, to degradation of the deepest human values--affection, loyalty, fraternity, a sense of common purpose--all in the name of progress, identified with order, efficiency, discipline, production.’” (quoting Isaiah Berlin, *The Sense of Reality* 255 (1997)) (comparing contemporary Federal **Indian** law to discussions of decolonization in India)); see also, Frantz Fanon, *The Wretched of the Earth* 250 (Constance Farrington trans., 1968 ed.) (explaining that colonization makes the colonized people perpetually question identity); supra note 28

48 The majority of these problematic restrictions and regulations remain in force today. See infra Part IV.

49 See Royster, supra note 15, at 13-14. Many commentators suggest that this opening of additional lands for non-**Indian** western expansion was really the driving motive behind **allotment**. Cohen Handbook, supra note 16, at 613 (“Their motives varied from a sincere wish to benefit **Indian** people to thinly veiled desires to obtain **Indian** land.”).

50 See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 *Ariz. L. Rev.* 963, 978 (1996). The United States distributed these lands, but:

The lands were not, of course, surplus. The formula used--160 acres for the head of the family, eighty acres for older children and wives, and forty acres for minor children, did not look even five years down the road to the future of the tribe. If an adult man were capable of supporting his family on 160 acres, did that mean that his eighteen-year-old son could do so on eighty acres, and a decade later his twelve-year-old, now twenty-two, on forty acres?

Id.

51 Guzman, supra note 4, at 605-06.

52 Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934*, at 46 (1991) (“**Indian** Office officials...remained torn [because leasing] could also harm the Natives by enabling them to live off rentals rather than farm.”)

53 Id. at 29.

54 **Act** of February 28, 1891, §3, ch. 383, 26 Stat. 794 (amending General **Allotment (Dawes) Act**, ch. 119).

55 **Act** of June 25, 1910, ch. 431, §4, 36 Stat. 856 (codified at 25 U.S.C. §403); see also 25 C.F.R. §§162.100-162.632 (2003) (modern BIA regulations for leasing oversight).

56 Bobroff, supra note 7, at 1614 (citing Leonard Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* 90 (1981)).

57 See infra text accompanying notes 104-05.

58 **Act** of June 25, 1910, ch. 431, §2 (codified as amended at 25 U.S.C. §373).

59 Bobroff, supra note 7, at 1618-19 (quoting interview with federal probate administrative law judge about Navajo Nation's experience).

60 1934 **Allotment** Hearing, supra note 31, at 17-18 (Memorandum of John Collier, Sec'y of **Indian** Affairs). Collier continued, “[i]t is difficult to imagine any other system which with equal effectiveness would pauperize the **Indian** while impoverishing him, and sicken and kill his soul while paupering him, and cast him in so ruined a condition.” Id. at 18. In 1928, the Meriam Report--a voluminous study preformed for the federal government--found increasing fractionation and bureaucratic inefficiency, and its publication had first highlighted the scope of the problem. L. Meriam, *The Problem of Indian Administration* (1928), reprinted in *Documents of United States Indian Policy* 219-21 (Francis Paul Prucha ed., 2d ed. 1990) (summarizing the most pertinent parts of the Meriam Report).

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- 61 Guzman, *supra* note 4, at 605.
- 62 Sixty million acres left **Indian** ownership this way. McDonnell, *supra* note 52, at 121.
- 63 McDonnell, *supra* note 52, at 88-90; Guzman, *supra* note 4, at 605. Twenty-seven million acres--two-thirds of all **allotted** land--passed out of **Indian** allottees' hands between 1887 and 1934 as a result of these "competency" determinations, often done unilaterally in response to mounting pressure for more land and more productive uses, that made the land eligible for sale. *Id.* Competency determinations were often sought and even effectuated by corrupt land speculators who then pounced to purchase or swindle land from unsuspecting allottees. *Id.* **Allotments** taken out of the trust status were also subject to frequent tax foreclosures and sheriff sales as the **Indian** allottees were suddenly thrust into a foreign legal system with all its obligations and no resources for its use. *Id.*
- 64 *Id.*; see also Oren Lyons et al., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* 321 (1992).
- 65 See Pommersheim, *supra* note 47, at 448. A more specific example is provided on the Pine Ridge Reservation where one observer wrote:  
[O]ne hundred years of **allotment** policies have altered many Oglalas' perceptions regarding landownership. This may be the aspect of assimilation that has had the most profound and lasting effect at Pine Ridge. Although much of the land remains sacred to the Oglalas, many are reluctant to forgo their share of the **allotments** in order to benefit tribal land consolidation, even if their interest in the **allotment** is minimal.  
Carl G. Hakansson, **Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies**, 73 N.D. L. Rev. 231, 242 (1997). By comparison, when the Oglala Chief Crazyhorse was asked to negotiate a sale of the Black Hills to the United States, he reportedly said, "[O]ne does not sell the land on which the people walk." *Id.* (citing Dee Brown, *Bury My Heart at Wounded Knee* 273 (1971)).
- 66 **Indian** Reorganization (Wheeler-Howard) **Act**, ch. 576, §1, 48 Stat. 984 (1934) (current version at 25 U.S.C. §461) ("[N]o land of any **Indian** reservation, created or set apart by treaty shall be **allotted** in severalty to any **Indian**."); *id.* §2 (current version at 25 U.S.C. §462) ("The existing periods of trust placed upon any **Indian** lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.").
- 67 Cohen Handbook, *supra* note 16, at 147.
- 68 **Indian** Reorganization **Act** §§ 5, 10 (current version at 25 U.S.C. §§465, 470). Interestingly, this type of revolving fund to allow tribes to purchase inherited interests and consolidate fractionated **allotments** into economically workable units was first proposed in the Meriam Report. In 1933, the Senate Committee on Interior and Insular Affairs and the Hoover Administration studied the problem of fractionation and suggested allowing tribes to purchase fractional interests on a deferred payment basis. *S. Rep. No. 72-1203, at 2* (1933). However, none of these reforms was implemented. Between 1928 and 1971, at least a dozen bills were introduced in Congress to halt fractionation but none was enacted. Ethel S. Williams, *Too Little Land, Too Many Heirs--The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 713 (1971). In 1966, one Senate committee reported that, "[t]he Bureau [of **Indian** Affairs] has given lipservice to correcting this very serious administrative problem, but has made no discernible progress toward solving it." *S. Rep. No. 89-1588, at 8* (1966); see, e.g., **Indian** Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcommittee on **Indian** Affairs of the House Committee on Interior and Insular Affairs, 89th Cong. 6, 31-32, 35 (1966) (proposing a simplification of transfers among fractional interest holders, which was never enacted, and describing **Indian** land tenure in the 1960s as "a big problem, but [with] small numbers").
- 69 **Indian** Reorganization **Act** §3 (current version at 25 U.S.C. §463).
- 70 Royster, *supra* note 15, at 17 n.90 ("Between 1936 and 1974, some 595,157 acres were restored to tribal ownership, but more than three times that many acres of existing tribal lands, a total of 1,811,010, were condemned for other purposes."); cf. *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685, 687 (N.D. 2002) (allowing North Dakota to exercise powers of eminent domain over land held in fee by the Turtle Mountain **Indian** Tribe).
- 71 Comm. on Interior and Insular Affairs, 86th Cong., **Indian** Heirship Land Study 27 (Comm. Print 1960) [hereinafter *Heirship Land Study*].

