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DEFENDING THE COBELL BUY-BACK PROGRAM

Rebekah Martin*

Abstract

A critically flawed inheritance system, stemming from the General Allotment Act of 1887 and continuing through various government regulations throughout history has left individually owned Indian land tracts in a state of “fractionation.”¹ Beginning with the 1823 decision of *Johnson v. McIntosh*,² which construed “Indian land ‘ownership’ into the oddly-hybrid form [of] tribal use at federal sufferance,” the U.S. government has controlled and implemented indigenous land policies that are detrimental to indigenous land ownership.³ Acting in a position of “trustee” of indigenous land, the U.S. government regulated the use and ownership of tribal land following the General Allotment Act.

Unfortunately, that trust relationship has not always been fulfilled, as the federal court for the District of Columbia acknowledged the government’s gross mishandling of the trust system, which led to the loss of billions of dollars in income from improperly managed agricultural, forestry and mineral leases on indigenous lands.⁴ In *Cobell v. Salazar*,⁵ a class action law suit concerning the mismanaged trust relationship resulted in a \$3.4 billion settlement, with the U.S. Department of the Interior (DOI) allocating \$1.9 billion of the funds to be used for the “Cobell Land Buy-Back Program” (Cobell Buy-Back Program). The Cobell Buy-Back Program is an expanded version of the DOI’s ongoing attempts to consolidate indigenous land to remedy the growing problem of fractionated interests. This comment responds to the Cobell Buy-Back Program that purports to buy back, consolidate, and return indigenous land over a ten-year period. This comment will (1) explain the history of fractionation and prior

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1. Fractionation is most easily defined as “the division of ownership in a piece of land between multiple people.” *Fractionation, Sovereignty and Stewardship*, LESSONS OF OUR LAND (2014), <http://www.lessonsofourland.org/printpdf/283> (created by Indian Land Tenure Foundation).

2. 21 U.S. (8 Wheat.) 543 (1823).

3. Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 602-03 (2000).

4. *Fractionated Ownership*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/land-issues/fractionated-ownership> (last visited Jan. 16, 2016).

5. 679 F.3d 909 (D.C. Cir. 2012).

attempts by the government to remedy it, (2) discuss the Cobell Buy-Back Program and its upsides, as well as potential downfalls, and (3) offer potential alternative solutions, both for eligible owners and tribes who choose not to opt in, and for meeting the needs not currently addressed by the Cobell Buy-Back Program.

I. Introduction

The Cobell Buy-Back Program is expected to help solve the issue of fractionated interests in indigenous lands. This is one of several Obama Administration initiatives aimed at restoring the relationship between the United States and indigenous tribes.⁶ President Obama has expressed a commitment to improving the status of indigenous people during his terms. This commitment is reflected by investments in tribal education, infrastructure, and mental health services in Indian Country.⁷ Although the history of the mistreatment of indigenous tribes by the U.S. government has long been swept under the rug in history classes and whitewashed by the media, indigenous leaders and other indigenous people are beginning to attract more attention to the historical abuse of their people.⁸ Technology and activism have created an environment better suited to educate people who would otherwise remain unaware of the dark history of the fragile relationship between the U.S. government and the tribes.⁹ One of the benefits of the ability to disseminate information and education easier and faster is the relative speed with which activists are now able to raise awareness of social issues, and many indigenous leaders have taken

6. Katie Zezima, *As Obama Makes Rare Presidential Visit to Indian Reservation, Past U.S. Betrayals Loom*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/politics/obama-to-make-rare-presidential-visit-to-indian-reservation-past-betrayals-loom-over-meeting/2014/06/13/70046890-f26f-11e3-9ebc-2ee6f81ed217_story.html; see also *Obama Administration Record for American Indians and Alaska Natives*, WHITE HOUSE, https://www.whitehouse.gov/sites/default/files/docs/american_indians_and_alaska_natives_community_record_0.pdf (last visited Nov. 14, 2016).

7. Tanya H. Lee, *Tribal Nations Conference Looks to Solidifying Gains*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 5, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/05/tribal-nations-conference-looks-solidifying-gains-162337>.

8. See Richard Kahn & Douglas Kellner, *New Media and Internet Activism: From the 'Battle of Seattle' to Blogging*, 6 NEW MEDIA & SOC'Y 87 (2004).

9. See *How Technology Helps Level the Playing Field in Grassroots Social Justice*, FUNDING EXCHANGE, <http://fex.org/blog1/how-technology-helps-level-the-playing-field-in-grassroots-social-justice> (last visited Jan. 16, 2016).

advantage of this to affect change.¹⁰ As a result, injustices are less likely to go unnoticed, and the Cobell Buy-Back Program is more likely to be implemented fully and attentively. No longer able to remain under the radar as in years past, the DOI leadership is more likely to listen and address issues with the Cobell Buy-Back Program than it has been with previous attempts at solving the issues of fractionated interests and indigenous land management. Increasing tribal participation in the program over the past two years is a positive sign that indigenous voices are finally being heard, to an extent. This comment provides a current perspective on the Cobell Buy-Back Program, and contends that the particular strengths of this consolidation effort could make this attempt uniquely successful.

II. Overview of Fractionation and its History

The contentious debate over the potential effects of the Cobell Buy-Back Program is rooted in the ostensible trust relationship between the United States and indigenous people.¹¹ Describing tribes as “wards” under the guardianship of the United States,¹² the Supreme Court under Chief Justice John Marshall initiated the policies and laws of indigenous rights in through a series of cases known as the Marshall Trilogy, which built upon the decision in *Johnson v. M’Intosh* holding that private citizens could not purchase lands from indigenous landowners.¹³ Decided in the early half of the nineteenth century, these cases set the precedent for the political standing of indigenous populations in the eyes of the U.S. government.¹⁴ *Cherokee v. Georgia*, in particular, is cited for its conception of the patronizing trust doctrine that has controlled indigenous policy over the following centuries.¹⁵ The characterization of indigenous people as unable to manage their own affairs allowed government actors to take advantage of

10. Mike Myers, *These Are Hopeful Times, but Remain Vigilant!*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 28, 2015), <http://indiancountrytodaymedianetwork.com/2015/12/28/these-are-hopeful-times-remain-vigilant>.

11. Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 403-07 (2005-2006).

12. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831) (“Their relations to the United States resemble that of a ward to his guardian.”).

13. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 LAW & HIST. REV. 67, 70-71 (2001), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1050&context=facpubs>.

14. See McCulley, *supra* note 11, at 401-02 n.4.

15. *Id.*

tribes based on their alleged dependency. This guardian-ward or trust relationship resulted in decades of mistreatment, characterized by the horrors of assimilation, all in the name of “protecting” indigenous people from themselves.¹⁶

A. *The 1887 General Allotment Act*

In 1887, Congress enacted the General Allotment Act, also known as the Dawes Act.¹⁷ This Act authorized the U.S. government to survey and divide indigenous land across the United States for allotment.¹⁸ This Act like many others was not patently ill-willed as the legislation claimed “to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.”¹⁹ Designed to help lift indigenous people out of poverty,²⁰ the Act allowed the government to take tribal lands and break them up in order to allot them to individual tribe members; however, the Act forced assimilation of indigenous people into the European culture by breaking up tribes as a social unit.²¹ The Act provided that the head of each family would receive 160 acres and each single person would receive eighty acres of indigenous land.²² The Act promoted the values of individual ownership, rather than communal ownership, by granting allotments of indigenous land to be held in trust by the DOI, reinforcing the complex fiduciary relationship between the DOI and the indigenous landowners.²³ The DOI held title to the land in trust for twenty-five years,

16. DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 78-81 (1997).

17. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.); see *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited Jan. 13, 2016).

18. This Act did not include the Five Civilized Tribes. See A. F. Ringold, *Indian Land Law—Some Fundamental Concepts for the Title Examiner*, 10 TULSA L.J. 321, 324 (1975).

19. 24 Stat. at 388; see also Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 580 (2010-2011).

20. See Davidson, *supra* note 19, at 580.

21. Terry L. Anderson, *Property Rights Among Native Americans*, FOUND. FOR ECON. EDUC. (Feb. 1, 1997), <http://fee.org/freeman/property-rights-among-native-americans> (“Indian land tenure systems were varied. While some ownership was completely or almost completely communal, other ownership was more like today’s fee simple. The degree of private ownership reflected the scarcity of land and the difficulty or ease of defining and enforcing rights.”); see also Guzman, *supra* note 3, at 604-05.

22. Davidson, *supra* note 19, at 580 n.27 (quoting Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 n.34 (1995)).

23. *History of Allotment*, *supra* note 17.

after which the final patent would be granted.²⁴ While held in trust, allotments were subject to complete federal restraints on alienation, which prevented individual owners from transferring property and hindered tribes from applying their laws of descent.²⁵ Because the land was not freely alienable title ownership divides among the heirs when an allottee dies, as tenants in common, although the land remained physically undivided.²⁶ With each generation, the number of owners entitled to one tract of land continues to grow, which increases the “fractionation” of the land.²⁷ To illustrate the severity of the situation, imagine one tract of land allotted in 1887 to an individual; this tract would pass on in equal parts to the decedent’s heirs upon his or her death. Presuming each generation of allottees produced three heirs, the land would be split into 243 undivided fractions by the time ownership vested in the sixth generation.²⁸

While undivided interests passing intestate to multiple heirs could potentially cause problems for any land owning families, the restrictions and circumstances surrounding indigenous land ownership are unique for three reasons. First, and most obviously, the initial legal restraints on alienation prevented landowners from transferring property at will.²⁹ Second, the accepted rules of intestate succession utilized by tribes previously were ignored in favor of state laws of succession.³⁰ Third, the government’s allocation of the “excess” areas surrounding indigenous allotted lands to euro-American settlers prevented indigenous descendants from “spreading out” and purchasing other land nearby; the only land available to them was often the land they inherited and were forced to share.³¹

As a result of the Dawes Act, allottees were unable to transfer their allotments at will upon death, and approval by the Secretary of the Interior

24. *Id.*

25. Chris Stainbrook, *Indian Lands – Passing Our Most Treasured Asset to Future Generations*, MESSAGE RUNNER (Indian Land Tenure Found., Little Canada, Minn.), vol. 2, n.d., at 1, <https://www.iltf.org/sites/default/files/Message%20Runner%202%20-%20lowres.pdf>.

