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COMMENTS

THIS LAND IS YOUR LAND, THIS LAND IS MY LAND? WHY THE *COBELL* SETTLEMENT WILL NOT RESOLVE INDIAN LAND FRACTIONATION

*Jered T. Davidson**

I. Introduction

Land ownership is generally regarded as the pinnacle of success and stability in regard to financial security. It has provided class structure, facilitated the development of countries, and furthered the transfer of wealth across generations. The first peoples to inhabit the United States, however, maintained a very different view of property. Massasoit said,

What is this you call property? It cannot be the earth, for the land is our mother, nourishing all her children, beasts, birds, fish and all men. The woods, the streams, everything on it belongs to everybody and is for the use of all. How can one man say it belongs only to him?¹

This communal view of property is one of tradition in Native American culture,² but the Indians nonetheless hold “private” property as well.³

* Second-year student, University of Oklahoma College of Law. Special thanks and sincere gratitude to Professor Katheleen Guzman for encouragement, advice, and critique while developing this comment, and for propelling me to reach beyond my boundaries. Much appreciation and accolades to Professor Owen Anderson for encouraging me to create novel solutions and to apply my abilities to furthering the legal community. Special recognition should also be paid to my family, without whom I would not be in the position I am today.

1. *Native American Quotes About Land Ownership*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/education/curriculum_connections/NA_Quotes.asp (last visited Apr. 25, 2011).

2. See Mary Lynn Murphy, Note, *Assessing NAGPRA: An Analysis of its Success from a Historical Perspective*, 25 SETON HALL LEGIS. J. 499, 502 (2001) (“[E]arly American property law, which emphasized private property ownership, ignored Native American concepts of communal property ownership.”).

3. Terry L. Anderson, *Property Rights Among Native Americans*, FREEMAN, Feb. 1997, available at <http://www.thefreemanonline.org/featured/property-rights-among-native-americans/> (“While some ownership was completely or almost completely communal, other ownership was more like today’s fee simple.”); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1599 (2001) (“Tribal property

Although the taking of individuals' private property for personal gain is generally regarded as a crime, the federal government has been doing so for over two hundred years⁴ through the takings clause of the Fifth Amendment⁵ and its subsequent jurisprudence. Native Americans have suffered similar injustices with continuing acquiescence by the Supreme Court.⁶

Most citizens would be outraged by the taking of land from private citizens, but "the federal government has enacted legislation and policies that have consistently taken both tribally held, and even individually held, land away from Native Americans" through removal, allotment, and escheat.⁷ Once considered a great program for assimilation, the "trust" theory of Indian

rights have varied across time, geography, cultures, and resources. Agricultural cultures have had the most extensive private property systems."); *see also* Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 614-15 (2000) ("To argue, however, that the ILCA effected no taking because no private property existed and, therefore, no one owned it works in only the most sterile sense. Legal theory divorces the term 'property' from the item itself to instead describe relative rights vis-a-vis that item. 'Property' thus means things one can do *with* Blackacre (entitlements) including its use, possession and consumption, as well as enjoying its fruits, the ability to exclude others from its use, and the ability to transfer it. Although ownership suggests the assemblage of all such rights in one person who then totes the full 'bundle of sticks,' one may properly speak of 'owning' a lone entitlement or stick, such as an option, right of first refusal, easement, restrictive covenant, or developmental right. Legally, the *right itself* is the property. Thus, there *is* property at stake superior, and perhaps even anterior, to ownership of Blackacre *per se*: the right to transfer it, in whole or in part, during life or at death. Abolishing rights of descent and devise therefore abolishes property, however conceptual that might seem. Whether that abolition constitutes a taking is a different inquiry.").

4. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-36 (1810) ("It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (stating that the restrictions in the Bill of Rights, specifically the takings clause of the Fifth Amendment, are limits on the federal government and not the states); *Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding the takings clause of the Fifth Amendment incorporated to the states through the due process clause of the Fourteenth Amendment).

5. U.S. CONST. amend. V.

6. 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, 401 (2005-2006) ("Native Americans have long known the sting of injustice in having their property rights stripped away by the federal government with the approving sanction of the Supreme Court.").

7. *Id.* at 402.

protection soon proved to be economic disaster.⁸ The assimilationist policies essentially stripped Native Americans of the right to alienate their land, creating a massive web of fractionation that has now rendered the allotted lands virtually worthless.⁹

In 1996, Eloise Cobell filed suit on behalf of over three hundred thousand Individual Indian Money (IIM) account holders to provide a proper accounting for all of the monies held in trust for individual Indians by the federal government.¹⁰ Some prior and subsequent policies of the federal government attempted to resolve the accounting issues and to achieve the reorganization of the fractionated lands, hoping to restore their value to the landholders.¹¹

The *Cobell* settlement highlights that problems with fractionation are still very much alive. A lump-sum compensation scheme is unworkable. To address the issues raised in the *Cobell* litigation, as well as to prevent further fractionation, Indian tribes must take a stance for fulfillment of trust responsibilities and more power in governance. A single, lump-sum payment is unworkable because truly compensating the Indians for their losses would essentially bankrupt the United States.¹² The Indian tribes and federal government must be willing to adopt new legislation that seeks to resolve the land tenure problem, or to use other essential government powers such as eminent domain to correct land fractionation, restoring economic value to the

8. Guzman, *supra* note 3, at 654 (“Quite apart from Congress’s role in creating fractionation is its alleged role in perpetuating the economic hardships plaguing allotments and other trust property.”).