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- 72 Id. at XV.
- 73 Id. at 15-20. Sample complaints from the co-owners themselves emphasized the challenges of having leases signed, staying aware of who owns what, and the inability to sell or get agency response. For example, one letter stated that:  
This land is nearly impossible to do anything with, such as sale or lease because of the amount of heirs involved. For instance I have one-eighteenth share of one-quarter section of land that we have tried to sell several times but could not get all interested parties. This will never do me any good.... think of the mess just one more generation or division will produce.  
Id. at 16. Each of the following excerpts illustrate the complaints of various **Indian** heirs. “Yes, the property benefits none of the heirs as it is now. The correspondence, notary, etc., costs more than any income derived from the property.” Id. at 19. “Who on earth could make a living on 3,500/11,975,040 percent of 80 acres of **Indian** land? I would like to sell my cup of **Indian** soil.” Id. “I was going to dispose of my share of 160 acres .... All the heirs signed, but it has been six years and the deal has not gone through Crow Agency.” Id. “I have tried for 6 years to buy the 400 acres.... The heir that won't sign wants money on the side because her share is small....” Id. And, in a classic example of the constructive dispossession articulated here-- that is the disconnect between legal and factual realities of **Indian** landownership--one fractional interest holder responded to the government's survey: “Gentleman, I am sorry, I don't know what land you're talking about.” Id. at 20.
- 74 Williams, *supra* note 68, at 711-13. At that time, the fractionation problem was characterized by about one-half of all **allotted** lands being held by six or more heirs, which is significantly less dramatic than it is today. Id. at 712.
- 75 Update on **Indian** Probate Problems, 10 Real Prop. Prob. & Tr. J. 220, 222 (1975) (Report of Committee on Probate Problems of the American **Indian**); see also Wesley L. Nutten, III, Probate Problems of the American **Indian**, 7 Real Prop. Prob. & Tr. J. 495, 500-01 (1972).
- 76 *Hodel v. Irving*, 481 U.S. 704, 713 (1987).
- 77 25 U.S.C. §§5, 9; 25 C.F.R. §§150.1-150.11 (requiring the recordation of every **Indian** land deed requiring a Secretary approval and authorizing the President to prescribe regulations to implement “any **act** relating to **Indian** affairs” and to settle **Indian** accounts); see also 43 C.F.R. § 4.200 (2002) (defining rules applicable in **Indian** administrative hearings and appeals, specifically pending probate regulations).
- 78 U.S. Gen. Accounting Office, Profile of Land Ownership at 12 Reservations, No. GAO/RCED-92-96BR, at 1-2 (1992) (Briefing Rep. to the Chairman, Select Senate Comm. on **Indian** Affairs) [hereinafter GAO Report].
- 79 Id. at 23.
- 80 Id. at 2.
- 81 Id. at 20.
- 82 Id.
- 83 Small interests are defined as those representing 2% or less of the total tract. Id. at 23.
- 84 Id. at 1-2. During this period, a provision of the ILCA mandated the “escheat” of all small interests with a low income-earning potential to the tribe with jurisdiction over the land upon the death of the current interest holder. This portion of the statute was later held unconstitutional by the Supreme Court. See *infra* Part V.B.2. However, even while this somewhat radical approach was applied over an approximate seven-year period, only 16,400 small interests actually escheated--while something like 315,000 more were created in just this small sample of twelve reservations. GAO Report, *supra* note 78, at 1-2.
- 85 Bureau of **Indian** Affairs, Notice to **Indian** Landowners (n.d.) (on file with author) (regarding proposed amendments to the 2000 ILCA). A similar letter was sent about proposed amendments in 1994. See Hakansson, *supra* note 65, at 252.
- 86 Land Records Information System: Landowner Interests, Current Status Data Report 1 (July 11, 2001) (on file with author) (handouts distributed at the Great Plains Trust Reform Consultation Meeting in Bismarck, North Dakota).

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- 87 Id.
- 88 GAO Report, *supra* note 78, at 24.
- 89 Id. at 24-25.
- 90 See 25 U.S.C. §§5, 9, 372-373 (requiring exhaustive federal management of **Indian** land records, accounts, and estates); 25 C.F.R. §§15.1-15.504 (2003); 43 C.F.R. §§4.200-4.357 (2002) (providing a sample of implementing regulations); see also *infra* Part IV.
- 91 **Indian** Land Consolidation **Act** Amendments: Joint Hearing Before the Senate Comm. on **Indian** Affairs and the House Comm. on Resources on S. 1586, S. 1315, and H.R. 3181, 106th Cong. 83 (1999) (statement of Kevin Gover, Assistant Sec'y for **Indian** Affairs, Dep't of the Interior) [hereinafter 1999 ILCA Amendments Hearing], cited in Bobroff, *supra* note 7, at 1619.
- 92 GAO Report, *supra* note 78, at 27.
- 93 Id.
- 94 See, e.g., Land Tenure Center, Land Law and Tenure Security, at [http://www.wisc.edu/ltc/live/externs\\_02.pdf](http://www.wisc.edu/ltc/live/externs_02.pdf) (on file with author) (externship program slideshow) (providing one example from the Oneida Tribe of **Indians** of Wisconsin of a 90-acre **allotment** with more than 125 co-owners that has been fallowed for so long that a forest has grown up, in stark contrast to the productive, non-fractionated farm fields around it).
- 95 **Allotments** cannot be taken to satisfy any debt, and mortgages have to be specially approved by the Secretary of Interior. 25 U.S.C. §§354, 483a; see also 25 C.F.R. §§152.1-152.35 (2003).
- 96 See, e.g., *infra* Part III.B.1.
- 97 Administration of these fractional interests is also extremely cumbersome, slow, and expensive. The backlog of **Indian** probate cases in 1999 was 8,000 estates long, with most assets still taking well over a year to distribute and the cost of administration often exceeding the value of the estates. See **Indian** Land Consolidation **Act**: Hearing Before the Sen. **Indian** Affairs Comm. on S. 1340, 107th Cong. 33 (2002) [hereinafter 2002 ILCA Hearing] (testimony of Austin Nunez, President, **Indian** Land Working Group, and Chair, San Xavier District of the Tohono O'Odham Nation in Arizona).
- 98 Theoretically, the current federal **Indian** policy is to promote tribal self-determination. See *supra* note 10 and accompanying text; see also Exec. Order No. 13,175, 3 C.F.R. 304-307, §2(b), (c) (2000-2001), reprinted in 25 U.S.C. §450 ("Consultation and Coordination with the **Indian** Tribal Governments"). The Order states:  
Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of **Indian** tribes to self-government. As domestic dependent nations, **Indian** tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with **Indian** tribes on a government-to-government basis to address issues concerning **Indian** tribal self-government, tribal trust resources, and **Indian** tribal treaty and other rights. The United States recognizes the right of **Indian** tribes to self-government and supports tribal sovereignty and self-determination.  
Id. (section numbers omitted).
- 99 E.g., *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd* and remanded by *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (ongoing litigation based on allegations that the Secretary of Interior and the Secretary of Treasury mismanaged **Indian** monetary accounts and thereby breached their fiduciary duties); *infra* text accompanying notes 147, 223.
- 100 See, e.g., Leeds, *supra* note 29, at 498.
- 101 See, e.g., Hakansson, *supra* note 65, at 255. As Hakansson points out, this fear of tribal involvement has many causes: The remoteness of many of the districts on Pine Ridge, the absence of telephones in many homes, and the fact that public transportation is almost nonexistent provides for a communication problem not only between tribal members and the federal government, but between tribal members and the tribal government as well.  
Id. Compare this to the emotional effects of colonization. See Pommersheim, *supra* note 47, at 448-53.

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- 102 See infra Part III.B.2.
- 103 See Mitchell, supra note 12, at 522-23.
- 104 See generally Heirship Land Study, supra note 71; see also supra note 73.
- 105 Jodi Rave Lee, Some **Indian** Tracts Are So Tiny They Stump Computer, Wis. St. J., Sept. 30, 2002, at A10 (highlighting sample story of a tribal citizen who owned 1/10,080th of a twenty-acre tract on the Red Cliff Reservation, on which he had “never fished from the shore....never stood beneath its trees,” and about which he told the reporter: “I may have seen it...but I’ve never stepped on it”).
- 106 Clinton Visits **Indian** Reservation, Newsday, July 8, 1999, at A7.
- 107 Id.
- 108 Leslie Reed, Clinton Tours Pine Ridge, Omaha World-Herald, July 7, 1999, at 1.
- 109 Id. Bruce Pipe Head, for example, an Oglala Sioux citizen and BIA employee, reported that though he owned twenty acres on the reservation he was unable to build a house because he could not get financing and instead had to wait in line for a place on tribal property. At the time of Clinton's visit, he and his wife had already been waiting eleven years. Id.
- 110 Getches, supra note 14, at 9.
- 111 See GAO Report, supra note 78, at 1, 9.
- 112 Id. at 9, 16, 21.
- 113 In the face of this poverty, the Oglala Sioux Nation stands out as a dramatic example of the central place land holds in the community's cultural, spiritual, and political identity. The citizens of Pine Ridge, like other members of the original Sioux tribes, currently refuse to accept a multimillion-dollar settlement payment from the United States for the illegal taking of the Black Hills. See [Sioux Nation, 448 U.S. at 374, 424](#) (awarding the Sioux Nation \$17 million plus interest from the federal government for illegally taking the Black Hills). Instead, they hold out for the land and all its meaning. See John P. LaVelle, [Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation](#), 5 *Great Plains Nat. Resources J.* 40, 64-68 (2001) (providing “compensation in the form of money rather than the return of Papa Sapa, the Sioux Nation decision failed to deliver justice to the Great Sioux Nation”).
- 114 Kenneth E. Robbins, Reflecting on the Numbers: Media Hype Breeds Misperception, Am. **Indian** Rep., Sept. 2000, at 22.
- 115 Urban Institute: Center for Public Finance Housing, Assessment of Am. **Indian** Housing Needs and Programs: Final Report xii, 66-67, 76-78, 80 (1996) (report prepared for the U.S. Dep't of Housing and Urban Dev., Office of Policy Dev. and Research).
- 116 Robbins, supra note 114, at 22.
- 117 Getches, supra note 14, at 15-16.
- 118 Id. At Pine Ridge in particular, Oglala Sioux men have a life expectancy of 56.5 years, which is the lower than the life expectancy in any nation in the Western hemisphere except Haiti. Vic Glover, Casinos Don't Help Most **Indians**, Soc. Educ., Sept. 1, 2003, at M14, available at WESTLAW.
- 119 Bobroff, supra note 7, at 1614-15.
- 120 See Michael A. Heller, [The Tragedy of the Anticommons: Property in the Transition from Marx to Markets](#), 111 *Harv. L. Rev.* 621, 667-69 (describing how having “multiple owners hold effective rights of exclusion” creates an “anticommons” in which non-use is ensured).