26. *Fractionated Ownership*, *supra* note 4.

27. *Id.*

28. *Id.*

29. Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 740-41.

30. *Id.* at 761.

31. *Id.*

was required for almost all land conveyances.³² Under the trust system, the U.S. government is responsible for the protection of indigenous interests including assets, lands, water, and income from trust property.³³ History has shown, however, that the U.S. government repeatedly fails to fulfill its fiduciary obligations as trustee, with the Dawes disaster serving as one of the early examples.

[M]ore often than not, the federal government has failed to honor its agreements or to protect the rights of Native people. The U.S. courts, for example, have unlawfully upheld the taking of aboriginal territory without compensation. Congress refers to its power over Indian nations as “plenary” and has passed laws allowing for the termination of Indian nations and the forced, illegal sale of Indian lands. More recently, the Department of Interior admitted to over a century of mismanagement of Indian lands and assets that has been responsible for the loss of billions of dollars in real income for nearly 500,000 Indian landowners.³⁴

Despite the U.S. government’s paternalistic treatment of indigenous tribes, history repeatedly shows that this patronization of the tribes benefits the government, rather than the tribes.³⁵ It is well established that since the initial removal from their homeland, through allotment, escheat, foreclosure and various other methods, indigenous land was stripped away by the U.S. government.³⁶ In addition to the actual, forcible removal from indigenous

32. See Ringold, *supra* note 18, at 324 (“The document retained legal title in the United States, but vested the equitable title and the right to use the land in the allottee.”); see also Davidson, *supra* note 19; *History of Allotment*, *supra* note 17 (“Under the General Allotment Act, Indian allottees were declared ‘incompetent’ to handle their land affairs and the United States would retain legal title to the land as trustee for the allottee . . .”). Under these policies, Indian allottees only retained “beneficial” title, which meant that “as long as the allotment was held in trust by the federal government,” the landowner could freely use the land but not sell or lease, barring permission from the Secretary. *Id.* The Dawes Act “stated that 25 years after the allotment was issued, Indian allottees would be given complete, fee simple ownership of the land. At that point, the landowner could sell or lease it to anyone.” *Id.*

33. *History of Allotment*, *supra* note 17.

34. *Legal & Legislative*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/land-issues/legal-and-legislative> (last visited Sept. 1, 2016).

35. *Id.*

36. McCulley, *supra* note 11, at 402; see also Armen H. Merjian, *An Unbroken Chain Of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 618 (2011) (“The statistics demonstrate just how powerful that machine was:

land, the multiple layers of bureaucracy surrounding indigenous land use and property decisions increased the likelihood that indigenous land would eventually become virtually useless upon fractionation, creating a system of “constructive dispossession.”³⁷

Compounding the problems stemming from the Dawes Act was the passage of the Burke Act, which amended Dawes in 1906. The Burke Act—also known as the Forced Patenting Act—gave the Secretary of the Interior the power to issue allottees a patent in fee simple to indigenous people considered “competent and capable” before the end of the initial twenty-five year trust period, which resulted in the removal of certain tracts of land from trust status. The sudden receipt of the fee patent, however, subjected unaware landowners to taxation in their respective states.³⁸ Wholly unprepared for this abrupt change, indigenous landowners soon began to lose their land through foreclosure.³⁹

By placing restrictions on alienation of indigenous lands, the U.S. government prevented indigenous landowners from making autonomous land conveyance and estate planning decisions that could have prevented the problem, or at least lessened its impact.⁴⁰ The growing problem of fractionated interests resulted in major losses of land value for indigenous families for generations, and continued to increase exponentially over the years.⁴¹ Because the land interests shared by indigenous descendants are undivided, the possibility of determining how the land should be used is effectively impossible. To put the land to any sort of valuable use, consent from at least fifty percent of the landowners must be obtained, making the

between 1887 and 1934, Native Americans lost ninety million acres, or about sixty-five percent of their land.”).

37. Shoemaker, *supra* note 29, at 730.

38. Burke Act, 25 U.S.C. § 349 (2012) (“[T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed”); *see* Merjian, *supra* note 36, at 618 (“The incidence of ownership over land was a completely foreign concept to the vast majority of reservation Indians. So too was the payment of taxes once a fee patent was issued. Consequently, tax foreclosures on parcels of individual land were rampant, shrinking Indian Country precipitously.”).

39. Douglas R. Nash & Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 SEATTLE J. FOR SOC. JUST. 121, 126 (2006).

40. *See id.* at 127-28.

41. *See id.*

tracts virtually worthless.⁴² Further, even when consent can be obtained between all landowners to put land to some sort of use, such as leasing, the highly divided ownership of the interest results in miniscule returns on leases to the individual landowners.⁴³ According to the DOI, a significant number of landowners earn twenty-five dollars or less in annual income from their fractional interests in allotments,⁴⁴ and some landowners even receive as little as five cents annually.⁴⁵ The impossibility of putting these tracts of land to any meaningful use, such as raising livestock, building homes, or creating businesses, prevented countless indigenous families from building generational wealth and setting up future generations for success.

Further, management of trust assets is extremely costly, causing a substantial waste of funds in the process and ultimately, often costing more to execute than the interests themselves are worth to the individual landowners.⁴⁶ The poorly organized approach to managing indigenous land also makes it easier for non-natives to obtain these lands. Part of the problem is the inability of indigenous landowners to partition the land, which they hold in an undivided share. While non-Indian landowners can purchase one landowner's nominal interest, and then partition the land off from the rest through a judicial process, indigenous landowners cannot do the same.⁴⁷ For example, in Osage County, Oklahoma, an indigenous

42. 25 U.S.C. § 2204(a)(2)(A) (2012) (“The Indian tribe may purchase all interests in a tract described in paragraph (1) with the consent of the owners of undivided interests equal to at least 50 percent of the undivided interest in the tract.”).

43. See Shoemaker, *supra* note 29, at 740-41 (“Instead, the descendents of the original individual allottees had no choice but to share what their ancestors had held individually—which was often too small to support individual families even at that time.”).

44. *Land Buy-Back Program for Tribal Nations: Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR, https://www.doi.gov/sites/doi.gov/files/uploads/frequently_asked_questions_updated_11.7.2016_0.pdf (last visited Nov. 16, 2016) (response to question 1) [hereinafter *Land Buy-Back: Interior Dep’t FAQs*].

45. See Davidson, *supra* note 19, at 582.

46. *Fractionated Ownership*, *supra* note 4; see also Shoemaker, *supra* note 29, at 731 (“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.”).

47. Shannon Shaw Duty, *Nation to Receive \$7.4 Million in Cobell Land Buy-Back Program*, OSAGE NEWS (Jan. 26, 2015), <http://osagenews.org/en/article/2015/01/26/nation-receive-74-million-cobell-land-buy-back-program/> (“That’s how you buy land in the Osage. You find an Indian with land with fractionated interest, you find a way to weasel in and

resident named Standing Bear said the process is allowed by Oklahoma law and supported by the Bureau of Indian Affairs (BIA) Osage Agency. “Anyone can . . . go through the process of getting an Osage’s undivided interest taken out of restriction and purchase it. But, the non-Indian can’t make decisions on the use of the land . . . However, the non-Indian can petition the court to divide the land, in kind, in equal shares.”⁴⁸

Despite the problems restricting alienation of property present to indigenous landowners and the BIA, the problem persists today.⁴⁹ As it exists, the trust relationship consists of the U.S. government, through the Secretary of the Interior and the BIA (under the authority of the DOI) as trustee, the indigenous allottees as beneficiaries, and the indigenous lands and funds as trust corpus. Today, nearly fifty-six million acres of land currently under indigenous ownership are held in trust for indigenous people by the U.S. government.⁵⁰ There are several “types” of indigenous ownership in the United States, one of which is “restricted status,” also known as “restricted fee.”⁵¹ In Restricted status ownership, title to the land is held by an individual or a tribe, but cannot be alienated or encumbered by the owner without the approval from the Secretary of the Interior.⁵² There are also State Indian reservations, which are lands held in trust by a state for an indigenous tribe subject to state law.⁵³ The problems with indigenous land ownership stem from the insistence of the U.S. government wanting to retain some sense of ownership over the land it has supposedly allotted to indigenous landowners.

B. Previous Efforts at Resolving Fractionation

Time and again, the U.S. government has attempted to remedy the misuse of indigenous land. Each time, the attempts fall short of successful reparation, and some attempts, such as the Indian Reorganization Act of 1934 (IRA), only further complicate the problem. The burdens on indigenous land tracts continue to prevent landowners from exercising

jump in on one little fraction and you force everybody out. It’s called Partition,’ Standing Bear said. ‘It’s how a lot of ranches got built in Osage County.’”).

48. *Id.*

49. See Shoemaker, *supra* note 29, at 749-50.

50. *Fractionated Ownership*, *supra* note 4.