9. *Id.* at 598 (“Fractionation [] renders allotment development or other economically productive use monumentally elusive, and propels investors into a ‘Kafkaesque quagmire’ of negotiation and statutory and regulatory compliance.”) (citation omitted).

10. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) (holding that the Secretary of the Interior had a duty to render an accurate accounting of all funds held in IIM trust and to create written plans for record retention and staffing, and that delay in discharging such duties constituted breach of trust).

11. See, e.g., Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)); Indian Land Consolidation Act, Pub. L. No. 97-458, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §§ 2201-2210 (2006)); American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. §§ 4001-4061 (2006)); American Indian Probate Reform Act, Pub. L. No. 108-374, 118 Stat. 1773 (2004).

12. According to the Department of the Interior, the federal government currently maintains fifty-six million acres of trust land. Press Release, Office of the Sec’y, U.S. Dep’t of the Interior, Secretary Salazar, Attorney General Holder Announce Settlement of Cobell Lawsuit on Indian Trust Management (Dec. 8, 2009) available at http://www.doi.gov/ost/cobell/FINAL_12-08-09_Cobell_release_as_revised_12-7PM_FINAL.pdf.

fractionated lands. These solutions are not likely to grant full compensation to all fractional interest holders, but they nonetheless offer more than the alternatives undertaken thus far.

This comment analyzes the potential impact of the *Cobell v. Salazar* Class Action Settlement Agreement of 2009¹³ on the issue of fractionation of Indian lands. To prevent further fractionation of land and allow the merger of fractionated interests, this comment proposes alternative measures that the federal government should implement to enable greater control of property currently held in IIM accounts. Part II provides a brief history of early Indian land policy, from the discovery doctrine to allotment. Part III introduces the problem of fractionation, noting the continuing struggles encountered by IIM holders and the federal government. Part IV discusses the complex *Cobell* framework, including the goals of the litigation, the importance of a historical accounting, and the resultant agreed-upon settlement conditions. Part V proposes a series of approaches to properly combat the land fractionation problem, offering ideas to greater enhance tribal and individual control of allotted lands. It analyzes the advantages and disadvantages of each, and concludes that a collaborative approach and active participation by the federal government, Indian tribes, and tribal members is needed to facilitate the end to one of America's most blatantly inadequate policies.

II. A Trusting Relationship?

In 1823, the United States Supreme Court began laying the foundation for Indian land policy. It was in that year that the Court issued its opinion in *Johnson v. M'Intosh*.¹⁴ The opinion asserted the United States' control of Indian lands by virtue of Great Britain's discovery, vesting exclusive title to those lands in the federal government, limited only by the Indians' right of occupancy.¹⁵ Yet, the Court further held that those rights could be extinguished by the federal government by either purchase or conquest.¹⁶ This decision "constructed the current foundation of federal Indian land

13. See INDIAN TRUST SETTLEMENT, <http://cobellsettlement.com> (last visited Apr. 25, 2011) ("On December 21, 2010, The United States District Court for the District of Columbia granted preliminary approval to the [*Cobell v. Salazar* Class Action] Settlement. On December 8, 2010, President Obama signed legislation approving the Settlement and authorizing \$3.4 billion in funds.").

14. 21 U.S. (8 Wheat.) 543 (1823).

15. *Id.* at 584-85.

16. *Id.* at 587.

policy by swiftly sweeping Indian land ‘ownership’ into the oddly-hybrid form it retains today: tribal use at federal sufferance.”¹⁷

“Although Indian removal is generally associated with the 1830 act of Congress, the process was already beginning in the late 1700s” when Indians were being pushed from lands along the East Coast.¹⁸ “Under the provisions of the [Indian Removal Act of 1830], the Choctaws, the Chickasaws, Cherokees, Creeks, and ultimately the Seminoles . . . moved to Indian Territory (what is now the state of Oklahoma).”¹⁹ The following year, the trust relationship first appeared with the pronouncement in *Cherokee Nation v. Georgia*²⁰ that tribes are “domestic dependent nation[s]” with a relationship to the federal government that resembles a “ward to his guardian.”²¹ Less than one year later, in *Worcester v. Georgia*,²² the Court reaffirmed the Cherokee tribe’s right to self-governance by preventing Georgia from exercising its laws within the borders of the Cherokee Nation.²³ Yet, because of the treaties between the Nation and the federal government, the Nation was to remain “under the protection of the United States.”²⁴

Perhaps the greatest protection recognized under the Cherokee cases is the fiduciary duty owed to Native Americans regarding land ownership, in which the “Indians held their land and property as beneficiaries, subject to the control of the United States acting as trustee.”²⁵ This protection of land persevered until the allotment era occasioned a temporary interlude.