- 121 In enacting the **Indian** Self-Determination **Act** of 1975, Congress specifically found that “the **Indian** people will never surrender their desire to control their relationships both among themselves and with non-**Indian** governments, organizations, and persons.” 25 U.S.C. §450(a)(2). Congress also found that:  
the prolonged Federal domination of **Indian** service programs has served to retard rather than enhance the progress of **Indian** people and their communities by depriving **Indians** of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the **Indian** people an effective voice in the planning and implementation of programs for the benefit of **Indians** which are responsive to the true needs of **Indian** communities.  
Id. at §450(a)(1).
- 122 [United States v. Montana](#), 450 U.S. 544, 566 (1981).
- 123 [Strate v. A-1 Contractors](#), 520 U.S. 438, 442 (1997).
- 124 [South Dakota v. Bourland](#), 508 U.S. 679, 697 (1993).
- 125 [South Dakota v. Yankton Sioux Tribe](#), 522 U.S. 329, 333 (1998).
- 126 [Nevada v. Hicks](#), 533 U.S. 353, 374 (2001) (holding that the tribal court has no jurisdiction to adjudicate member's tort claims arising from state official's execution of process on tribal member's trust land and non-**Indian** exhaustion of claims in tribal court no longer required before seeking federal court relief). Justice O'Connor, joined by Justice Stevens and Justice Breyer, expressed surprise, which was shared by many observers, when she stated, “[t]he majority's sweeping opinion, without cause, undermines the authority of tribes to ‘make their own laws and be ruled by them’ ....[T]he Court's decision is unmoored from our precedents.” Id. at 387 (O'Connor, J., concurring in judgment) (citation omitted). See also [County of Lewis v. Allen](#), 163 F.3d 509, 511 (9th Cir. 1998) (holding that no tribal jurisdiction exists over state law enforcement officer's activities on reservation pursuant to tribal-state agreement).
- 127 But see [Hicks](#), 533 U.S. at 360 (“The ownership status of land, in other words, is only one factor to consider in determining whether regulation of activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’”) (citation omitted).
- 128 See [Solem v. Bartlett](#), 465 U.S. 463, 471-72 (1984) (describing “checkerboard” conditions on typical **Indian** reservations).
- 129 See infra text accompanying note 131. The Court has decided a string of **Indian** Country diminishment cases. [Yankton Sioux Tribe](#), 522 U.S. 329; [Hagen v. Utah](#), 510 U.S. 399 (1994); [Solem](#), 465 U.S. at 464-65; [Brendale v. Confederated Tribes & Bands of Yakima](#), 492 U.S. 408, 409-13 (1989); [Rosebud Sioux Tribe v. Kneip](#), 430 U.S. 584 (1977); see also Philip P. Frickey, [A Common Law for Our Age of Colonialism: The Judicial Divestiture of \*\*Indian\*\* Tribal Authority over Nonmembers](#), 109 Yale L.J. 1, 7 (1999) (arguing that the modern “Court has assumed a legislative function--that of implementing the ongoing colonial process”).
- 130 Ironically, this concern for the expectations of the new non-**Indian** residents ignores any reliance **Indians** had before this in their formal treaties and promised retention, in many cases, of absolute and undisturbed use within their reserved territories. See Royster, supra note 12, at 10. “Absolute and undisturbed use” was a common phrase in treaties of the time--as in the Fort Laramie Treaty of 1868 in “which the United States pledged the Great Sioux Reservation, including the Black Hills [of South Dakota], would be ‘set apart for the absolute and undisturbed use and occupation’” of the Sioux people. [Sioux Nation](#), 448 U.S. at 374 (quoting Treaty of Fort Laramie, April 29, 1868, art. II, 15 Stat. 635 (1868)). See also Treaty Between the United States of America and the Crow Tribe of **Indians**, May 7, 1868, 15 Stat. 649, 649-50 (1868) (describing reserved land as “set apart for the absolute and undisturbed use and occupation”); Treaty Between the United States of America and the Kiowa and Comanche Tribes of **Indians**, Oct. 21, 1867, 15 Stat. 581, 582 (1867) (“Medicine Lodge Treaty”) (describing land at issue as reserved for the tribes' “absolute and undisturbed use and occupation”); cf. [United States v. Rogers](#), 45 U.S. 567, 567-68 (1846) (finding criminal defendant was “a free white man and a citizen of the United States,” who had removed himself to the Cherokee Nation and been fully adopted by the tribe so that he “exercised and exercises all the rights and privileges of a Cherokee **Indian**,” was still subject to federal, and not exclusive tribal jurisdiction).
- 131 See, e.g., [Brendale](#), 492 U.S. at 409-13.
- 132 See [Strate](#), 520 U.S. at 454-55.

- 133 Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. Rev. 35, 35 (1995); cf. Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 5-6, 55 (1991) (establishing pattern of Court diminishing both sovereignty and property rights of Indians by classifying tribal interests as either sovereign concerns when tribes would benefit from treatment as property owners or as private property associations when tribes would benefit from being treated as sovereigns). How, for example, can a government simultaneously be required to “own” significant amounts of property and also exercise its sovereign power of defining that very property?
- 134 See Hicks, 353 U.S. at 360; supra notes 126-27.
- 135 See infra Part III.B.3.
- 136 Additionally, note that current amendments to the ILCA significantly restrict the definition of “Indian” for inheritance and landownership purposes. Though this restricted definition is apparently intended to reduce the number of potential heirs and therefore stall some further fractionation, one must ask what effect the statute’s automatic reclassification of individuals as non-Indians for realty purposes may have on future applications of the current Court’s fact-specific jurisdictional analysis. See infra notes 216-17.
- 137 Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 Kan. J. L. & Pub. Pol’y 513, 520 (2001). “When we try to pick out anything by itself, we find it hitched to everything else in the universe.” John Muir, *My First Summer in the Sierra* 157 (1911).
- 138 For example, with the complex ownership patterns prevalent now, the potential for triple taxation of businesses within reservation boundaries exists, with the tribes, states, and the federal government all asserting taxation authorities. See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 157 (1980) (approving Washington state’s application of various state taxes to sales of cigarettes and other goods in Indian Country despite fact that similar tribal taxes already exist).
- 139 Cf. supra notes 129-32 and accompanying text.
- 140 Thomas Christopher & Frederick Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 U. Tol. L. Rev. 691, 691 (1970), cited in Cohen Handbook, supra note 16, at 47 n.1.
- 141 Panel, *Sources of American Indian Law*, 67 Law Libr. J. 494, 498 (1974), cited in Cohen Handbook, supra note 16, at 47 n.1.
- 142 See supra Part I.A-B.
- 143 See 25 C.F.R. §§150.1-150.11. The totality of regulations affecting Indian trust lands are both comprehensive and voluminous, spanning multiple sections and chapters of the Code of Federal Regulations. These regulations exist in an almost constant state of revision and uncertainty.
- 144 See 25 U.S.C. §§202, 462. To sell, gift deed, or grant a right-of-way to a non-co-owner, an individual interest holder must obtain consent from at least fifty-one percent of the other co-owners. See 1998 ILCA Hearings, supra note 11 (statement of Edward B. Cohen, Deputy Solicitor, Dep’t of Interior); see also *United States v. Navajo Nation*, 537 U.S. 488 (2003) (discussing modern scope of secretarial discretion in Indian Country).
- 145 See 25 U.S.C. §§202, 334-337, 343-344, 347-348, 412a.
- 146 Bobroff, supra note 7, at 1619.
- 147 See, e.g., *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 12 (D.D.C. 1999), renamed and ongoing in *Cobell v. Norton*, 201 F. Supp. 2d 145, 147 (D.D.C. 2002) (“Special Master’s Emergency Report Regarding Proposed Relocation of Records to the Lee’s Summit Federal Records Center, filed April 17, 2002, documents the slipshod and haphazard way in which the Interior Department continues to carry out its solemn trust responsibilities to the individual Indian plaintiffs in this case.”); see also J. Michael Kennedy, *Truth and Consequences on the Reservation*, L.A. Times, July 7, 2002, (Magazine) at 14, 16 (reporting personal story of plaintiff Elouise Cobell and historical practice of individual Indians receiving lease payments that “arrived sporadically...for amounts no one understood”