51. NAT’L CONG. OF AM. INDIANS, TRIBAL NATIONS OF THE UNITED STATES: AN INTRODUCTION 26 (n.d.), [https://assets.aspeninstitute.org/content/uploads/files/content/upload/Tribal_Nations_and_the_United_States-NCAI\[1\].pdf](https://assets.aspeninstitute.org/content/uploads/files/content/upload/Tribal_Nations_and_the_United_States-NCAI[1].pdf).

52. *Id.*

53. *Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last visited Sept. 11, 2016).

rightful autonomy over individual land.⁵⁴ Consider this excerpt on the importance of estate planning for indigenous families:

In general, IRA land must be devised (or passed on) to a Native American in a manner that preserves its trust status. Non-IRA land, on the other hand, can be devised to whomever the devisee chooses, taking it out of trust and passing on outright ownership, but to a non-Indian only.

If a will seeking to devise tribal land contains a provision failing to recognize this important distinction, the devise will be considered invalid and the federal or tribal governments will determine disposition of that land. It is unlikely that either government will consider the intent expressed by the deceased in his or her will.⁵⁵

A brief examination of the previous attempts to resolve fractionation, through various acts of Congress, underscores the perpetual struggle between indigenous people seeking sovereignty over their own land, and a government that refuses to relinquish its paternalistic control.⁵⁶

In 1928, a government report known as the “Merriam Report,” was published. The Report shed light on the issues already facing indigenous land, and criticized the policy of allotment and the United States’ treatment of indigenous people.⁵⁷ The Report provided “undeniable evidence of the destructiveness of federal Indian policy and spurred significant changes in the federal administration of Indian affairs.”⁵⁸ Early on, this Report alerted Congress to the issues created by the Dawes Act, which subsequently attempted to fix the problem in the form of IRA.⁵⁹ Officially called the Wheeler-Howard Act, the stated intention was “to conserve and develop Indian land and resources; to extend Indians to the right to form business and, other organization; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education

54. Shoemaker, *supra* note 29, at 745. “The first necessary repair work now is to restore tribal autonomy in these crucial areas.” *Id.* at 781.

55. *Why Native Americans Families Should Re-Consider Professional Estate Planning Services*, MCKINLEY IRVIN FAMILY LAW BLOG (May 14, 2013), <http://www.mckinleyirvin.com/Family-Law-Blog/2013/May/Why-Native-Americans-Families-Should-Re-Consider.aspx>.

56. *Id.*

57. *History of Allotment*, *supra* note 17.

58. *Id.*

59. Guzman, *supra* note 3, at 606.

for Indians; and for other purposes.”⁶⁰ Despite its claimed goal of reversing the assimilation practices of years past, the results were ultimately ineffectual.⁶¹ Although IRA ended the allotment process, it also ensured that all remaining trust lands would remain in trust indefinitely.⁶² Likewise, the U.S. Court of Appeals for the District of Columbia noted in *Cobell v. Norton* that “[t]he federal government retained control of lands already allotted but not yet fee-patented and thereby retained its fiduciary obligations to administer the trust lands and funds arising from those lands for the benefit of individual Indian beneficiaries.”⁶³ Adding to the problem, the Act did not prevent land from passing out of trust when inherited by a non-Indian heir, or on the occasion that an allotted owner petitioned the Secretary of the Interior to remove the land from trust status or remove the restrictions.⁶⁴ Ultimately, the Act did not change the aspects of the General Allotment Act that were causing issues: probates still increased fractionation exponentially generation after generation with each allotment, the trust system and its decision-making authority over the land “as a distant and paternalistic landlord,” and a significant amount of reservation land being owned by non-Indians.⁶⁵

In 1983, Congress passed the Indian Land Consolidation Act (ILCA).⁶⁶ This Act, purporting to “improve the economy of the tribe and its members,” barred the testate or intestate transfer of highly fractionated interests, and mandated non-compensated escheat to the tribe with jurisdiction.⁶⁷ ILCA intended to assuage the existing burdens of fractionation, which had not been slowed by IRA.⁶⁸ Section 207 of ILCA, however, which mandated escheat of fractional interests that represented

60. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

61. *History of Allotment*, *supra* note 17.

62. *Id.*

63. 240 F.3d 1081, 1087 (D.C. Cir. 2001).

64. *History of Allotment*, *supra* note 17.

65. *Id.*

66. Guzman, *supra* note 3, at 598.

67. *Id.*; see also Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, § 207, 96 Stat. 2515, 2519 (“No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.”).

68. *Amending the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land: Hearing on S. 550 Before the S. Comm. on Indian Affairs*, 108th Cong. (2003) <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg87046/html/CHRG-108shrg87046.htm> (May 7, 2003).

two percent or less of the tract, led to lengthy court battles in the cases *Hodel v. Irving*⁶⁹ and *Babbitt v. Youpee*.⁷⁰ In *Hodel*, the Supreme Court held that the provision amounted to an unconstitutional Fifth Amendment violation, functionally terminating ILCA.⁷¹

Following the disappointment of ILCA, Congress tried another approach to confronting the fractionation matter. In an attempt to resolve after-death conveyances (one of the causes of fractionation unique to indigenous populations),⁷² Congress again attacked the issue of probate.⁷³ In 2004, Congress enacted the American Indian Probate Reform Act (AIPRA), which created a uniform federal code for trust lands and a system that limited who could inherit trust lands. In 2008, Congress then amended AIPRA in ways that “drastically affected the way that tribal member trust estates are distributed to heirs after death.”⁷⁴ Except for Alaska, the Five Civilized Tribes, and the Osage, AIPRA amended ILCA and its amendments, which removed the states from the probate process and created a federal code for determining intestate succession.⁷⁵ After the provisions pertaining to probate took effect on June 20, 2006, state laws no longer determined how trust land on reservations passed on to the next generation.⁷⁶

An important aspect of AIPRA is the provision that authorizes indigenous tribes to determine succession to trust and restricted lands by adopting their own probate codes, consistent with federal law and subject to the approval of the Secretary of the Interior.⁷⁷ As often occurs in legislation, the Act was imperfect and failed to satisfactorily reach a solution. Following the implementation of AIPRA, several law schools around the country instituted programs to assist underserved indigenous populations

69. *Hodel v. Irving*, 481 U.S. 704 (1987).

70. *Babbitt v. Youpee*, 519 U.S. 234 (1997).

71. *Hodel*, 481 U.S. at 716-18.

72. Nash & Burke, *supra* note 39, at 132. “AIPRA authorizes tribes to adopt tribal probate codes that will govern the descent and distribution of trust or restricted lands located within that tribe’s reservation, or which are otherwise subject to that tribe’s jurisdiction, notwithstanding any other provision of law.” *Id.* at 157.

73. See Stainbrook, *supra* note 25 (discussing the pre-AIPRA probate process).

74. *Tribal Wills Project*, UNIV. OF DENVER: STURM COLLEGE OF LAW, <http://www.law.du.edu/index.php/tribal-wills-project> (last visited Dec. 24, 2016).

75. *American Indian Probate Reform Act of 2004*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/recent-allotment-legislation/probate-reform-act-2004> (last visited Jan. 16, 2016).

76. *Id.*

77. See *id.*

with adequate estate planning methods, in a sensitive and culturally understanding environment.⁷⁸

“Understand, death is not a topic tribal officials wish to discuss openly,” said a longtime resident of Ramah. “They will talk to tribal members about being prepared for when they, or another could be gone. However, death specifically, is like taboo.” . . . “Under the Act, if a tribal member were to die without an official will in place, most of his or her trust lands would pass to the oldest child, the oldest grandchild, or the oldest great grandchild. If none of these specific descendants exist or are able to receive the property, the trust lands will pass to the tribe. This means that regardless of the tribal member’s desires, no other family member will have any claim to the lands.”⁷⁹

These programs were necessary because the Act failed to establish adequate funding to achieve its goals through estate planning initiatives.⁸⁰ These initiatives would require providing education for lawyers and landowners, establishing law school clinics, and placing attorneys in areas with potential clients.⁸¹ Although a “direct correlation” between providing estate planning services and reduction of fractionation is evident, in the years following AIPRA’s implementation, the problem of fractionation remained an enormous issue for these reasons.⁸² Additionally, while AIPRA intended to allow for consolidation of land through some of its provisions, its execution fell short.⁸³ Unfortunately, despite ambitious intentions and

78. Donald Jaramillo, *Law School Students Provide Much-Needed Services*, CIBOLA BEACON (Grants, N.M.) (Jan. 16, 2015), http://www.cibolabeacon.com/news/law-school-students-provide-much-needed-services/article_06d86028-9d8d-11e4-9de0-eb775f0c94b9.html.

79. *Id.*

80. Diane K. Lutt, Note, *The American Indian Probate Reform Act: A Five-Year Review*, 51 WASHBURN L.J. 105, 106, 129 (2011).

81. *Id.* at 129 (“Even though various organizations currently provide estate planning services, the absence of adequate federal funding poses a real challenge to the effectiveness of AIPRA and its central goal of reducing fractionation. This lack of funding places the burden of providing services on groups such as Legal Services and law school clinical programs, both of which have limited resources to reach those in need of estate planning services.”).

82. *Id.* at 129-30.

83. Nash & Burke, *supra* note 39, at 144 (“The title of AIPRA, the American Indian Probate Reform Act, presents the image of a probate law. However, it is much more. AIPRA contains many provisions of interest to tribal governments and officials to effectuate land consolidation and reduce fractionation of the lands over which they have jurisdiction.”).

high hopes, AIPRA was ultimately too complex, too underfunded, and failed to reduce fractionation on a large scale.