17. Guzman, *supra* note 3, at 602-03.

18. Clara Sue Kidwell, *The Effects of Removal on American Indian Tribes*, NAT’L HUMAN. CENTER, <http://nationalhumanitiescenter.org/tserve/nattrans/ntecoindian/essays/indianremovalc.htm> (last visited Apr. 25, 2011).

19. *Id.*

20. 30 U.S. (5 Pet.) 1 (1831).

21. *Id.* at 17.

22. 31 U.S. (6 Pet.) 515 (1832).

23. *Id.* at 561 (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter.”).

24. *Id.* at 561-62.

25. McCulley, *supra* note 6, at 404.

Allotment began in 1887 with the passage of the General Allotment Act, also known as the Dawes Act, bearing the name of its author.²⁶ The Act authorized the President to grant allotments,²⁷ which were typically one-hundred-and-sixty-acre parcels of Indian reservation land, to the individual Indians.²⁸ When all Indians had received an allotted parcel, “the remaining surplus lands were . . . opened to [white] settlement.”²⁹ The Dawes Act “privatized reservations by removing the land from tribal ownership and control,” and then “surveyed, sectioned, and parceled land to individual tribal members in trust.”³⁰ While federal Indian policy was initially based on “the separation of tribes and citizens,”³¹ in the 1880s, the idea of peacekeeping through separation gave way to the ultimate goal of assimilation, where Native peoples were to become agrarian, Christian, and citizens.³² The allotment policy was premised on the idea that “[t]he primary agent of civilization and citizenship was to be private land ownership.”³³ With these elements in place, the Indians could be purged of their cultural inhibitions, ultimately leading to “legal cultural genocide.”³⁴

The Dawes Act further facilitated acculturation by allowing “the federal government . . . to retain legal title and transfer[] mere beneficial or equitable title to each allottee, who was to receive a standard fee patent after 25 years.

26. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (2006)); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 & n.32 (1995).

27. See Royster, *supra* note 26, at 10 n.34 (“The exact size of allotments varied over time. As originally enacted, the General Allotment Act varied the size of the allotment by the status of the individual. Each head of family received 160 acres; single adults received 80 acres; and orphans and other single persons received even less.”).

28. McCulley, *supra* note 6, at 407.

29. Royster, *supra* note 26, at 9 & n.33.

30. Guzman, *supra* note 3, at 604.

31. Royster, *supra* note 26, at 7.

32. *Id.* at 9 (“[A]dvocates of the policy believed that individual ownership of property would turn the Indians from a savage, primitive, tribal way of life to a settled, agrarian, and civilized one.”); Guzman, *supra* note 3, at 597 (“In 1887, Congress passed the General Allotment Act to privatize Indian reservations and advance the assimilationist sentiment of the day. The Act divested land from tribes to their members, each of whom received a tract of land on a wing and a prayer: become an autonomous Christian agrarian.”).

33. Royster, *supra* note 26, at 9.

34. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 721 (1986).

During the trust period, all conveyances . . . were prohibited” absent the express “approval of the Secretary of the Interior.”³⁵ This complete restraint on alienation deprived Indians of freely transferring their interests or making their land economically productive,³⁶ rendering them in the classification of the “landed poor.”³⁷ But the problem did not end there. The Dawes Act also prevented allottees from transferring their allotments by will at death, leaving distribution up to state intestacy law, which divided small parcels among multiple interest holders, fractionating the interests into unusable parcels.³⁸

III. The Fractionation Problem and the Failure of Redress

A. The Evolution of Fractionation

The initial problem with the Dawes Act is that it required the federal government to hold land in trust, denying alienability and preventing individual Indians from controlling their lands.³⁹ After the expiration of the trust period of twenty-five years, however, the individual Indian would receive a patent⁴⁰ in fee,⁴¹ free from any other holdings and completely alienable.⁴² “The twenty-five year trust period [soon] came under attack” from supporters of assimilation, who rallied Congress to pass the Burke Act in 1906,⁴³ authorizing the Secretary of the Interior to issue early patents.⁴⁴ The passage of the Burke Act resulted in a huge influx of often premature

35. *Id.*

36. McCulley, *supra* note 6, at 405.

37. BLACK’S LAW DICTIONARY 957 (Bryan A. Garner ed., 9th ed. 2009) (defining land-poor as one “owning a substantial amount of unprofitable or encumbered land, but lacking the money to improve or maintain the land or to pay the charges due on it”).

38. Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 738.

39. *Id.*

40. BLACK’S LAW DICTIONARY, *supra* note 37, at 1234 (defining patent as a “governmental grant of right, privilege, or authority”).

41. *Id.* at 690 (defining a fee as “a heritable interest in land”).

42. 25 U.S.C. § 348 (2006).