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as part of the “haphazard way of doing business...called the **Indian** trust system”); John McCaslin, Editorial, Inside the Beltway; Continuous Contempt, Wash. Times, Jan. 18, 2002, at A9 (describing Cobell litigation, including contempt proceedings against Secretary of Interior Gale Norton after the court’s “investigator hired computer-security experts who hacked, with ease, into the trust system and created a fake account without being detected”); Mary Annette Pember, Editorial, Huge **Indian** Accounting Scandal Can No Longer Be Ignored, St. Paul Pioneer Press, Dec. 15, 2002, at A21 (calling the Cobell litigation “the ‘**Indian** Enron’ case”).

148 25 C.F.R. §162.104.

149 **Act** of Aug. 9, 1955, ch. 615, 69 Stat. 540 (1955) (current version at 25 U.S.C. §415). But see *infra* Part V.B.4.

150 This may deter more profitable leasing. Just one of many examples is the oil company that withdrew its bid for an oil and gas lease after realizing how much work was involved in obtaining the necessary signatures from the 101 heirs, of whom the BIA had no address for 21 and 6 were deceased with estates still pending agency probate. Heirship Land Study, *supra* note 71, at 16.

151 See, e.g., 25 U.S.C. §415a; *infra* Part V.B.4. Currently, if heirs cannot come to an agreement on agricultural leases, the BIA sends out notices, giving heirs ninety days to negotiate a resolution and then assuming the advertisement and leasing responsibility upon owners' behalf. For example, each spring, the Fort Peck Agency sends out approximately 10,000 ninety-day notices to individual owners of 1,200 leases. See 1998 ILCA Hearings, *supra* note 11 (statement of Edward B. Cohen, Deputy Solicitor, Dep't of Interior).

152 25 U.S.C. §324.

153 For example, in 1960, one heir reported difficulty selling **allotted** property on the Rosebud Sioux Reservation in South Dakota, despite the consent of all adult heirs, because two minor heirs lived on the Navajo Reservation. The Navajo court appointed guardians; however the out-of-state appointment was not recognized by South Dakota. The minor's share was so small that the cost of guardianship (if appointed by state law of South Dakota) would likely exceed the value of the interest. Heirship Land Study, *supra* note 71, at 16. The BIA wrote the heirs that “we feel it advisable to resolve the question of who would pay for the guardianship proceedings before continuing the proposed sale.” *Id.*

154 See Guzman, *supra* note 4, at 608-09 n.56.

155 25 U.S.C. §483. However, authority exists that the Secretary of Interior may use his or her discretion to consider a partition request of one owner. See *Sampson v. Andrus*, 483 F. Supp. 240, 243-44 (D.S.D. 1980).

156 25 U.S.C. §§409a, 412a, 465, 487(c), 501, 955.

157 See, e.g., *infra* Parts V.B.4, VI.A.

158 25 U.S.C. §§372-373a; 25 C.F.R. §15.302; see also 25 U.S.C. §348 (applying state intestacy laws).

159 25 C.F.R. §15.301; see also 43 C.F.R. §§4.200, 4.202 (2002).

160 25 C.F.R. §15.201 (2003).

161 Heirship Land Study, *supra* note 71, at 4.

162 See 43 C.F.R. §4.208 (2002).

163 One comment from a disgruntled heir in 1960:

This 160 acres of heirship land was my daughter's who was killed June 8, 1951 and the examiner of inheritance divide it 80 acres to me, 80 acres to her father, he left in November 22, 1922. Have not heard from him since and that's 37 years this November 22, 1959. See Heirship Land Study, *supra* note 71, at 18. In order to lease, sell, or use the property, of course, she would have to get this missing man's consent.

164 In 1960, hearing examiners complained to Congress of at least one pending case with 245 heirs and cited an example of a then-living **Indian** who had 116 grandchildren and, after considering potential takers by representation, heirs spanning five generations. *Id.* at 2.

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The interests in those estates, however small (they were several generations post-**allotment** already), would have been formulaically divided into hundreds of shares more than forty years ago, and the same process exists to mandate their continual division today.

165 **Act** of June 25, 1910, ch. 431, 36 Stat. 855, 856 (current version at 25 U.S.C. §373) (amending General **Allotment Act**); see also *Tooahnippah*, 397 U.S. at 609-10 (clarifying that the Secretary of Interior may not “revoke or rewrite a will that reflects a rational testamentary scheme...simply because of a subjective feeling that the disposition of the estate was not ‘just and equitable’” and basing its ruling on the importance of testamentary devise as one of the few rights an **Indian** landowner maintains under current regulations).

166 See 1998 ILCA Hearings, supra note 11. Edward Cohen, who was then the Deputy Solicitor of the Department of Interior stated: The fact that an estate may be worth very little does not reduce the Bureau's cost to probate these estates. Significant time is consumed in locating the heirs and obtaining their current addresses. For example, in three recent deaths on the Fort Berthold Reservation (N.D.), the three deceased individuals owned a total of 53 undivided interests on the reservation as well as additional interests on four other reservations.

Id.

167 Id.

168 Clearly, some of these regulations have served a worthwhile purpose, protecting **Indian** landownership in the modern era while other minority communities have experienced continued loss. However, the perpetuation of fractionation begs the question of whether retaining title alone is enough. The inevitable answer is that it is not. See generally Mitchell, supra note 12 (discussing the continued loss of African-American land)

169 See supra text accompanying note 25; see also *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-56 (D.D.C. 1972).

170 Tribal cultures did not freeze at the point of **allotment**, and current interests and values must be taken into consideration. See Pommersheim, supra note 47, at 449 (“A nation cannot be treated as an exotic plant for long if it is to grow.” (quoting Isaiah Berlin, *The Sense of Reality* 255 (1997))).

171 In addition:

After massive attempts to mold “the **Indian** land vision” into a Western and individualistic one, it is manifestly unfair to now divest individual property interests in favor of tribal ones, particularly when aside from a cultural inheritance, an interest in a fractionated **allotment** might be the only piece of property an allottee even has to devise.

Guzman, supra note 4, at 657.

172 See generally Miller, supra note 31.

173 **Indian** Land Consolidation **Act** of 1983, Pub. L. No. 97-459, 96 Stat. 2515, 2517-19 (1982) (codified at 25 U.S.C. § 2201-2210 (1982)). This **Act** was approved on January 12, 1983 and included in the 1982 Edition of the U.S. Code, which contains all laws in force on January 14, 1983.

174 **Indian** Land Consolidation **Act** Amendments of 1984, Pub. L. No. 98-608, 98 Stat. 3171 (amending 25 U.S.C. § 2203-2206, and adding §2211). These amendments were ultimately codified in the 1988 Edition of the U.S. Code.

175 **Indian** Land Consolidation **Act** Amendments of 2000 (amending 25 U.S.C. §§2201, 2204-2207, and adding §§2212-2219). These amendments were included in the 2000 Edition of the U.S. Code. Though the majority of the 2000 amendments have yet to be certified or implemented, Congress did specifically find that “the [continuing] problem of the fractionation of **Indian** lands described in this section is the result of a policy of the Federal Government, cannot be solved by **Indian** tribes, and requires a solution under Federal law.” Id. §101(13) (codified at notes to 25 U.S.C. §2201 (“Congressional Findings”)); see also supra Part II.A.

176 Guzman, supra note 4, at 658-59 (“To the extent that the medium is the message, any federal **Indian** policy designed without tribal input, no matter how salutary, might be philosophically rejected on that basis alone.”); see also, 2002 ILCA Hearing, supra note 97, at 33-34 (testimony of Austin Nunez, President, **Indian** Land Working Group and Chair, San Xavier District of the Tohono O’odham Nation). As early as 1984 at least one tribe--the Sisseton-Wahpeton Sioux--was expressing such skepticism about the ILCA's likely

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results that they sought congressional relief of their own. See Hearing on S. 2380 and S. 2663 Before the Select Comm. on **Indian** Affairs, 98th Cong. 96-97 (1984) (material submitted by Michael L. Lawson, Heirship: The **Indian** Amoeba (1982)); see also Mark Fogarty, Land Advocates Say Amendments Mixed Bag, **Indian** Country Today, Dec. 13, 2000 (describing tribal critique of the ILCA amendments from 2000 because changes “infringe on tribal sovereignty and trample the rights of individual **Indians**”).