Following the failure of ILCA and the implementation of AIPRA, the issues surrounding fractionation and the necessity for land consolidation went largely unmentioned as the problem appeared practically insurmountable.⁸⁴ It was not until the conclusion of a class action lawsuit in 2010 that the U.S. government began to address the concerns of fractionation more ambitiously.

C. The Cobell Settlement

The BIA, under the authority of the DOI, is responsible for managing trust lands, while the U.S. Treasury Department invests the ‘Individual Indian Money’ (IIM) trust accounts “and is responsible for accounting and financial management of the funds.”⁸⁵ It is this relationship that brings rise to the fiduciary duty owed by the U.S. government to indigenous landowners.⁸⁶ In 1996, Elouise Cobell, Treasurer for the Blackfeet Tribe for over a decade, filed a class action suit against the DOI and the U.S. Treasury Department, alleging “breach of fiduciary duties in managing class members’ ‘Individual Indian Money’ (IIM) trust accounts.”⁸⁷ As treasurer for her tribe, Cobell noticed irregularities in management of funds that had been handled by the U.S. government.⁸⁸ Styled *Cobell v. Salazar*, the suit accused the BIA of “mismanaging, diverting and losing money that belongs to Indians” for decades.⁸⁹ Eventually, the Obama Administration negotiated a settlement with the parties, and in 2010, Congress passed a bill allowing the appropriation of funds for this purpose.⁹⁰ Under the terms of the Cobell Settlement, \$3.4 billion was granted to the class, with the government establishing \$1.9 billion of that amount for a “Trust Land

84. See generally Nash & Burke, *supra* note 39.

85. Merjian, *supra* note 36, at 619.

86. *Id.* at 628.

87. *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012).

88. *Id.*; see also *Elouise Cobell, Rest in Peace*, HIGH COUNTRY NEWS (Oct. 26, 2011), <http://www.hcn.org/wotr/elouise-cobell-rest-in-peace>.

89. Christopher Barrett Bowman, Comment, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 CATH. U. L. REV. 543, 544 (2004).

90. *Cobell/Land Buy-Back*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/cobell> (last visited Nov. 10, 2016).

Consolidation Fund.”⁹¹ The breakdown of funds within the \$3.4 billion settlement included a \$1.412 billion Accounting/Trust Administration Fund, “plus a \$100 million Trust Administration Adjustment Fund, plus any earned interest, to pay for Historical Accounting and Trust Administration Claims. This money will also pay for the cost of administering and implementing the Settlement, as well as other expenses.”⁹² Most notably, the settlement accounted for a \$1.9 billion Trust Land Consolidation Fund to purchase fractionated individual indigenous lands, and consolidate them accordingly.⁹³ According to the terms of the settlement:

- The program will allow individual indigenous landowners to get money for land interests divided among numerous owners. Land sales are voluntary. If you sell your land it will be returned to tribal control.
- Up to \$60 million for an Indian Education Scholarship Fund to help indigenous people attend college or vocational school. This money will come out of the \$1.9 billion Trust Land Consolidation Fund and will be based upon the participation of landowners in selling these fractionated land interests.⁹⁴

Over a ten-year period ending in November 2022, the funds are to be used to buy back fractionated interests and restore the land to tribal ownership.⁹⁵ The DOI offers “fair market value” to certain landowners to purchase back the interests, which are then returned to the tribes, although held in trust by the U.S. government.⁹⁶ By the DOI’s estimation at the time, there were approximately 245,000 landowners of nearly three million fractional interests across Indian Country eligible for participation in the Cobell Buy-Back Program.⁹⁷

91. *Cobell v. Salazar Class Action Website: Frequently Asked Questions*, INDIAN TR. SETTLEMENT, <http://www.indiantrust.com/faq.php.nonssearch> (last visited Sept. 7, 2016) [hereinafter *Class Action Website FAQs*].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Land Buy-Back Program for Tribal Nations: Landowners*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/buybackprogram/landowners> [hereinafter *Land Buy-Back: Landowners*] (last visited Sept. 1, 2016).

While a symbolic victory for indigenous tribes nationwide,⁹⁸ the case and its resulting settlement purport to make reparations for wrongs on a significant scale.⁹⁹ Far from admitting to any past—or continuing—wrongdoing against indigenous people, the settlement denied misconduct,¹⁰⁰ while seemingly rectifying the serious land issue. Immediately, indigenous leaders and various critics voiced skepticism as to whether the DOI could be trusted to finally remedy the problem, or if the U.S. government would fall short of its fiduciary duty yet again.¹⁰¹

III. The Land Buy-Back Act

A. Overview of the Purpose

Attempting to consolidate land that has become highly fractionated over generations is one of the largest components of the Cobell Settlement plan.¹⁰² The DOI offers to buy back land from eligible landowners (any landowner with an IIM account), and upon receiving the interests in the land, returns it to the tribe—in trust.¹⁰³ By doing this, the Cobell Buy-Back Program intends to allow individuals to receive monetary benefit from their land, and allow the tribes to retain ownership of the land as a whole.¹⁰⁴

The information provided by the DOI to landowners explains how the program works for individuals. The four stages of the Cobell Buy-Back Program are “1. *Outreach* to contact landowners 2. *Land research* to

98. Kelly Gibson, *Cobell Settlement Win Is Not Financial*, PARTNERSHIP WITH NATIVE AM. (June 24, 2011), <http://blog.nativepartnership.org/cobell-settlement-win-is-not-financial/>.

99. Elouise Cobell, Statement at the Department of Interior Press Conference Announcing the Settlement in *Cobell v. Salazar* (Dec. 8, 2009) [hereinafter *Cobell Statement*] (on file with author); Press Release, Elouise Cobell, \$3.4 Billion Settlement Announced in Federal Mismanagement of Individual Indian Trust (Dec. 8, 2009), <http://www.cobellsettlement.com/pressrelease.php> [hereinafter 2009 Press Release] (“Indians did not receive the full financial Settlement they deserved, but we achieved the best Settlement we could.”).

100. Davidson, *supra* note 19, at 597 (“As is customary with most settlement agreements, the federal government and the respective secretaries ‘deny any and all liability and damages’ to the beneficiaries or mismanagement of funds, but agreed to settle ‘to avoid the burden, expense, and uncertainty of continuing the case.’”).

101. *See generally id.*

102. *See generally Class Action Website FAQs*, *supra* note 91.

103. *Id.*

104. *Id.*

determine fair market value 3. *Valuation* using “mass-valuation” techniques [and] 4. *Acquisition* sending Application Packets to landowners.”¹⁰⁵

The DOI website explains that individuals who sell their interests will receive payments directly into their IIM accounts.¹⁰⁶ In addition to receiving the money based on the land appraisals, sellers also receive seventy-five dollars per offer.¹⁰⁷ The interests are then consolidated and “immediately restored to tribal trust ownership for uses benefiting the reservation community and tribal members.”¹⁰⁸ One of the advertised benefits of the Cobell Buy-Back Program is the restoration of the land as belonging to the tribe, rather than the individual, as an effort to reestablish the communal ownership that was eliminated for the sake of assimilation.¹⁰⁹ The intentions of the program are good, and there seems to initially be an overwhelmingly positive outcome for tribes and individuals. However, a critical look at the Cobell Buy-Back Program gives a clearer picture of the potential downfalls.

B. Criticisms of the Act and Initial Failure

It comes as no surprise that many leaders in indigenous communities do not trust the DOI to ensure landowners are treated fairly in regard to land appraisal and management of trust lands.¹¹⁰ The wariness is not misplaced; the U.S. government’s long, documented history of taking indigenous land and subsequently mismanaging it served as the very basis for the Cobell Settlement, and the penumbras of past mistreatment by the government cast long shadows across any attempts at resolving the issues.¹¹¹ From the beginning, consolidation attempts have been seen as another means of

105. *Cobell v. Salazar/Indian Land Consolidation Program: The Buy Back Program*, NATIVE AM. RIGHTS FUND, https://www.narf.org/nill/resources/buy_back_program.pdf (last visited Nov. 16, 2016).

106. *Land Buy-Back: Landowners*, *supra* note 97.

107. *Id.*

108. *Id.*

109. *See* Guzman, *supra* note 3, at 605.

110. *E.g.*, Jay Daniels, *The BIA’s Cobell Land Buy Back Plan Is a Mess*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 3, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/03/bias-cobell-land-buy-back-plan-mess> [hereinafter Daniels, *Buy Back Plan Is a Mess*].

111. Rob Hotakainen, *U.S. Gears Up for Huge, Difficult Land Buyback for Indian Tribes*, MCCLATCHYDC (Aug. 1, 2013), <http://www.mcclatchydc.com/news/politics-government/article24751675.html>.

taking indigenous land.¹¹² Consequently, a key hurdle to Cobell Buy-Back Program implementation is the ability of the DOI to convince eligible landowners to sell their property.¹¹³ Among many concerns for tribal leaders is the U.S. government's continuing insistence on keeping the land in trust. After purchasing the land from owners, it will then remain essentially under government control.¹¹⁴ Additionally, many critics expressed skepticism about a "fair market value" that is determined by the U.S. government.¹¹⁵

One of the most obvious downfalls of the Cobell Buy-Back Program is the current plan for any remaining money after the program ends. The Settlement states: "The Department of the Interior will have up to 10 years from the date the Settlement is granted final approval to purchase the fractionated trust land. Any money remaining in the Land Consolidation Fund after that time will be returned to the U.S. Treasury."¹¹⁶

112. *Id.* ("This is a modern day retaking of the land and, given the historical implications of that, they don't want to relive it,' Les Riding-In, assistant dean and director of graduate studies at the University of Texas-Arlington and a member of the Comanche Tribe, said in an interview. 'It's reminiscent of how the government took the land back when colonization was happening.'"); *see also* Daniels, *Buy Back Plan Is a Mess*, *supra* note 110.