43. Royster, *supra* note 26, at 10.

44. Burke Act of 1906, ch. 2348, 34 Stat. 182 (codified as amended at 25 U.S.C. § 349 (2006)) (authorizing the Secretary of the Interior, in his discretion, to issue a patent in fee simple to an allottee if they are deemed “competent and capable of managing his or her affairs,” and the result of which removed “all restrictions as to sale, incumbrance, or taxation of said land”).

patent grants, which came from the adoption of “competency commissions” that would roam Indian Country looking to issue early patents.⁴⁵

Between the “expiration of the trusts and premature patents[,] thousands of patents in fee were issued.”⁴⁶ These lands, once patented, could be alienated and encumbered, and Indian owners fell subject to fraudulent sales and repossessions for failure to pay liens.⁴⁷ Before the expiration of the allotment era, nearly twenty-seven million acres had fallen out of Indian hands, and another sixty million acres were lost through sales of “surplus” lands to non-Indians.⁴⁸ In the end, “[u]nless its covert purpose was to force precipitous declines in Indian-held acreage, allotment failed.”⁴⁹

But the loss of land was only the beginning. Those that died within the twenty-five-year trust period were not allowed to devise their property or distribute their allotments according to their personal wishes.⁵⁰ “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. . . . [which] practically mandated the start of fractionation.”⁵¹

The complete and utter failure of the allotment policy facilitated the continued fractionation problems of today. Interests have become so small that it is virtually impossible for any one of the landholders to turn it into something economically valuable.⁵² For example, consider the famous case of Tract 1305 of the Sisseton-Wahpeton Sioux tribe referenced in *Hodel v. Irving*:

Tract 1305 [of the Sisseton-Wahpeton Lake Traverse reservation] is 40 acres and produces \$1,080 dollars 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

45. Royster, *supra* note 26, at 11-12.

46. *Id.* at 12.

47. *Id.*

48. *Id.* at 13.

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

50. Shoemaker, *supra* note 38, at 738.

51. *Id.*

52. McCulley, *supra* note 6, at 408 (“The miserable failure of the allotment process, set into motion by the Dawes Act, created this large problem of fractionation, where increasingly multiple co-owners share the already small parcels of land to the extent that it marginalizes their interests to the point of nearly negating any feasible economic or practical use of the land.”).

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.⁵³

“In 2003, this same tract produced \$2,000 in income annually and was valued at \$22,000.”⁵⁴ The number of owners has increased to 505 and “the smallest heir would now be entitled to \$.00001824,” while the administrative costs per year ballooned to \$42,800.⁵⁵ Even a simpler case would show the inefficiencies of allotment and the extreme fractionation of land that has occurred. Today, “many allotments exceed several hundred owners,” with common denominators reaching the trillions.⁵⁶

The fundamental problem is that now these “allotments may have tens or hundreds of owners, and many of the owners are so distantly related that they do not know each other, live in distant states, and are members of different tribes.”⁵⁷ The land has become economically worthless. The fractionalized interest holders have basically become this generation’s “landed poor” because they are unable to acquire “credit, reliable returns on investment and improvements, and the potential for wealth accumulation,” while continuously being “constructive[ly] dispossess[ed] despite maintenance of record title.”⁵⁸ Moreover, obtaining unanimous agreement for sale or leasing is virtually impossible. If the owners do not know each other – much less know how many other holders there are – they cannot seek to turn the land into an economically productive parcel.⁵⁹

53. Guzman, *supra* note 3, at 610 (quoting *Hodel v. Irving*, 481 U.S. 704, 713 (1987)) (alteration in original).

54. OFFICE OF THE SPECIAL TRUSTEE, U.S. DEP’T OF THE INTERIOR, RESTORING TRUST: THE REFORMATION OF INDIAN TRUST MANAGEMENT 5 (2007), [hereinafter RESTORING TRUST], available at http://www.doi.gov/ost/congressional/restoring_trust.pdf.

55. *Id.*

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

57. John C. Sledd, Events Leading to the American Indian Probate Reform Act of 2004, at 3 (Apr. 12, 2007) (Montana State University Symposium), available at <http://www.montana.edu/indianland/symposium/pdf/eventsleadingtoAIPRA.pdf>.

58. Shoemaker, *supra* note 38, at 749.

59. See Guzman, *supra* note 3, at 607-08 (“Unlike the routine cotenancy where any concurrent owner may lease, sell, or mortgage a fractional interest without procuring approval from the other owners, leasing an allotment ordinarily requires *unanimous* consent by *all*

One way to attempt to make economic use of fractionated land is to seek federal approval for leases, but this practice is limited by requiring approval of a pre-designated number of owners.⁶⁰ The reality is that the consequences of one failed policy continue to haunt allottees and the federal government alike. We remain in a state where fractionated interests continue to grow at an unprecedented pace.

B. Attempted Salvation from Fractionation

Problems attendant to allotment began appearing almost immediately after the passage of the Dawes Act.⁶¹ Neither the assimilationists nor the tribes and tribal members were happy with the policies or the amount of corruption emerging within the system.⁶²

The 1920s saw a drastic change in federal policy regarding allotments. The “forced-fee and other premature patents were officially abandoned,” and, by

interest holders. This arrangement creates enormous difficulties where lost or simply recalcitrant cotenants exist.”).