- 177 At least four tribes pursued some special type of probate legislation. See, e.g., **Act** of October 19, 1984, **Pub. L. No. 98-513**, §8(a), **98 Stat. 2411**, 2414 (Lake Traverse **Indian** Reservation in North Dakota and South Dakota); **Act** of January 12, 1983, **Pub. L. No. 97-459**, **96 Stat. 2515** (Devils Lake Sioux Reservation in North Dakota); **Act** of June 17, 1980, **Pub. L. No. 96-274**, **94 Stat. 537** (Standing Rock Sioux Reservation in North Dakota and South Dakota); **Act** of April 18, 1978, **Pub. L. No. 95-264**, §§3-4, **92 Stat. 202** (Umatilla **Indian** Reservation in Oregon); see also **H.R. Rep. No. 97-908**, at 9-10 (1982) (reporting Senate Comm. on Interior and Insular Affairs decision to extend land consolidation and exchange authority to all tribes in amendment to original Devils Lake proposal).
- 178 **25 U.S.C. §2203(a)** (1982). Before the ILCA, some tribes who had accepted application of the **Indian** Reorganization **Act** (the “IRA”) in the 1930s had already used equivalent authority under that law to pursue similar efforts, including tribal incorporation by which individual interest holders could turn in fractional interests to receive tribal “shares” and then exchange them for a consolidated piece of tribal property. The authority for this derived from §17 of the **Indian** Reorganization **Act** (also known as the Wheeler-Howard **Act**). Ch. 576, §17, 48 Stat. 984, 988 (1934) (codified as amended at **25 U.S.C. §477** (2000)); see **25 U.S.C. §464** (1964); **25 C.F.R. §121.18** (1970); see also Oklahoma **Indian** Welfare **Act**, **25 U.S.C. §501** (2000); Williams, *supra* note 68, at 731. The Rosebud Sioux Tribe in South Dakota, for example, had tried this tribal incorporation approach with some success. *Id.* However, even today, fractionation persists at Rosebud and challenges occur because of the difficulty of getting owners to go through the lengthy and labor-intensive consolidating process, finding equivalent pieces of tribal property to exchange or set aside, avoiding divisive confrontations among tribal citizens, and financing such an operation. See *infra* text accompanying note 181; see also Videotape: Land Exchange and Consolidation (1998) (**Indian** Land Working Group) (on file with Land Tenure Center), available at <http://www.ilwg.org>. Similar attempts made at Standing Rock Sioux Reservation had even less success. Williams, *supra* note 68, at 731 n.105.
- 179 **25 U.S.C. §2204** (1982) (current version at **25 U.S.C. §2204** (2000)). According to Congress, then, the ILCA was designed to “merely extend the land acquisition authority of the IRA to the reservations of tribes [such as the Devils Lake Sioux] who rejected the **Act** in elections held in the mid-1930s.” **H.R. Rep. No. 97-908**, at 14 (1982) (authorizing the purchase, sale, and exchange of lands by the Devils Lake Sioux Reservation in North Dakota); see also Comment, Tribal Self-Government and the **Indian** Reorganization **Act** of 1934, 70 Mich. L. Rev. 955, 972 (1972) (“During the two-year period within which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 **Indians**) accepted the **Act** and 77 tribes (86,365 **Indians**, including 45,000 Navajos) rejected it.”). Like Devils Lake, other non-IRA tribes had previously sought special legislation. See *supra* notes 176-77.
- 180 See Hakansson, *supra* note 65, at 251 n.165 (detailing the process for proceeding under a consolidation plan).
- 181 *Id.*
- 182 *Id.* at 256-59 (reporting results of collection of opinions of a group of diverse attorneys, historians, geographers, land use specialists, and Oglala tribal members at Pine Ridge).
- 183 See **25 U.S.C. §2206** (1982).
- 184 *Id.*
- 185 **25 U.S.C. §2206(a)** (1988).
- 186 **Hodel**, 481 U.S. at 717; see also **Babbitt v. Youpee**, 519 U.S. 234, 242-43 (1997) (finding the amended version of the escheat also unconstitutional).
- 187 See, e.g., Leeds, *supra* note 29, at 492.
- 188 See, e.g., Ronald Chester, Is the Right to Devise Property Constitutionally Protected?--The Strange Case of **Hodel v. Irving**, 24 Sw. U. L. Rev. 1195, 1201 (1995). For a review in support of the Court's decision, see generally Guzman, *supra* note 4, at 639-41,

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who argues the forced escheat might be better viewed as a substantive due process violation and that takings law in general should account for non-economic factors, including unique historical and emotional connections to property. The Court in *Irving and Youpee* emphasized the unique and absolute character of the governmental action to find these **acts** were takings.

189 GAO Report, *supra* note 78, at 1-2. While this radical “solution” was being applied, only 16,400 small interests actually escheated-- while something like 315,000 more were created. *Id.*

190 Guzman, *supra* note 4, at 655-56, 662.

191 *Id.* at 656 n.253.

192 25 U.S.C. §2204 (1982). Tribes also, under separate authority, can purchase fee land and place it back into trust, but the conversion process is difficult and costly--and degrading for individual **Indians** who attempt to do so because they must declare themselves incapable of managing their own affairs in order to ask for BIA trust assistance. See *Acquisition of Title to Land in Trust*, 25 C.F.R. pt. 151 (2001) (describing the criteria that the Sec'y of the Interior will use in determining whether to exercise his or her authority to accept title to land to be held in trust for the benefit of **Indian** tribes and individuals). This rule also describes the procedure for mandatory acquisitions of title and establishes a process to address the difficulties encountered by **Indian** tribes which have no reservation, have no trust land, or have trust land the character of which renders it incapable of being developed. *Id.* An attempt to simplify this process, which was proposed by the Clinton administration, was stalled as one of the first **acts** of the Bush II administration. See *Land Regulations Targeted for Withdrawal*, Aug. 13, 2001, at *Indianz.com*, <http://www.indianz.com/News/show.asp?ID=law/8132001-1> (last visited Oct. 17, 2003) (on file with author).

Financing is always an issue, with few tribes able to divert money from tribal programs and services for meaningful acquisition programs. A Department of Agriculture **Indian** Land Acquisition Program does exist and has provided twenty-seven land acquisition loans to tribes; however, the income derived from consolidated interests are still often inadequate to pay the loan debt, forcing tribes to find other funding or revert to non-**Indian** leasing. Mark Welliver, Comment, CP 87 and CP 100: **Allotment** and Fractionation Within the Citizen Potawatomi Nation, 2 U. N.M. Tribal L.J. 2, text accompanying nn. 259-60 (2002), available at <http://tlj.unm.edu/articles/mark/index.htm>. The process is also time-consuming and can be politically controversial. Despite frequent payment in lieu of tax arrangements with many counties and states, misunderstandings abound. See, e.g., Cheryl Meyer, *Tribe Unveils Concept for Hoffman Estates Casino*, *Chi. Trib.*, June 10, 2003, at C2 (implying incorrectly that if the Ho-Chunk Tribe were to buy property it would automatically “become part of the American **Indian** land trust” and that “the village and state would not receive tax revenue from the casino”); Mike Hoeft, *Hobart Status Goes to Referendum*, *Green Bay Press-Gazette*, Jan. 26, 2002, at B1 (describing possible incorporation of non-**Indian** town within traditional reservation boundaries into a village and describing the area as “entirely within the boundaries of the Oneida Tribe of **Indian's** original 65,730-acre reservation [of which the] tribe owns about 6,388 acres of tax-free trust land”). Not surprisingly, the process for taking land out of trust and putting it into fee is relatively simple, potentially creating a tax liability for the **Indian** owner and freeing the federal government of its trustee responsibilities all at once. See 25 C.F.R. pt. 152 (2003).

193 25 U.S.C. §2212 (2000).

194 *Id.* §2213.

195 Welliver, *supra* note 192, at text accompanying n.263.

196 Matt Kelley, *Associated Press*, *Consolidating Indian Land Holdings Will Save Millions, Feds Say*, *The Daily Ardmoreite*, Nov. 5, 1999, available at [www.ardmoreite.com/stories/110599/new\\_conso.shtml](http://www.ardmoreite.com/stories/110599/new_conso.shtml).