113. David Murray, *\$54 Million Offered for Tribal Land on Fort Belknap Reservation*, GREAT FALLS TRIBUNE (June 10, 2015, 7:39 PM MDT), <http://www.greatfallstribune.com/story/news/local/2015/06/10/million-offered-tribal-land-fort-belknap-reservation/71042974/> ("There are also questions on how the individual ownerships in trust land have been identified and appraised. The Cobell lawsuit that led to the buy-back settlement was grounded in the Department of the Interior's failure to keep adequate records of Indian trust lands in the first place. Elizabeth Colliflower came from Virginia to get some answers about how her Trust Land ownership had been appraised and accounted for. Examining the purchasable interests inventory she'd received in the mail, Colliflower noted that some of the parcels of trust land she'd obtained over the past 11 years were not included."); *see also* Hotakainen, *supra* note 111.

114. Jay Daniels, *Land Buyback Program: Did Anything Really Happen?*, NATIVE TIMES (Jul. 24, 2014), <http://www.nativetimes.com/index.php/life/commentary/10193-land-buyback-program-did-anything-really-happen>.

115. *See* Daniels, *Buy Back Plan Is a Mess*, *supra* note 110.

116. *Class Action Website FAQs*, *supra* note 91; *see* Davidson, *supra* note 19, at 602 ("Second, the DOI is limited to ten years to liquidate the monies in the Consolidation Fund. If the account is not liquidated within the time period, the money must be returned to the Treasury. The economic reality of this stipulation means that, to ensure that the ten-year period does not lapse, the DOI must identify and begin to acquire the most highly fractionated parcels within five years. This is especially troubling for the interest holders who are classified as 'whereabouts unknown.' For this special class of persons, the DOI must satisfy additional stipulations to locate as many interest holders as possible. These additional procedures are notice-related, and, if satisfied, the owners are deemed to consent

Another infrequently reported problem with the Cobell Settlement's execution is the status of class members who are considered to be in the "Whereabouts Unknown"¹¹⁷ group:

Without current addresses, account holders cannot receive periodic Statements of Performance (IIM account statements) or other mailings from OST. Account information that OST provided to Garden City Group (GCG), the claims administrator for the Cobell Settlement, does not have current mailing addresses for WAU accounts. Therefore, GCG is not able to mail Cobell Settlement checks to WAU accounts. GCG returns those funds to OST. The funds are deposited into WAU accounts.¹¹⁸

Although the whereabouts unknown class does not specifically pertain to eligible landowners, but rather to class members of the settlement's terms, it is yet another example of one of the many criticisms that opponents of the settlement cite to show the inadequacy of the terms of the settlement.

Additionally, and potentially more importantly, land ownership has impact beyond mere monetary value.¹¹⁹ Familial and cultural connection to land may influence many landowners not to sell their interests.¹²⁰ Although the DOI claims to preserve the cultural value of land by restoring it to the tribes, the fact remains that the land will continue to be held in trust by the

to the conveyance of their fractionated interests after five years from the date of final approval, with the proceeds to be placed in IIM accounts.”).

117. *Consultations on Cobell Trust Land Consolidation: Frequently Asked Questions (FAQ)*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/cobell/faq> (last visited Nov. 16, 2016). The Office of the Special Trustee for American Indians (OST) maintains a list of Individual Indian Money (IIM) accounts that do not have current address information. Accounts without current address information are referred to as Whereabouts Unknown (WAU) accounts. As of December 31, 2012, there were over 83,000 WAU accounts.

118. *Id.*

119. *Land Buy-Back: Interior Dep't FAQs*, *supra* note 44 (response to question 39) (“Many individuals have a strong personal and cultural connection to land which transcends economic value.”).

120. Jerilyn Decoteau, *Why I Opted Out of the Cobell Settlement*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 4, 2011), <http://indiancountrytodaymedianetwork.com/2011/06/04/why-i-opted-out-cobell-settlement>.

U.S. government.¹²¹ For many, the mere promise from a potentially untrustworthy authority will not be a satisfactory enticement to sell.¹²²

Finally, many indigenous leaders have called attention to the potential for forced sales of indigenous land. As one critic pointed out, the department of the interior has articulated a strategy to “identify tracts with relatively low fractionation and a few ‘large’ interest owners, the acquisition of whose interests could bring a tribe to a controlling level of interest in that tract with a minimal number of acquisitions.”¹²³ The DOI defines a “controlling level of interest” as a mechanism in ILCA that permits tribes that acquire a simple fifty-one percent majority interest in allotted or restricted fee lands to obtain the minority owners’ land interests by forced sale.¹²⁴

Although the DOI claimed repeatedly that there would be no forced sales, this clearly serves as evidence that this simply is not the case. Further, this discovery only worsened the public’s outlook on the Cobell Settlement terms as a whole, giving rise to several editorials in opposition to the settlement, its terms, and the perceived lack of transparency in the DOI’s decision making process.¹²⁵

The level of distaste many had—and still have—for the Cobell Buy-Back Program, particularly at its inception, cannot be overstated. Most editorials and public commentary expressed skepticism that the program would do what it purported to; at best, they feared it would be ineffective, and at worst, downright detrimental.

C. Improvements in 2014-2015

In December of 2013, the first offers were mailed to potential sellers, officially kicking off the Cobell Buy-Back Program.¹²⁶ Initially, payment for many of the resold land was delayed, with many of the class members’

121. *Land Buy-Back: Interior Dep’t FAQs*, *supra* note 44 (response to question 39) (“By selling your interests through the Buy-Back Program, you help to preserve the Indian land base because interests purchased by the Program and restored to tribes will remain in trust forever.”).

122. Decoteau, *supra* note 120.

123. Gabriel S. Galanda, *Buy Back Violates International Human Rights*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 12, 2012), <http://indiancountrytodaymedia.network.com/2014/03/12/buy-back-violates-international-human-rights>.

124. *See* 25 U.S.C. § 2204(a) (2012).

125. Galanda, *supra* note 123.

126. *Id.*

checks seemingly lost in the mail.¹²⁷ indigenous leaders called attention to the delay, questioning whether it should really come as any surprise that the checks did not come as promised.¹²⁸ In some areas, disillusioned landowners and indigenous leaders held protests outside of local BIA offices, demanding a response to the problem.¹²⁹ Finally, after some payments were delayed several months, the payments finally arrived,¹³⁰ and the expected benefits began to materialize.¹³¹ Despite the slow start to executing the terms of the settlement,¹³² the Cobell Buy-Back Program finally progressed in 2014.¹³³ As of September 2015, the DOI has entered into agreements with twenty-five tribes and purchased over 850,000

127. E.g., S.E. Ruckman, *Cobell Funds Delay Cuts Deep*, NATIVE TIMES (Dec. 12, 2013), <http://www.nativetimes.com/index.php/life/commentary/9343-cobell-funds-delay-cuts-deep>.

128. Jay Daniels, *BIA Gets an 'F' for Handling of Cobell Settlement*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 12, 2013), <http://indiancountrytodaymedianetwork.com/2013/12/12/bia-gets-f-handling-cobell-settlement> (“Tribes need to take the BIA to task on these issues and demand that this payment be completed and that the Buy Back Program progress more quickly than it has so far. There’s only eight years left to spend the \$1.9 billion dollars plus all interest it has accrued in the past two years and all interest accruing before the balance is expended. That’s just my opinion, but these are things to think about and discuss. The non-acting promises need to stop.”).

129. Ruckman, *supra* note 127.

130. Travis Coleman, *Cobell Settlement Notifications Begin; Hundred of Thousands Expected to Benefit*, REZNET NEWS (July 3, 2011), <http://web.archive.org/web/20160604001221/http://www.reznetnews.org/article/cobell-settlement-notifications-begin-hundred-thousands-expected-benefit-0>.

131. Michael L. Connor, *Informed Decision-Making and Interior’s Land Buy-Back Program*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 25, 2015), <http://indiancountrytodaymedianetwork.com/2015/06/25/informed-decision-making-and-interiors-land-buy-back-program>.

132. Matt Volz, Associated Press, *Tribal Leaders Criticize Cobell Settlement’s Land Buyback Program*, MISSOULIAN (Missoula, Mont.) (Apr. 3, 2014), http://missoulian.com/news/state-and-regional/tribal-leaders-criticize-cobell-settlement-s-land-buyback-program/article_4cb8473e-bb89-11e3-b304-001a4bcf887a.html; see also Jay Daniels, *Are Second-Round Payments for Cobell Coming Soon?*, ROUNDHOUSE TALK (Sept. 15, 2014), <http://roundhousetalk.com/2014/09/15/are-second-round-payments-for-cobell-coming-soon/>.