60. 25 U.S.C. § 2218 (a), (b)(1) (2006) (“Notwithstanding any other provision of law, the Secretary may approve any lease or agreement that affects individually owned allotted land or any other land held in trust or restricted status by the Secretary on behalf of an Indian, if – (A) the owners of not less than the applicable percentage (determined under subsection (b) of this section) of the undivided interest in the allotted land that is covered by the lease or agreement consent in writing to the lease or agreement; and (B) the Secretary determines that approving the lease or agreement is in the best interest of the owners of the undivided interest in the allotted land. . . . The applicable percentage referred to in subsection (a)(1) of this section shall be determined as follows: (A) If there are 5 or fewer owners of the undivided interest in the allotted land, the applicable percentage shall be 90 percent. (B) If there are more than 5 such owners, but fewer than 11 such owners, the applicable percentage shall be 80 percent. (C) If there are more than 10 such owners, but fewer than 20 such owners, the applicable percentage shall be 60 percent. (D) If there are 20 or more such owners, the applicable percentage shall be a majority of the interests in the allotted land.”).

61. See INTERTRIBAL MONITORING ASS’N ON INDIAN TRUST FUNDS, REPORT ON DISCUSSIONS WITH THE INDIAN TRIBES AND INDIVIDUALS ON THE CONSOLIDATION OF FRACTIONATED OWNERSHIP INTERESTS IN ALLOTTED INDIAN LANDS & RECOMMENDATIONS FOR ADDRESSING FRACTIONATION 7 (2009) available at <http://www.itmatrustfunds.org/documents/Fractionated%20Land%20Initiative/FY09/09January/2009Jan,%20ITMA%20Fractionation%20Report%20&%20Recommendations.pdf>.

62. See Royster, *supra* note 26, at 16 (“The destructive effects of the allotment policy documented in the Meriam Report — effects on the economic, social, and physical well-being of the tribes - generated sympathy and popular support for a change in the federal approach.”).

the 1930s, the issuance of patents was down more than fifty percent.⁶³ Land loss, however, was still ravaging Indian Country.⁶⁴

Soon thereafter, the Department of the Interior (DOI) began to look for ways to shore up the Indian land problem. The ultimate result was the 1928 publishing of the Meriam Report, a nine-hundred-page document recounting the plight of Native Americans, giving great detail on the effects of fractionation.⁶⁵ The report, which was independent from the government, examined the “economic, social, cultural, and physical well-being of the tribes.”⁶⁶ While the Meriam Report is generally considered the catalyst for shifting sentiment in regard to Indian land policy, the 1933 appointment of John Collier as Secretary of the Interior was equally momentous.

1. *The Indian Reorganization Act of 1934*

“Within four months of taking office, Collier effectively put an end to allotment and the practice of issuing fee patents by directing the superintendents not to submit either certificates of competency or fee patents.”⁶⁷ Collier’s work was reaffirmed the following year when Congress enacted the Indian Reorganization Act of 1934 (IRA).⁶⁸ The IRA provided that no lands “shall be allotted in severalty to any Indian,”⁶⁹ extended the trust

63. *Id.* at 15.

64. *See id.* at 13 (“Despite the devastating effect of fee patents, the 27 million patented acres lost to non-Indians represented only about one-third of the tribal losses during the allotment era. More than twice as much land - some 60 million acres - was lost under the surplus lands program.”).

65. INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928).

66. Royster, *supra* note 26, at 16.

67. *Id.*

68. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-495 (2006)).

69. 25 U.S.C. § 461. Interestingly, the Act did nothing to address the allotments of the previous Dawes time period, but merely prevented the future allotment of lands that were held on behalf of Indians. Guzman, *supra* note 3, at 606 (“While remedial, the Indian Reorganization Act did little to halt the steady spread of land base erosion, as it neither reversed existing allotments by returning them to the tribe nor invalidated completed transactions to Anglo-American takers. It additionally proved ineffectual against the fractionation of existing allotments.”).

period for the original allotments,⁷⁰ “authorized the Secretary of the Interior to restore any remaining surplus lands to tribal ownership,”⁷¹ prohibited the devising of lands to nonmembers who were not heirs of the owner,⁷² and “authorized the Secretary to take new lands into trust and to add those lands to reservations.”⁷³ Interestingly, only a small fraction of lands were restored through the “buy-back” process.⁷⁴

The IRA also granted the authority for tribes to create their own constitutions,⁷⁵ under which a significant number of tribes still operate today.⁷⁶ To be clear, the IRA did have some small benefits. It reduced the amount and pace at which trust land was being lost.⁷⁷ But because of the opportunity for holders to voluntarily request a fee conversion, lands continued to deplete.⁷⁸ While some areas continue to experience net losses in lands, it is now estimated, from the low of forty-nine million acres held in trust when the IRA went into effect, that the policies have allowed the trust holdings to increase to approximately fifty-four million acres today.⁷⁹ Noteworthy as these accomplishments are, the failure to address the original allotment fractionation problem condemned allotment holders to a state of petrified surveillance as the trust land base diminished fraction by fraction.

70. Royster, *supra* note 26, at 17. The Act designated that lands shall be held in trust “until otherwise directed by Congress.” This remains one great aspect of Indian land policy whereby Congress has adopted the trust rule for perpetuity. 25 U.S.C. § 462; *see also* 25 U.S.C. §§ 2201-2221 (2006); 25 U.S.C. §§ 4001-4061 (2006). Trustees can now petition for removal of the trust classification and receive a patent. *See* 25 C.F.R. §§ 152.4-.5 (2011).

71. Royster, *supra* note 26, at 17; 25 U.S.C. § 463.

72. 25 U.S.C. § 464; *see also* 25 U.S.C. § 2201.