197 *Id.*

198 Compare this to effects of the decision to allow leasing to non-**Indians** despite its prohibition in the original **Dawes Act**, which ultimately left “many **Indians** landless; working for subsistence wages on lands that they once owned.” Hakansson, *supra* note 65, at 246.

199 *Id.* at 21. See also **Indian** Land Consolidation **Act** Training Materials, February 2002, Phoenix, AZ, No. 20, Pilot Project Guidelines for “Buyback Program,” Great Lakes Agency, Midwest Region, Report as of December 1, 2001 (on file with author). If given access

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to these purchasing funds directly, tribes and individual **Indians** might better leverage the investments with the establishment of an **Indian** funding institution to guarantee and subsidize loans, a proposal currently being considered by many **Indian** advocacy groups. Welliver, *supra* note 192, at text accompanying n.271; cf. Royster, *supra* note 15, at 6; *infra* Part V.C.

200 Welliver, *supra* note 192, at text accompanying nn.271-72.

201 *Supra* note 175.

202 25 U.S.C. §2216(a) (2000).

203 *Id.* §2218(c) (on behalf of missing or undetermined heirs or devisees).

204 *Id.* §2216(b)(1)(A).

205 *Id.* §2216(b)(1)(B).

206 *Id.* §2216(e). Other **Indian** co-owners, the tribe, tribal citizens, and prospective leasing applicants can make a written request for the names and mailing addresses of all **Indian** owners in an **allotment**, as well as information on the parcel and ownership percentages. *Id.* But see *supra* notes 99, 147; *infra* note 223.

207 *Id.* §2218(a)(1).

208 *Id.* §2218(b)(1).

209 **Indian** Land Consolidation **Act** Amendments of 2000 §206. Under the first amended ILCA, tribes were allowed, subject to Secretary approval, to adopt tribal codes to govern the disposition of fractional interests that would otherwise escheat to the tribe under the **Act**. 25 U.S.C. §2206(c) (1988). Observations by federal authorities suggest that few of these codes were ever passed, though some special tribal probate codes had been passed before the ILCA as examples of special congressional legislation. See *supra* text accompanying note 177.

210 25 U.S.C. §2205 (2000).

211 *Id.*

212 *Id.* §§2205(b)(3)(A), 2206(g)(4)-(5). Even after the Secretary does **act**, these provisions still cannot become effective for another 365 days after that certification or 180 days after the applicable tribal probate code is approved, whichever is later. *Id.* There is no indication when the Bush II administration will take this step. Instead, additional probate reform continues to be proposed, and none of the necessary clarification has been provided. See *infra* notes 215-16, 224 and accompanying text. Senator Ben Nighthorse Campbell of Colorado introduced the newest reform bill and the most recent hearing was held by the Senate Committee on **Indian** Affairs in October of 2003. For the most recent developments, including the status of the Senate's most recent proposal, S. 550, 108th Cong., or the "American **Indian** Probate Reform **Act** of 2003," which has generated significant additional controversy since its introduction in March of 2003, see the Senate Committee on **Indian** Affairs's website at <http://indian.senate.gov/>.

213 436 U.S. 49, 72 (1978).

214 Cf. *Talashie v. Lujan*, No. 92-1026 (D.S.D. filed July 30, 1993) (unpublished memorandum opinion) (holding that special tribal legislation mandating escheat was constitutional under the 5th Amendment takings analysis). But see *Dumarce v. Norton*, 2003 WL 21981993 (D.S.D. May 15, 2003) (finding section of special tribal probate code enacted by Congress and applied by the BIA mandating escheat of certain fractional interests unconstitutional under U.S. Takings Clause analysis without mention of possible differences in **Indian** Civil Rights **Act** or any different standard of review for tribally supported legislation).

215 25 U.S.C. §2206. The purpose of these provisions is primarily to reduce the Department of Interior's own administrative burden by limiting the number of state statutes to be reviewed and applied. See 1999 ILCA Amendments Hearing, *supra* note 91, at 41 (statement of Kevin Gover, Assistant Sec'y of the Interior, Bureau of Interior Affairs), cited in Bobroff, *supra* note 7, at 1619 (emphasizing existence of thirty-three separate state statutes and need for uniformity to lighten the bureaucratic burden).

- 216 Compare 25 U.S.C. §2201(2) (restricting “**Indian**” to a member of an **Indian** tribe or eligible to become a member) with 25 U.S.C. §2201(2) (1982) (defining “**Indian**” in the original ILCA to include “any person who is recognized as an **Indian**,” which was understood to mean having **Indian** descendency); see also 2002 ILCA Hearing, supra note 97, at 33 (testimony of Austin Nunez, President, **Indian** Land Working Group; Chair, San Xavier District of the Tohono O’Odham Nation speculating as to federal, responsibility-reducing motive).
- 217 For example, this newly defined “non-**Indian**” can essentially take only a life estate by intestacy, and even a collateral **Indian** heir can only inherit if he or she is already a co-owner in the allotment. 25 U.S.C. §2206 (2000). In the absence of any eligible **Indian** heir, the interest escheats to the tribe; however, any co-owner in the allotment can prevent this by choosing to purchase the interest individually from the estate at fair market value. Id. As for devise, the amendments allow only bequests to **Indians** or to the tribe, with a non-**Indian** devisee eligible to take only a life estate and the remainder descending as it would under intestacy if the non-**Indian** were not an heir. Id. §2206(a)(4). In the absence of a lineal heir who meets the new definition of **Indian**, the devise to any close heir is permitted, but the tribe may purchase at fair market value the interest from that heir unless the devisee renounces his or her interest in favor of an **Indian** person or elects to take just a life estate. Id. §2206(a)(3)(B). Ultimately, the new amendments give owners more options for disposal of their smallest interests than the mandated escheat of the first versions; however, the decedent’s capacity to devise to non-**Indians** is limited mostly to instances when other eligible **Indian** heirs do not exist and the tribe does not purchase the interests. Id. Importantly, no specific rules for succession are included, just these general class requirements, which explains the need for additional legislation before the amendments can be certified and applied. See supra notes 212, 215.
- 218 25 U.S.C. §2206(c)(2)(B).
- 219 Id. §2206(c)(2)(A).
- 220 Id. §2206(c)(1).
- 221 Id. §2206(e); see infra note 267.
- 222 25 U.S.C. §2206(f). No additional funds have yet been distributed for this purpose.
- 223 A recent decision by the D.C. Circuit upheld a ruling by the district court that federal government has breached its fiduciary obligations to allotment owners and is liable for accounting of mismanaged funds, with up to \$10 billion allegedly missing. See *Cobell v. Norton*, 240 F.3d 1081, 1102-05 (D.C. Cir. 2001); supra notes 99, 147.
- 224 Supra note 85. A recent failed congressional effort to further modify these rules died before action could be taken by both houses but would have included last-minute revisions to add a previously unheard of “passive trust” concept, additional mechanisms for partition, and distinguish different intestacy schemes for “acquired” versus “devise or inheritance” interests—all without meaningful tribal input. See 148-151 Cong. Rec. S11,786 (2002) (proposing language regarding passive trust status for trust or restricted land in the 107th congressional session of the Senate); see also *Passive Trust Faces Test in New Congress*, Indianz.com, November 25, 2002, at <http://www.indianz.com/News/show.asp?ID=2002/11/25/trust> (on file with author) (last visited Oct. 14, 2003). In 2002, [l]egislation to unify **Indian** land inheritance policies, and create a controversial status of trust ownership, died this year despite last-minute lobbying by tribal organizations....no further public discussion was held on the passive trust proposal, which was drafted behind closed doors. Tribal leaders were nonetheless encouraged to lobby on its behalf in the closing days of the [c]ongressional session.
- Id. Such an amendment, in some form, is still necessary before the 2000 ILCA amendments can really be implemented because the amendments, promoted as providing a uniform intestate succession for **Indian** Country, failed to provide the actual descent provisions and instead define only general classes of whom might be eligible to become heirs. See 25 U.S.C. § 2206(b) (discussing intestate succession); supra notes 212, 215 and accompanying text.
- As far as the “passive trust” concept, this was apparently responding to opposition to the clause limiting non-tribal members from inheriting reservation land. A passive trust provision would theoretically create an “in-between” ownership estate so that the full trust responsibilities of the federal government would not attach but the land would be subject to general tribal jurisdiction and tax-exempt status. The prevalence of intertribal marriages, coupled with the frequent decision to make multiple tribes share one reservation, has created a situation in which an individual may have vested interests on several different reservations and non-member inheritance

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restrictions might otherwise infringe on the family's right of inheritance. The passive trust election, however, is controversial as it appears to be an attempt by the federal government to back out of its fiduciary duty to **Indian** landowners and **Indian** tribes. See 148-151 Cong. Rec. S11,783, at 511, 786.