133. U.S. DEP’T OF THE INTERIOR, STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS (2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf> [hereinafter 2014 STATUS REPORT].

acres.¹³⁴ The Cobell Buy-Back Program's benefits allowed many recipients to benefit from ownership, at long last.¹³⁵

While the DOI initially failed to satisfy its promises, the ability of indigenous communities to shine a spotlight on the DOI's disappointing action forced the department to reconsider and review the way the Cobell Buy-Back Program was being enforced.¹³⁶ As a result, the DOI addressed several of the larger criticisms of the program in the 2014 and 2015 status reports,¹³⁷ including greater involvement with tribal leaders and more involvement with the Office of the Special Trustee for American Indians (OST) to assist with estate planning for individual landowners.¹³⁸ The most promising evidence of the progress made by the DOI over the past three years is the number of tribes that have opted-in. This trend is particularly notable among tribes whose leaders expressed concern with the Cobell Buy-Back Program at its inception, but have since decided to participate.¹³⁹ In December 2014, the DOI expanded the Cobell Buy-Back Program, doubling the number of tribal government participants.¹⁴⁰ The DOI predicted that selling the additional land interests would raise \$60 million for tribal scholarships within the Cobell Education Scholarship Fund.¹⁴¹ As of October 1, 2015, the amount contributed so far has reached nearly \$30

134. *Land Buy-Back Hits Milestone with Over \$500M in Purchases*, INDIANZ.COM (June 26, 2015), <http://www.indianz.com/News/2015/017984.asp>; see also Connor, *supra* note 131.

135. Press Release, Indian Trust Settlement, Indian Country Response to Cobell Payments Overwhelmingly Positive (Dec. 28, 2012), http://cobellsettlement.com/press/IIM-Indian_Country_Response_to_Cobell_Payments_Overwhelmingly_Positive.pdf.

136. Andrea Olson, *Government Will Honor Land Buy-Back Program*, NBC MONTANA (Aug. 21, 2014), <http://www.nbcmontana.com/news/government-will-honor-land-buyback-program/27648232>.

137. 2014 STATUS REPORT, *supra* note 133.

138. *Land Buy-Back Program for Tribal Nations: Informed Decision Making*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/buybackprogram/landowners/informeddecisionmaking> (last visited Sept. 1, 2016) [hereinafter *Land Buy-Back: Informed Decision Making*].

139. See *Quapaw Tribe Tries to Opt Out of Cobell Trust Fund Settlement*, INDIANZ.COM (June 20, 2011), <http://www.indianz.com/News/2011002045.asp>. But see ICTMN Staff, INDIAN COUNTRY TODAY MEDIA NETWORK, *Quapaw Tribe Hails DOI Progress in American Indian Land Buyback Program* (May 18, 2014), <http://indiancountrytodaymedianetwork.com/2014/05/18/quapaw-tribe-hails-doi-progress-american-indian-land-buyback-program-154925>.

140. Friends Comm. on Nat'l Legislation, Native American Legislative Update: December 2014, at 2 (Dec. 8, 2014), http://abq.imym.org/cms/wp-content/uploads/2014/12/NativeAmericanLegislativeUpdate_December_2014.pdf (section titled, "Land Buy Back Program Expands").

141. *Land Buy-Back Program for Tribal Nations: Cobell Education Scholarship Fund*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/buybackprogram/landowners/scholarshipfund> (last visited Dec. 23, 2016).

million.¹⁴² “The amount contributed is based on a formula required under the terms of the *Cobell* settlement that sets aside funding contributions based on the value of the fractionated interests sold.”¹⁴³

Over the next two years, the DOI plans on implementing the Cobell Buy-Back Program in at least forty-two locations, which cover roughly eighty-three percent of Indian Country.¹⁴⁴ While the consolidation fund is not large enough to purchase all fractionated interests across the nation, the DOI appears optimistic that the number of fractionated tracts will be significantly reduced in the coming years.¹⁴⁵

D. Hope for Success

The Cobell Buy-Back Program, with all its drawbacks and criticism, has three main strengths for proponents to defend: the availability of funds, the relative simplicity of the program, and the increased involvement of indigenous leaders.

The most important difference between the Cobell Buy-Back Program and previous consolidation attempts is the utilization of federal funds to achieve the goals of consolidation.¹⁴⁶ While AIPRA was lauded for its potential to resolve the issue of fractionated ownership, it also had “the potential for being used by the United States as a means of reducing obligations and services to indigenous people, avoiding issues of liability for breach of trust responsibilities and reducing its costs and administrative time.”¹⁴⁷ AIPRA relied on individuals, attorneys, clinics, and other areas for supporting the sheer number of estate planning services needed.¹⁴⁸ Although it set out rules for the process, it failed to provide funds that

142. Press Release, U.S. Dep’t of the Interior, Interior Transfers an Additional \$10 Million to Cobell Education Scholarship Fund, Brings Total to Nearly \$30 Million (Oct. 1, 2015), <https://www.doi.gov/pressreleases/interior-transfers-additional-10-million-cobell-education-scholarship-fund-brings>.

143. *Id.*

144. Caroline Simson, *5 More Tribes Ink Deals for Land Buyback Program*, LAW360 (Sept. 16, 2015), <http://www.law360.com/articles/703383/5-more-tribes-ink-deals-for-land-buyback-program> (“The DOI says that there are 42 locations where land consolidation activities such as planning, outreach, mapping, mineral evaluations, appraisals or acquisitions are expected to take place through the middle of 2017, representing 83 percent of all outstanding fractional interests across Indian Country.”).

145. *Id.*

146. See Anthony J. Franken, *Dealing with the Whip End of Someone Else's Crazy: Individual-Based Approaches to Indian Land Fractionation*, 57 S.D. L. REV. 345, 365 (2012), for discussion of “negligible” federal funds spent on AIPRA.

147. Nash & Burke, *supra* note 39, at 123.

148. See Franken, *supra* note 146, at 362-67.

would support and help make the probate process actually succeed at reducing fractionation.

The relative simplicity of the Cobell Buy-Back Program's basic goals makes the consolidation process more feasible than previous attempts.¹⁴⁹ As with any government program, there are certainly details and red tape that may somewhat complicate execution of the goals. Unlike previous attempts, however, such as ILCA and AIPRA, the fundamental aspects of the Cobell Buy-Back Program itself are easily explained to landowners and lay people. Compare this to ILCA and AIPRA, both of which contained language and provisions that complicated successful execution.

The 2000 Act made major revisions to the Indian Land Consolidation Act, but it was so complex that the Department of the Interior ultimately conceded that the law was too complicated to administer. Indian tribes and individuals had other issues with the 2000 Act; foremost among the concerns was determining who was Indian, and thus, could hold land in trust. The definition would have forced landowners to choose between disinheriting their non-Indian children and taking family land out of trust so it could be left to them in fee, but subject to state taxation and possibly state regulation. As the Department of the Interior questioned the feasibility of implementing the 2000 Act's amendments pending further legislative developments, it agreed not to issue the formal certification required by the 2000 Act before the key provisions could take effect.¹⁵⁰

Similar complaints were made of AIPRA, which, as one critic put it, was "artfully crafted in a manner that . . . avoids the most fundamental federal fear—expenditure of federal monies to fix the federally created problem. . . . It can be of use to Indian tribes and individuals, but only if its provisions are understood, and a clear understanding is difficult to achieve by reading it from beginning to end."¹⁵¹

Of the criticisms of AIPRA, among the most cited is its complexity; at over forty pages long, the Act's sheer denseness makes it a difficult concept to educate and sell to the laymen who depend on it.¹⁵² The Cobell Settlement, though imperfect, is capable of succinct explanation, and is thus

149. See discussion *supra* Section III.A. See also Franken, *supra* note 146, at 359,

150. Nash & Burke, *supra* note 39, at 131.

151. *Id.* at 123.

152. See generally Lutt, *supra* note 80; Nash & Burke, *supra* note 39, at 123.

more capable of execution, without the added necessity of endless hours of manpower from estate planning attorneys.

Finally, the involvement of indigenous leaders in the Cobell Settlement execution is a strength of the Cobell Buy-Back Program that cannot be understated.¹⁵³ The historical reluctance of the U.S. government to allow indigenous people into the process of remedying fractionation is not only a symptom of a larger problem in the relationship between the parties, but also a direct roadblock to fixing any of the previous failed initiatives. In implementing acts such as the Dawes Act, IRA, ILCA, and the like, the proponents of the initiatives rarely, if ever, consulted with indigenous populations, and often actively ignored their interests.¹⁵⁴ Since executing the Cobell Settlement, the DOI and BIA have included and sought out the input of indigenous leaders and landowners in greater numbers than before.¹⁵⁵ In November, the DOI also announced plans for an initiative that would invite tribes to provide more input in the process,¹⁵⁶ such as a “listening session” to provide an opportunity for indigenous leaders to make their voices heard.¹⁵⁷

Contrast this to previous programs, which largely ignored concerns and often, acted explicitly against stated desires of indigenous people. This may be at least partially attributed to the climate of increasing social awareness over the past decade.¹⁵⁸

The role of technology in the modern era has influenced social justice and activism on a greater scale than in previous years.¹⁵⁹ Due to the creation of social media, a message can be widespread without the purchase of television or radio advertisements.¹⁶⁰ The ability for marginalized groups to finally express concerns over injustices on platforms that can reach far wider audiences than allowed in previous eras of history has allowed

153. *Class Action Website FAQs*, *supra* note 91.

154. *See generally* Transcript of Trust Land Consolidation Program Regional Tribal Consultation (Aug. 18, 2011), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/Tribal-Consultation-081811mmr.pdf>.

155. *Id.*

156. *See generally* U.S. DEP’T OF THE INTERIOR, 2015 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS (2015), https://www.doi.gov/sites/doi.gov/files/uploads/Buy-Back_Program_2015_Status_Report.pdf [hereinafter 2015 STATUS REPORT].

157. *DOI Schedules Listening Session for Cobell Land Buy-Back Program*, INDIANZ.COM (Dec. 8, 2015), <http://www.indianz.com/News/2015/019796.asp> [hereinafter *DOI Schedules Listening Session*].

158. *See* FUNDING EXCHANGE, *supra* note 9.