73. Royster, *supra* note 26, at 17; 25 U.S.C. § 465. This “buy-back” program is similar to the trust settlement that is being proposed *infra* Part V.

74. Royster, *supra* note 26, at 17 & n.90.

75. 25 U.S.C. § 476; McCulley, *supra* note 6, at 409 (“The IRA encouraged the promotion of tribal self-government by supporting the formation of tribal constitutions.”). For examples of original constitutions or constitutions that continue in effect or have been revised, *see Constitutions*, NATIVE AMERICAN CONSTITUTION AND LAW DIGITIZATION PROJECT, <http://thorpe.ou.edu/const.html> (last visited Apr. 25, 2011).

76. Sledd, *supra* note 57, at 4.

77. *Id.*

78. *Id.*

79. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-781, INDIAN ISSUES: BIA'S EFFORTS TO IMPOSE TIME FRAMES AND COLLECT BETTER DATA SHOULD IMPROVE THE PROCESSING OF LAND IN TRUST APPLICATIONS 9 (2006) available at <http://www.gao.gov/new.items/d06781.pdf>.

2. *The Indian Land Consolidation Act*

Even after the passage of the IRA, the question of how to restore the fractionated lands remained unaddressed. In fact, four years after its passage, “the Interior Department convened a meeting in Glacier National Park to identify solutions to fractionation.”⁸⁰ The group established three goals: “decrease administrative cost, increase the productive use of Indian land, and stop the loss of trust land to fee status.”⁸¹ Born of these three goals were three recommended actions: “address probate procedures to stop further fractionation, develop consolidation tools, and provide funds to purchase interests from [voluntary sellers].”⁸² Unfortunately, timing was again an issue, with scarce resources to be allocated as a result of the ongoing depression era and the onslaught of World War II.⁸³ Congress revisited the problem in 1960 with the *Indian Heirship Land Survey*,⁸⁴ which found that “only one quarter of the parcels had more than six owners.”⁸⁵ Additional meetings followed in 1966 and 1977. The suggested actions were similar to those recommended at Glacier, but were ultimately rejected because of either the anticipated costs to the federal government or dissatisfaction among tribal landowners.⁸⁶

By 1983, evidence illustrating the magnitude of the problem had grown to such a point that Congress felt compelled to act, despite its inaction over the previous half-century.⁸⁷ That same year, Congress passed the Indian Land Consolidation Act (ILCA).⁸⁸ The ILCA authorized the consolidation of tribal lands through sale, purchase, or other exchanges.⁸⁹ It also allowed for the adoption of tribal probate codes to be used in probates through the DOI.⁹⁰

80. Sledd, *supra* note 57, at 6.

81. *Id.*

82. *Id.*

83. *Id.*

84. H. COMM. ON INTERIOR & INSULAR AFFAIRS, 98TH CONG., INDIAN HEIRSHIP LAND SURVEY (Comm. Print 1960).

85. Sledd, *supra* note 57, at 6.

86. *Id.*

87. *Id.* at 7.

88. Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2519 (codified as 25 U.S.C. §§ 2201-2221 (2006)).

89. 25 U.S.C. § 2203 (2006); Sledd, *supra* note 57, at 7.

90. 25 U.S.C. § 2205; Sledd, *supra* note 57, at 7.

The ILCA was quite radical. A new definition of "Indian" was used, significantly narrowing the eligibility for inheriting land.⁹¹ The "most radical" provision of the ILCA, section 207, "called for escheat to tribes of interests less than 2% of the whole parcel, testate or intestate, which had not earned at least \$100 in the year prior to probate."⁹²

Soon after the ILCA went into effect, three devisees brought suit challenging its constitutionality, claiming that the escheat provision constituted a seizure without just compensation. To nearly everyone's surprise, Justice O'Connor, in *Hodel v. Irving*,⁹³ stated:

There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial. . . . Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimus*, their value may not be. . . . There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right.⁹⁴

The Supreme Court in *Irving*, looking to protect the rights of the deceased to devise property, struck down the taking as an unconstitutional violation of the Fifth Amendment⁹⁵ – the first such case since *Pennsylvania Coal Co. v. Mahon*.⁹⁶ Even before the Court announced its decision in *Irving*, Congress was taking precautions due to the pending lawsuit. In 1984, a nervous Congress began hearings to amend the ILCA;⁹⁷ the Act was amended in October of 1984.⁹⁸ The amended section 207 provided that the land would not escheat if the interest "represents 2 per centum or less of the total acreage in such tract and is incapable of earning \$100 in any one of the five years from the date of decedent's death."⁹⁹ If it were unable to earn \$100 "in any

91. McCulley, *supra* note 6, at 409.

92. Sledd, *supra* note 57, at 7.

93. 481 U.S. 704 (1987).

94. *Id.* at 714-15.

95. *Id.* at 717.

96. 260 U.S. 393 (1922) (indicating that government regulation that prevents the use or severely limits the use of property can amount to a regulatory taking which must be supported by an action of eminent domain and the payment of just compensation); Guzman, *supra* note 3, at 612 n.67.