Debates regarding the details of these probate reforms are ongoing. See Returning American **Indian** Lands to Tribal Control: Hearing on The **Indian** Probate Reform Act of 2003, S. 550 Before the Senate **Indian** Affairs Committee, 108th Cong. (May 7, 2003) (statement of Wayne Nordwall, Director, Western Region Bureau of **Indian** Affairs, Dep't of Interior); **Indian** Land Bill Draws Complaints from All Sides, Indianz.com (May 8, 2003) at <http://www.indianz.com/News/show.asp?ID=2003/05/08/reform> (on file with author) (last visited Oct. 16, 2003); Senate Committee Debates **Indian** Probate Bill, Indianz.com (May 6, 2003), at <http://www.indianz.com/News/show.asp?ID=2003/05/06/land> (on file with author) (last visited Oct. 16, 2003). See supra note 212.

225 In the notice to individual **Indian** interest holders, the stated purpose of the amendments is to “keep **allotted** land in trust for **Indian** use.” Notice to **Indian** Landowners, supra note 85.

226 See supra Part III.B.3.

227 “Unfortunately, the **Dawes Act**....denied **Indians** the adaptability and ingenuity that made the Anglo-American common law of property work. Instead, **Indian** property law was effectively ossified, dependent on the occasional meddling of Congress and regulation-writing officials in Washington for change.” Bobroff, supra note 7, at 1620. The same can be said for the ILCA today.

228 See **Brendale**, 492 U.S. at 433 (Stevens, J., concurring) (“Zoning is the process whereby a community defines its essential character.”). In concurrence, Justice Blackmun stated:

It would be difficult to conceive of a power more central to ‘the economic security, or the health or welfare of the tribe’...than the power to zone.... This fundamental sovereign power of local governments to control land use is especially vital to **Indians**, who enjoy a unique historical and cultural connection to the land.

Id. at 458 (Blackmun, J., concurring) (citations omitted).

229 See **Indian** Self-Determination and Education Assistance Act of 1975 §§103, 104(b) (current version at 25 U.S.C. §§450f, 450h). Issues of financing these responsibilities also remain. See, e.g., **Thompson v. Cherokee Nation of Okla.**, 334 F.3d 1075, 1079-82 (2003) (discussing development of appropriations for tribal contracts under the ISDA).

230 **Indian** Self-Determination and Education Assistance Act §§450a-450n. In the case of the “enhanced self-determination” provision, by which some pilot tribes could take over all of the BIA's management functions, a recent court has suggested the “block grant” appropriations due to the tribes need not necessarily include funding for the actual administration of these programs, even if the BIA would have had to expend these funds had the contract not been executed. See **Thompson**, 334 F.3d. at 1079.

231 Of course, there is the potential that the tribal probate code authority alluded to in the 2000 ILCA amendments might be a vehicle for this but, absent certification and federal support, it is likely it will not go nearly far enough. See supra Part V.B.5.

232 Leeds, supra note 29, at 497-98.

233 Id. at 496.

234 Id. at 498.

235 See 25 C.F.R. §§152.10-152.14.

236 Cohen Handbook, supra note 16, at 632-33.

237 “Rather, the solution lies in tribal governments working with **allotment** owners to re-create functioning property systems to govern the transfer and inheritance of **allotted** lands, systems that meet local needs, address questions of facilitating efficient use and inheritance, and evolve to meet future conditions.” Bobroff, supra note 7, at 1622. Bobroff acknowledges that creating a new system is “complicated at best,” and “tremendously difficult” given the added challenge of overcoming extreme fractionation. Id.

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- 238 Guzman, *supra* note 4, at 660-61 (arguing that an ideal policy would “recognize the tribes' reserved sovereignty regarding issues of descent, distribution, and consolidation and the broader effects flowing from them, and therefore position the federal government as facilitator to, rather than creator of, tribal policies”).
- 239 John Collier, the commissioner of the BIA who fought for passage of the IRA and its extension of the restricted and trust status over **Indian** lands beyond the initial twenty-five year period, envisioned that the “guardianship” role of the federal government should be permanent, but that the BIA would ultimately become “a purely advisory and special service body [as is] the Department of Agriculture [vis-à-vis] American farmers.” See Comment, Tribal Self-Government and the **Indian** Reorganization Act of 1934, *supra* note 179, at 967. In other words, that “administrative absolutism” would not prevail. *Id.*; see *infra* note 272; cf. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *Yale L.J.* 348, 365-67 (1953) [hereinafter Cohen, *Erosion*].
- 240 Similarly, proposals for the exercise of tribal or federal eminent domain authority to condemn especially problematic fractional interests with compensation--which could also be flexibly and locally defined--also exist. Leeds, *supra* note 29, at 498; see also Frickey, *supra* note 129, at 83 (suggesting eminent domain might be a solution to jurisdictional issues with a federal “Unallotment Act” giving the tribe the right of first purchase or a “more aggressive program would recognize a tribal power of eminent domain concerning fee simple reservation land,” noting such an authority has not been tested but should theoretically exist); cf. *United States v. Mazurie*, 419 U.S. 544, 557-59 (1975).
- 241 Professor Leeds, in proposing more fundamental tribal control, predicts that her “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.” Leeds, *supra* note 29, at 498. Cultural barriers that may exist in some places regarding estate planning, for example, could be alleviated by local will statutes, canons of construction, and default distributions. See Bobroff, *supra* note 7, at 1618-19 (referring to discussions with Administrative Law Judge McDonald about the Navajo Nation's experience). Similarly, tribes may also choose completely different tenure systems, perhaps based on alternate forms of communal, rather than undivided private, interests on highly fractionated tracts. While the incorporation or use of limited liability partnerships or community land-trust concepts have been suggested in other communities with fractionation problems, this otherwise difficult and costly endeavor could be more realistically implemented in this manner. See generally Mitchell, *supra* note 12.
- 242 See *supra* note 224.
- 243 Sampson, 483 F. Supp. at 243-44; *supra* note 155.
- 244 25 U.S.C. §483; see *supra* text accompanying note 155.
- 245 See Mitchell, *supra* note 12, at 508.
- 246 Currently, most trust assets pass by intestacy, the use of wills “not widespread due in part to cultural and spiritual norms on dying, and to a lack of trust in the BIA.” Welliver, *supra* note 192, at text accompanying n.239 (quoting Executive Summary of the **Indian** Land Tenure Partnership Plan (Feb. 2001) (unpublished proposal)).
- 247 The **Indian** Land Tenure Foundation's website can be found at [http:// www.indianlandtenure.org](http://www.indianlandtenure.org) (last visited Oct. 27, 2003).
- 248 See **Indian** Land Tenure Foundation, at [http:// www.indianlandtenure.org/](http://www.indianlandtenure.org/); see also *supra* Part V.B.3.
- 249 Such a shift might also breach the federal trust responsibility, especially if construed as requiring protection of individual property. See *supra* notes 25, 30.
- 250 Heirship Land Study, *supra* note 71, at 2.
- 251 *Id.* An interesting proposal might consider the feasibility of an option that would impose a tribal tax on some such actions of tribal citizens.
- 252 Pommersheim, *supra* note 47, at 479.