159. *Id.*

160. *Id.*

groups, including indigenous populations, to shed light on social justice issues and congregate in larger groups than previously possible.¹⁶¹ It is in no small part thanks to these advancements, that issues such as the historical plight of indigenous populations and unfair treatment from the U.S. government towards tribes, are finally receiving a spotlight and some attention.

Ultimately, 2015 saw more progress than many skeptics anticipated, as more tribes and individuals opted into the Cobell Buy-Back Program. Proponents of the program are able to boast a significant decrease in fractionated interests compared to previous attempts.¹⁶² The DOI's 2015 annual status report highlighted the positive outcomes so far, including: community water supply plants, increased scholarship funding, housing development, and cultural renewal and burial ground expansion.¹⁶³

IV. Other Approaches to Fractionated Interests

There are still several drawbacks to the Cobell Buy-Back Program as is, and a certain amount of skepticism is necessary. Any funds from the Settlement remaining after the implementation of the program in 2022 will be returned to the U.S. Treasury Department.¹⁶⁴ After already taking such a large cut in damages, the possibility of any remaining funds simply being returned to the U.S. Treasury is a less-than-satisfactory result.¹⁶⁵ This, along with the fact that landowners are unable to negotiate better prices for the sale of their land,¹⁶⁶ serves as another piece of ammunition for the members of the community who feel that the Cobell Buy-Back Program is merely another chance for the U.S. government to appear invested in repairing its

161. *Id.*

162. 2015 STATUS REPORT, *supra* note 156, at 8 (“As of September 2015, there were fewer than 3 million fractional interests across Program-eligible locations, a decrease of 9.7 percent from 2013. For locations with Buy-Back Program sales, the total fractional interests decreased approximately 20 percent from 2013 to 2015, with several locations in the Great Plains and Rocky Mountain Regions decreasing by approximately 35 percent.”).

163. *Id.*

164. *Land Buy-Back Program for Tribal Nations, Top Things to Know*, U.S. DEP'T OF THE INTERIOR, 1, 2016, <https://www.doi.gov/sites/doi.gov/files/uploads/Top%20Things%20to%20Know%20About%20the%20Program%202016.docx> (last visited Jan. 9, 2017).

165. Davidson, *supra* note 19, at 596-97 & n.13. The Cobell lawsuit initially alleged approximately \$10 billion in damages, but eventually settled for a significantly reduced amount of \$3.4 billion. *Id.*

166. *Land Buy-Back: Landowners*, *supra* note 97.

relationship with tribes, while still managing to only protect its own interests.¹⁶⁷

It is important to note here, that although much of this comment lumps indigenous groups together for the sake of simplicity, the best method of approaching estate planning is an individualized approach, because the different tribes vary widely, have unique traditions and culture, and are certainly not one homogenous group.¹⁶⁸ Historically, tribal approaches to land succession varied widely. Consequently, approaching land succession from a viewpoint of individual-based methods, which allows tribes to take matters into their own hands as opposed to working with policies set forth by the U.S. government, is a popular position among many.¹⁶⁹ Perhaps surprisingly, this viewpoint, when considered alongside the upcoming changes to the Cobell Buy-Back Program in 2016 and beyond, serves as a point in the program's favor. By including indigenous leaders in the decision making process, and allowing the tribes to play an active role in identifying eligible parcels of land, participating in the valuation process, and creating priority lists, the Cobell Buy-Back Program allows tribes to uniquely shape the results for its own members, in addition to the positive effect of providing tribes with tracts of land to put to any purpose it desires.

Some proponents of individual-based approaches to solving indigenous property issues claim that the United States should provide financial support to programs that seek to reduce fractionation by assisting individual landowners with estate planning methods.¹⁷⁰ "This [individualized] approach will reduce fractionation, engage indigenous landowners in decision-making processes, and give some hope to those individuals who feel overwhelmed by the complicated array of laws working against them and the interests of their families."¹⁷¹

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

167. See generally Davidson, *supra* note 19.

168. Stainbrook, *supra* note 25, at 1-2.

169. See generally Franken, *supra* note 146.

170. Franken, *supra* note 146, at 364-67.

171. *Id.* at 345.

flexibility to both probate and intratribal transactions, a more solid and sustainable foundation for the future of Indian Country can be built.¹⁷²

Allowing tribes to create their own probate codes under AIPRA allows them to retain autonomy and control over the succession process and exercise tribal sovereignty,¹⁷³ but it's only one of many steps necessary for a complete fix. The estate planning approaches help slow the fractionation process, but combining this with the Cobell Settlement's consolidation goals is necessary to reducing the problem on a measurable level. While this approach may work for some landowners, it fails to consolidate any land already in a state of fractionation.¹⁷⁴

The link between adequate estate planning and reduced fractionation cannot be ignored.¹⁷⁵ The Cobell Settlement, in its current state, deals primarily with the consolidation of land; a stronger approach would include improving upon estate planning initiatives. Additionally, landowners who choose not to sell the land and want to ensure that their heirs receive property must still follow the regulations set forth by AIPRA.¹⁷⁶ In recent years, law schools nationwide have started clinics or events to offer free estate planning services to indigenous people.¹⁷⁷ The Tribal Wills Project, at the University Of Denver School Of Law, sends law students to reservations upon the invitation of the tribes, in order to draft wills, burial instructions, and other important life-planning documents for tribal members as a response to the problem.¹⁷⁸ These programs, however, are likely stretched thin and underfunded.¹⁷⁹ The DOI also encourages landowners to speak to OST in order to prevent future fractionation through proper estate planning, but successful eradication of fractionated interests requires a much more proactive, ambitious approach to providing estate

172. Shoemaker, *supra* note 29, at 732.

173. Press Release, U.S. Dep't of the Interior, Washburn Approves Northern Cheyenne Probate Code; Tribe Set to Unlock Fractionated Land (Nov. 13, 2014), <http://www.bia.gov/cs/groups/public/documents/text/idc1-028487.pdf>.

174. *Id.*

175. *See supra* Part II.

176. Greg Guedel, *Native American Families Should Plan Ahead for Cobell Settlement Payments*, NATIVE AM. LEGAL UPDATE (Dec. 17, 2010), <http://www.nativelegalupdate.com/2010/12/articles/native-american-families-should-plan-ahead-for-cobell-settlement-payments/>.

177. *See* Miriam Knof, *SILC Celebrates Successful Indian Estate Planning Clinic*, UNIV. OF N.M. SCHOOL OF LAW (May 7, 2015), <http://lawschool.unm.edu/news/2015/05/silc.php>.

178. Jaramillo, *supra* note 78.

179. Franken, *supra* note 146, at 366-67.

planning services.¹⁸⁰ To the credit of OST, the department has been proactive in recent years by creating the new position of “Fiduciary Trust Officers,” who provide individual services directly to tribal beneficiaries, in order to uphold its commitment to improving management issues.¹⁸¹ This is yet another example of a recent change that can serve as evidence, albeit small, for the improving landscape of tribal relations with the U.S. government.

The overarching reason, however, that other approaches are less favorable than the one at hand is the simple fact that the Cobell Buy-Back Program is firmly established, and clearly here to stay.¹⁸² It is well underway, with nearly \$1.2 billion worth of lands purchased as of December 2015, and more landowners reaching sale agreements every month.¹⁸³ While perhaps not an ideal solution for everyone, and subject to valid criticism, the Cobell Buy-Back Program nearly guarantees that failing or refusing to participate will only result in more land and money forfeiture to the U.S. government.¹⁸⁴

The necessity of properly executing the sales of the lands over the next few years cannot be understated. Ensuring that as many eligible landowners as possible are aware of the costs and benefits of the Cobell Buy-Back Program, and are prepared to respond accordingly when an offer arrives, is an integral aspect of the Program’s success.¹⁸⁵ Eligible landowners have only a limited number of days to decide whether or not to sell, and then the opportunity is gone.¹⁸⁶ The forty-five-day limit creates another opportunity

180. See *Land Buy-Back: Informed Decision Making*, *supra* note 138 (“Landowners who do not receive an offer or choose not to sell their land may wish to speak with OST or BIA about planning to pass on their land in ways that minimize future fractionation. The OST has partnered with a number of tribal organizations, legal aid services, and law schools to help provide Indian trust beneficiaries with resources to assist with estate planning.”).

181. ICTMN Staff, *Anadarko Agency Fiduciary Trust Officer: Informing Tribes on Investments and Strategies*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 23, 2013), <http://indiancountrytodaymedianetwork.com/2013/09/23/anadarko-agency-fiduciary-trust-officer-in-forming-tribes-investments-and-strategies>.

182. See 2015 STATUS REPORT, *supra* note 156.

183. *DOI Schedules Listening Session*, *supra* note 157; see also 2015 STATUS REPORT, *supra* note 156.

184. Davidson, *supra* note 19, at 601-02.

185. See Jacob Wascaus, *Maximizing the Tribal Land Buy-Back Program: How Priority Lists Can Help Tribes Influence What’s Purchased*, COMMUNITY DIVIDEND (Fed. Reserve Bank of Minneapolis), July 2014, at 1, https://www.minneapolisfed.org/~media/files/pubs/cd/14-07/comm_div_july2014_web.pdf.

186. *Land Buy-Back: Interior Dep’t FAQs*, *supra* note 44 (response to question 106).

for the settlement funds to go back to the government,¹⁸⁷ rather than to the tribes, as any funds remaining after the Cobell Buy-Back Program ends will be returned to the government.¹⁸⁸ Utilizing AIPRA as an additional safeguard against future fractionation provides a two-prong attack to fractionation, and provides a viable option for skeptical landowners to sell property.