97. Sledd, *supra* note 57, at 7.

98. Indian Land Consolidation Act, Pub. L. No. 98-608, 98 Stat. 3171 (1984).

99. *Id.*

one of the five years before the decedent's death," a rebuttable presumption arose that it would be "incapable of earning \$100 in any one of the five years following the death of the decedent."¹⁰⁰

The *Irving* Court, however, did not hear arguments on the 1984 amendments. The amendments eventually found their way before the Court in *Babbitt v. Youpee*,¹⁰¹ and were declared unconstitutional on the same grounds as in *Irving*. According to Justice Ginsburg,

Amended § 207 still trains on income generated from the land, not on the value of the parcel. . . . Congress' creation of an ever-so-slight class of individuals equipped to receive fractional interests by devise does not suffice, under a fair reading of *Irving*, to rehabilitate the measure. Amended § 207 severely restricts the right of an individual to direct the descent of his property.¹⁰²

Despite a valiant effort by Congress, the ILCA offered no real solution to the fractionation problem.

3. *The American Indian Trust Fund Management Reform Act of 1994*

The fractionation issue is only one part of the overall Indian land problem. Each original allottee and the subsequent heirs are beneficiaries of IIM accounts, which purportedly allow them to draw income from their fractionated interests.¹⁰³ In 1992, following a congressional oversight hearing, a report was released, entitled *Misplaced Trust*, providing an overview of what the DOI and Bureau of Indian Affairs (BIA) were facing with the management of the IIM accounts. The report found severe mismanagement through failing to properly account for monies in IIM accounts, and, in turn, failing to adequately discharge fiduciary responsibilities.¹⁰⁴ In pertinent part, the report stated:

100. *Id.*

101. 519 U.S. 234 (1997).

102. *Id.* at 243-44.

103. See 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, 551 (2004).

104. MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499, at 2 (1992).

The Bureau of Indian Affairs (BIA) has failed to fulfill its fiduciary duties to the beneficiaries of the Indian trust fund. The Bureau's [sic] management of the Indian trust fund has been grossly inadequate in numerous important respects. The Bureau has failed to accurately account for trust fund moneys. Indeed, it cannot even provide accountholders with meaningful periodic statements on their account balances. It cannot consistently and prudently invest trust funds and pay interest to accountholders. It does not have consistent written policies or procedures that cover all of its trust fund accounting practices. Under the management of the Bureau of Indian Affairs, the Indian trust fund is equivalent to a bank that doesn't [sic] know how much money it has. . . . The real losers in the mismanagement of the Indian trust fund are the Tribes and individual Indian accountholders. . . . Yet victims of this nonfeasance have had no recourse except to the very agency that is responsible for their predicament.¹⁰⁵

Moreover, the report created a timeline of sorts, recommending that, if the DOI and BIA could not reasonably gain control of the IIM situation in a timely fashion, Congress should take additional action or consider moving the responsibility for the IIM accounts elsewhere.¹⁰⁶

With firm evidence from *Misplaced Trust* in hand, Congress enacted the Indian Trust Fund Management Reform Act of 1994.¹⁰⁷ The Act redefined the Secretary of the Interior's role in maintaining the trust funds associated with IIM accounts.¹⁰⁸ Title II of the Act attempted to allow tribes the ability to exercise control over their trust funds.¹⁰⁹ Title III created the Office of the Special Trustee (OST) to "provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians."¹¹⁰ This provision applied not only to the OST, but also to the BIA, Minerals Management

105. *Id.* at 56.

106. *Id.* at 66.

107. 25 U.S.C. §§ 4001-4061 (2006).

108. *Id.* § 4011. For another federal provision detailing the Secretary's trust responsibilities, see 25 U.S.C. § 162a(d) (2006) (noting that the Secretary's trust obligations include "[p]roviding adequate systems for accounting for and reporting trust fund balances").

109. 25 U.S.C. § 4022.

110. *Id.* § 4041(1).

Service, and the Bureau of Land Management, to ensure that all “trust responsibilities[] are effective, consistent, and integrated.”¹¹¹

In 1997, Paul Homan, appointed as the first Special Trustee, sought to upgrade computers, clean up trust records, and eliminate backlogs.¹¹² Unfortunately, Congress failed to adequately fund the OST to meet all of these proposed objectives,¹¹³ leaving the possibility of rendering a total accounting impossible and the problem of fractionation alive.

4. American Indian Probate Reform Act

In 2004, Congress passed the American Indian Probate Reform Act (AIPRA)¹¹⁴ to correct the failed policies of the IRA and ILCA.¹¹⁵ Specifically, Congress sought to address the continued problem of fractionation by revising probate procedures in Indian Country to facilitate consolidation of fractionated lands.¹¹⁶ “The AIPRA changes the probate laws for Indian property belonging to Native American individuals who die intestate.”¹¹⁷ The most significant policy shift flows from “the creation of a uniform, national Indian probate code that replaces the burdensome various state probate code provisions.”¹¹⁸

The AIPRA has several major advantages to combat the fractionation problem. First, without a valid will, “trust property will pass under the new federal probate code or approved tribal probate code, rather than under the state laws that currently govern Indian probate.”¹¹⁹ Under the AIPRA, immediate family members are still first in line to inherit, but they “are only entitled to inherit the property if they either a) meet the definition of ‘Indian,’ b) are the decedent’s descendants within two generations of an Indian, or c) they are already co-owners of the same parcel of land.”¹²⁰ Special provisions

111. *Id.* § 4041(2).