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- 253 Cf. John Warfield Simpson, *Yearning for the Land: A Search for the Importance of Place* 139-74 (2002) (comparing the stories of land management practices told by the Ho-Chunk Tribe, which emphasize stewardship and rooted-ness in the land, with those of its Western neighbors, which are often more concerned with accumulating possessions). “Ho-Chunks also devote significant resources to cultural, environmental, and other concerns that would be of much lower priority in Western societies....Those other concerns are perhaps as central to their basic needs as food and shelter.” *Id.* at 169.
- 254 Note again that instead of facilitating free and simplified **Indian** land transactions, the 2000 ILCA amendments work primarily to give the Secretary of Interior more control over these transactions, allowing her greater discretion and consent-giving authority. See *supra* Part V.B.4. Although this might encourage greater economic development in the short term, it does not promote self-governance in the long-term. See *supra* Part III.B.2 (describing the negative effects that increased federal control can have on questions of tribal jurisdiction). Instead, it leaves individual **Indians** one step further removed from free transactions and still less likely to consolidate when forced to apply for and receive permission just to do the most basic of transactions, including giving a piece of property to a child or otherwise consolidating holdings within their own family. See *supra* notes 202-04 and accompanying text.
- 255 Interestingly, when the **allotment act** was first being considered in the nineteenth century, the Commissioner of **Indian** Affairs actually suggested that the temporary protective trust status should restrict alienation only to non-**Indians**, which would have allowed this free exchange among tribal citizens from the very beginning. That suggestion was never adopted. Bobroff, *supra* note 7, at 1615.
- 256 Other less flexible probate reform proposals—including providing a single uniform intestate succession rule, placing arbitrary limits on the number of heirs, or requiring descent to one particular person, such as the oldest son—are actually more likely to disinherit or fail to provide for minor or dependent relatives as individual circumstances could not be considered. For example, one proposal suggested inheritance to one heir with priority given to the spouse, then to the eldest descendent of the decedent living on the **allotment** at the time of death or, if no descendent living on **allotment**, then to oldest descendent living on the reservation, then to eldest descendent not living on the reservation. If no heirs existed at that level, then the land would pass to other relatives with priority to those closest in blood, living on the **allotment**, and on the reservation. Finally, if no named person existed, the property would escheat. H.R. 11113, 89th Cong., at 1-2 (1966); see Williams, *supra* note 68, at 726.
- 257 Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 Wis. L. Rev. 340, 378 (1966) (“Actually, little is known how people in the nineteenth or eighteenth centuries actually disposed of their assets....The law of succession in general grows more varied as society does so.”); see Carole Shammass et al., *Inheritance in America from Colonial Times to the Present* 23-24 (1987). Historically, intestacy was developed as government’s plan “imposed for social rather than individualistic reasons on all those who do not make use of volitional alternatives.” Friedman, *supra* at 355.
- 258 In this example, even if that real property outside **Indian** Country were distributed into multiple intestate shares, the typical non-**Indian** heirs would be able to negotiate and have mechanisms at hand for their disposal and consolidation, as well as safeguards such as the rights to select property, homestead protections, and spousal allowances. Moreover, most likely they would be inheriting a unified parcel from a single owner and sharing that land within a single generation of their family and not joining any pre-existing tangle of hundreds of strangers as their co-owners.
- 259 See, e.g., [Wis. Stat. § 767.255](#) (2001-2002) (discussing the determination of individual property at divorce in a marital property state). When people choose to divorce, the state accepts the burden of distributing on a case-by-case basis. There is no reason for necessarily different treatment at probate, especially when the rewards in this instance are so much greater for individuals, communities, and the country. See also [Cal. Prob. Code §6451 \(West Supp. 2003\)](#) (example of equitable adoption doctrine based on flexibility and consideration of unique circumstances).
- 260 Unlike the uncertain fate of tribal probate codes or other efforts at tribal legislation, express authority herein to look to tribal governments’ statements of policy could make efforts at local tribal control more meaningful. See *supra* Parts V.B.5, V.C.1.
- 261 As a decimal, this works out to a 0.008210180624 share in the total parcel.
- 262 In addition, new canons of will construction could be instituted-- and explained to testators at the time the will is drafted--so that unspecified class gifts of multiple interests in a will would also be equitably divided among members of that class without necessarily further subdividing each fractional interest. See also Mary Louise Fellows, In [Search of Donative Intent](#), 73 *Iowa L. Rev.* 611,

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656-57 (1988) (suggesting that more flexible standards for reforming donative instrument should be applied to intestate statutes as well, giving examples of “inflexible distribution” of “fixed shares in fee to heirs” that “appear wholly misguided when applied to the estate of a property owner who dies leaving minor children,” in which case any estate planner would have advised to create a trust rather than distributing outright); cf. Marissa J. Holob, [Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals](#), 85 *Cornell L. Rev.* 1492, 1501-02 (2000) (arguing for recognition of non-traditional family relationships of intimacy and interdependence and stating that the “current [American] system of property distribution is inflexible and outdated. Current intestacy laws do not take into account that the law deals with ‘particular individuals in particular circumstances.’” (citations omitted)).

263 See also [Tooahnippah](#), 397 U.S. at 609 (emphasizing the importance of the right to devise as one of the few remaining property rights for individual **Indians** on their **allotments**). Importantly, the rights of decedents' family members would also be unimpaired as they would have an opportunity to make a claim against the estate, could reach an approved settlement agreement with other likely heirs, and have no vested right in the property to begin with. See *supra* text accompanying note 186. In the cases challenging the ILCA's original escheat provisions, the potential heirs were expressly able to raise the constitutionality of the forced escheat only as third-party agents representing their decedents' interests. The Court clarified that the forced escheat was unconstitutional because it destroyed the decedent's right to devise property, not the family members' rights to inherit, which were never protected. *Id.*

264 25 C.F.R. § 15.311 (requiring individual orders and written decisions).

265 See Cristy G. Lomenzo, [A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses](#), 46 *Hastings L.J.* 941, 949, 959 (1995) (proposal to prevent “laughing heirs” by allowing remote heirs to take as “next of kin” only if they can show “clear and convincing evidence of a cordial relationship with the decedent”). Currently, in **Indian** Country, these very remote potential heirs have to be notified and found and their legal relation to the decedent determined in lengthy family history proceedings, including determinations about unrecorded adoptions, uncertain paternity, and the like. This proposal would eliminate this step.

266 Cf. Mitchell, *supra* note 12, at 573-74 (providing example of land courts with expertise in Norway **acting** as mediators and arbiters for consolidation efforts).

267 25 U.S.C. §2206(e). However, the Secretary of the Interior is required to certify this provision, which she has not done. The statute can still have no effect on a decedent's estate for approximately a year after that certification occurs. See *supra* note 212.

268 Using the inherent sovereignty reasoning in [Kerr-McGee Corp. v. Navajo Tribe](#), 471 U.S. 195, 198-201 (1985), which held that Secretary approval was not required for a tribally imposed tax, a clear case could be made that Secretary approval would not be required for tribes enacting probate policies under these circumstances.

269 See Administrative Procedures **Act**, 5 U.S.C. §554 (2000). See generally 43 C.F.R. pt. 4, subpt. D (2002). Tribal court jurisdiction for this function should not only be allowed but encouraged for tribes and individuals that elect to use that mechanism. Recent reports show that approximately 170 functioning tribal courts exist in the United States. Getches, *supra* note 14, at 390 (noting a significant increase since 1978). The Supreme Court has asserted that exhausting tribal remedies is required before a litigant can have standing in federal courts traditionally for other civil actions. See [Iowa Mut. Ins. Co. v. LaPlante](#), 480 U.S. 9, 16 (1987); [Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians](#), 471 U.S. 845, 856-57 (1985). But see [Hicks](#), 533 U.S. at 374; *supra* note 126. Congress could also specifically shift jurisdiction of this administrative appeal to tribal courts under its plenary power and the Court's **Indian** Civil Rights **Act** line of reasoning. See Michael C. Blumm & Michael Cadigan, [The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction Over Indian Cases](#), 46 *Ark. L. Rev.* 203, 219 (1993) (arguing Congress can constitutionally alter federal court jurisdiction over **Indian** law cases); see also [United States v. Enas](#), 255 F.3d 662, 666, 673 (9th Cir. 2001) (ruling Congress “holds the trump card” to determine parameters of tribal sovereignty); cf. [Santa Clara Pueblo](#), 436 U.S. at 72 (holding that cases arising under **Indian** Civil Rights **Act**, according to intent of Congress, are not subject to federal jurisdiction). Also, federal review would exist if needed later. [Tooahnippah](#), 397 U.S. at 599.

270 See generally *supra* notes 229-30.

271 See *supra* text accompanying note 45.

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- 272 In 1950, Felix Cohen made his now-famous statement comparing the **Indian** to the miner's canary in a similar vein. Cohen, *Erosion*, supra note 239, at 390 (“Like the miner's canary, the **Indian** marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of **Indians**, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”). In that same article, Cohen made a more specific and resonant point: talk of federal “withdrawal” from **Indian** Country has, throughout history, been accompanied by an increase in “the problem of bureaucratic aggrandizement.” *Id.* at 387-89. In long-range terms, we find that between 1851 and 1951, a century in which the **Indian** Bureau kept talking about working itself out of a job and turning over responsibility to the **Indians**, congressional appropriations to **Indian** tribes decreased by approximately 80%, while appropriations to the **Indian** Bureau (chiefly for salaries) increased by approximately 53,000%. *Id.* at 388. Cohen argued against the desirability of increased reliance on administrative “expertise” because of the “harshness and heartlessness” of its attendant effects on human beings and instead articulated the need for either “a higher respect for inexpert human beings or a lower respect for expert administrators.” *Id.* at 390.
- 273 “Great nations, like great men, should keep their word.” *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

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