A better course of action may be to utilize the policies set forth by AIPRA¹⁸⁹ to reduce fractionation for the remaining percentage of indigenous landowners who do not participate in the Cobell Buy-Back Program, while engaging indigenous leaders and educating members of tribes in the land repurchasing process.

Instead of keeping the remaining funds, steps should be taken to utilize the entire \$1.9 billion to continue helping the tribes after the Cobell Buy-Back Program's end.¹⁹⁰ Additionally, the amount set aside to purchase and consolidate the lands will not be sufficient to cover purchases of all fractionated interests across Indian Country.¹⁹¹ Upon the conclusion of the Cobell Buy-Back Program in 2022, the problem of fractionation will persist, albeit on a hopefully smaller scale. It is still entirely possible, however, that the end result may include returning some of the funds to the U.S. government, if it is not actively prevented. By apportioning the

187. Once offers to purchase land have been sent out, landowners have a forty-five day window to respond and accept. If the forty-five-day deadline to respond is missed, landowners may miss their opportunity to sell back the land, and although they can submit a response late, it may not be accepted past the deadline. See *Land Buy-Back: Interior Dep't FAQs*, *supra* note 44 (response to question 112).

188. See *Land Buy-Back Program for Tribal Nations, Top Things to Know*, *supra* note 164, at 1.

189. Nash & Burke, *supra* note 39, at 122-23 ("In many respects, AIPRA represents a positive step toward achieving these goals. It introduces new tools, such as land consolidation agreements by heirs at probate and authorization for tribal probate codes, that can govern the intestate descent of interests in trust land. Some provisions are antithetical to AIPRA's stated purpose, such as intestate fractionation of larger land interests. AIPRA encourages Indian people to create wills, if for no other reason than to avoid its punitive effects, such as forced sales at probate and primogenitor rules for smaller land interests.").

190. Rob Capriccioso, *Members of Congress Want More Native Control of Cobell Buyback Program*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 4, 2014), <http://indiancountrytodaymedianetwork.com/2014/06/04/congress-members-question-interiors-control-cobell-buyback-program-155145> ("Congress members, especially Young, have also asked Interior to use more common sense when it comes to the buyback money, such as by placing it in an interest-bearing account so that there would be more money for Indian country in the long run.").

191. 2015 STATUS REPORT, *supra* note 156, at 12.

remaining money toward providing essential estate-planning services to landowners who did not sell, the DOI can exhibit its dedication to reducing fractionation and serving the best interests of the tribes. The estate-planning approach is less paternalistic and allows indigenous landowners to be brought back into the process, rather than cut out. One of the worst outcomes would be the return of a significant amount of funds to the U.S. Treasury after the Cobell Buy-Back Program's end.¹⁹²

Whether due to the program's end, spending the entire fund, inability to convince landowners to sell, failure to locate "whereabouts unknown" class members, or a myriad of other complications, one thing is certain: the Cobell Buy-Back Program, independent of other action from the government, will not definitively end fractionation.¹⁹³ One way that the U.S. government can signify its commitment to finding a solution to this injustice is the implementation of other potential resolutions to the problem.¹⁹⁴

V. Future Fixes

One suggested, although unlikely, approach to addressing indigenous land concerns is to remove the U.S. government from its role as a trustee entirely, allowing indigenous landowners and tribes to finally obtain actual independence and autonomy over land.¹⁹⁵ This, however, is unlikely to occur for a multitude of reasons, not the least of which is the historical anecdotal evidence that indicates the U.S. government is unlikely to relinquish its control over indigenous land.¹⁹⁶ Because this is unlikely to transpire, it is imperative for the U.S. government and indigenous populations to work together to reach the best possible solution and improve relations between the two.

192. Davidson, *supra* note 19, at 598.

193. See *Land Buy-Back: Interior Dep't FAQs*, *supra* note 44.

194. See generally Franken, *supra* note 146; see also Lure Sutton & David H Getches, *Indigenous Planning and Resource Management*, in TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT 303 (Richmond L. Clow & Imre Sutton eds., 2001); Davidson, *supra* note 19, at 594.

195. Shoemaker, *supra* note 29, at 763 ("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.").

196. See *id.* at 735.

Some opponents of the Cobell Buy-Back Program have opined that other forms of legislation, not yet tried by Congress, may be a better and more viable solution to fractionation. Proposals include a theoretical “Dormant Tribal Fractional Interests Act,” which draws its basis from the established principles of dormant mineral acts.¹⁹⁷ The dormant mineral acts allow unused mineral interests that have laid dormant for a certain amount of time, to revert in ownership back to the primary interest holder from whom the mineral interest owner was carved out.¹⁹⁸ A similar approach for unused physical land interests is appealing for the fact that it would extinguish one of the problems of the current program—the fact that some owners of the nominal interests simply cannot be located to purchase from.¹⁹⁹ This approach, however, is also unlikely to be a viable solution, not only because there are some differences in treatment of surface ownership of land versus mineral ownership of land, but also because it is possible that an act such as this may be considered a type of unconstitutional taking of property,²⁰⁰ much like the courts determined was the case for the ill-fated escheat provisions of ILCA.

The United States has a long history of misguided and misapplied programs and acts that purported to rectify the abuses of generations of indigenous people. Each of the actions taken by the government in the name of “helping” indigenous people manage land use and ownership, from the Dawes Act through IRA, to AIPRA, and beyond, have chipped away at the rights of tribes in some form.²⁰¹ Whether facilitating assimilation through a deceptively generous-sounding “allotment” program,²⁰² extending the trust land restrictions on alienation through IRA,²⁰³ or creating a dense, inefficiently-funded, estate planning program under AIPRA,²⁰⁴ the consistent failure of the U.S. government to effectively and fully attack the land use and ownership problems among the indigenous population seems to be less a problem of good intentions with poor implementation, but more

197. Davidson, *supra* note 19, at 603-10.

198. *Id.*

199. *Land Buy-Back: Interior Dep’t FAQs*, *supra* note 44 (responses to questions 1 & 20).

200. *See* Davidson, *supra* note 19, at 588.

201. *See generally* Davidson, *supra* note 19.

202. Guzman, *supra* note 3, at 605.

203. Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 413-14 (2015) [hereinafter Shoemaker, *No Sticks*] (“The IRA also extended the trust status of remaining allotments and its accompanying restrictions on alienation and bureaucratic oversight indefinitely (a status that remains today).”).

204. Lutt, *supra* note 80, at 106-07.

a concerted effort on the part of governmental agencies to further the interests of the United States at the cost of the indigenous population.²⁰⁵ Addressing the issues raised by indigenous leaders and reacting accordingly is imperative to beginning the restoration of confidence in the DOI, and a half-hearted plan of action that may ultimately end up benefitting the U.S. government at the expense of indigenous tribes will simply not be sufficient to make this consolidation program more successful than previous ones.²⁰⁶

Many of the concerns outlined in this comment can be rectified, but doing so would be at the cost of the interests of the government; replacing its own leadership with tribal-backed leadership, fixing the land appraisal process, establishing a plan for the remaining funds in order to prevent returning unspent money to the U.S. Treasury Department, and most importantly, planning consolidation and estate planning initiatives for the post-Cobell years. All could enable the Cobell Buy-Back Program to flourish, restore a semblance of sovereignty, and display genuine attentiveness to indigenous rights and needs.²⁰⁷

VI. Conclusion

*It seems strange that we have to buy back our own land. We did not create this problem. Our ancestors signed the Treaty of 1855 in good faith, convinced that “exclusive use” meant the land was ours forever.*²⁰⁸

While the Cobell Buy-Back Program’s rocky beginning made many critics wary, and rightfully so, the effort put forth by indigenous leaders in placing responsibility on the BIA and the DOI to live up to their promises has prompted some significant changes to the Cobell Buy-Back Program, and led many tribes to reconsider their positions in 2014 and 2015. The status report addressed many of the concerns specifically raised by tribal leaders, and tangible results have made the Cobell Buy-Back Program arguably more successful than past attempts at consolidating fractionated interests in a fair and equitable manner. It is by no means a perfect solution, and may yet disappoint in the remaining seven years, but it is currently the

205. Shoemaker, *No Sticks*, *supra* note 203, at 407-14.

206. Press Release, U.S. Dep’t of the Interior, Speech: Salazar Addresses the White House Tribal Nations Conference (Dec. 5, 2012), <https://www.doi.gov/news/pressreleases/salazar-address-the-white-house-tribal-nations-conference>.

207. See Capriccioso, *supra* note 190.

208. Chuck Sams, *We’re Prepared to Buy Back Our Own Land*, HIGH COUNTRY NEWS (July 21, 2014), <http://www.hcn.org/issues/46.12/were-prepared-to-buy-back-our-own-land>.

best option available. The DOI and indigenous tribes must work together to ensure the Cobell Buy-Back Program's success, and the key to that will be placing more tribal leaders in important roles during this process, creating strong alternatives and educating eligible landowners on their options, implementing funding to create better probate planning services, and addressing the issues that will follow in the post-Cobell years. This comment offers some potential alternatives to the Cobell Buy-Back Program, as well as options to better utilize the funds of the Cobell Settlement. The mistreatment of indigenous people in the United States over generations has manifested in a justified lack of confidence in U.S. leadership among the tribes, and this badly damaged relationship is not one that will heal easily. Any real beneficial solution will require much more than some promises and a relatively measly \$3.4 billion settlement. To begin the healing process, the DOI must finally put its own interests second and create a program that does not result in another series of broken promises and dark legacies. While the current program offers the best solution so far, addressing the remaining problems and admitting responsibility for past mistakes could bring the Program back from a place of skepticism, and prevent the Cobell Buy-Back Program from becoming yet another failed program, much like its misguided predecessors.