112. *Cobell v. Norton*, 240 F.3d 1081, 1091 (D.C. Cir. 2001).

113. *Id.* at 1092.

114. Pub. L. No. 108-374, 118 Stat. 1773 (2004).

115. See *McCulley*, *supra* note 6, at 412-13.

116. *Id.* at 411.

117. *Id.*

118. *Id.* at 410.

119. *Understanding the American Indian Probate Reform Act of 2004*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/understanding.htm> (last visited Apr. 25, 2011) [hereinafter *Understanding the AIPRA*].

120. *McCulley*, *supra* note 6, at 413. Congress amended the definition of Indian in the AIPRA.

Under AIPRA, an “Indian” is a person who: 1) is a member of an Indian tribe, or 2) is eligible to become a member of an Indian tribe; or 3) was an owner of an

also appear for spouses. For example, “spouse[s] will inherit 1/3 of any money in [an] IIM account at the time of [decedent’s] death, and all of the money produced from [decedent’s] interest in trust or restricted land during [a] spouse’s lifetime.”¹²¹ The spouse can also “continue to live in a family home located on allotted land.”¹²² The category of takers also includes “other eligible heirs,” who are entitled to receive “the remaining 2/3 of any money in [the decedent’s] IIM account . . . and the remaining ownership interest in the trust or restricted land.”¹²³

Comparison of Intestacy Distribution Under Oklahoma Law and AIPRA ¹²⁴		
	Oklahoma ¹²⁵	AIPRA ¹²⁶
Surviving spouse and children	Spouse receives 1/2 of the estate and children share other 1/2, regardless of how many there are.	Spouse receives 1/3 of trust personalty and life estate in trust land; when spouse dies, each “eligible heir” ¹²⁷ receives an equal share in trust and restricted land interests.

interest in trust restricted land on October 27, 2004; or 4) meets the definition of “Indian” under the Indian Reorganization Act, or 5) in California, any person as in 1, 2, 3, and 4, or who owns trust or restricted land in California.

Understanding the AIPRA, *supra* note 119.

121. *Understanding the AIPRA*, *supra* note 119.

122. *Id.*

123. *Id.*

124. This chart demonstrates the distributional schemes under the Oklahoma intestacy statutes and the AIPRA for lands equal to or greater than five percent of the fractional whole.

125. 84 OKLA. STAT. § 213 (2010).

126. 25 U.S.C. § 2206 (2006); Cecelia Burke, *Without a Valid Will, Your Trust Land Interests 5% or Greater Will Be Divided as Follows*, INDIAN INST.: SEATTLE U. SCH. OF LAW, <http://www.indianwills.org/LandownerDownloads/YourTrustLandInterests5percentOrGreater.pdf> (last visited Apr. 25, 2011).

127. An “eligible heir” includes “any of the decedent’s children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are . . . Indian; or . . . lineal descendants within 2 degrees of consanguinity of an Indian; or . . . owners of a trust.” 25 U.S.C. § 2201(9).

	Oklahoma	AIPRA
Spouse and no children	Spouse receives all joint industry property and 1/3 non-joint industry property; parent(s) take the other 2/3 of non-joint industry property.	Spouse receives all trust personalty and life estate in trust land; when spouse dies, interests pass to other "eligible" heirs listed below.
No spouse but surviving children or grandchildren	Children share equally; if child predeceases parent, grandchildren receive their parents' share.	Each "eligible" child receives equal share in trust lands; if child predeceases parent, grandchildren receive their parents' share.
No spouse and no surviving children, grandchildren, or great-grandchildren	To any survivors in the second parentela (parents or descendants of parents); if none, to any survivors within the third parentela (grandparents or descendants of grandparents); if none, to next-of-kin.	Surviving parents share equally; if none, then "eligible" siblings share equally; if none, then to tribe with jurisdiction; if none of the above, then rules allow co-owners to take or purchase interests or permit sale by United States.

Undoubtedly the most controversial provision of the AIPRA is the so-called less-than-five-percent rule. This provision states that if an Indian landowner dies intestate and "no applicable Indian tribal probate code trumps the AIPRA," inheritance of a less-than-five-percent interest in the whole is limited "to the decedent's oldest eligible child, then the oldest eligible grandchild, or the oldest eligible great-grandchild."¹²⁸ Though the spouse "retains the right to live in the family home on the fractionated parcel during his or her lifetime, . . . the DOI may purchase interests in land that are less

128. McCulley, *supra* note 6, at 414.

than 5% of the total interest, for fair market value, during the probate proceeding without the consent of the heirs.”¹²⁹

The AIPRA also includes a “purchase option at probate.” The purchase option allows “the decedent’s heirs, other co-owners of the land held in trust, and the tribe where the land is located, [to] purchase the decedent’s interest in the parcel, [provided that] the purchase price [] equal[s] [] or exceed[s] the fair market value.”¹³⁰ This process helps to meet a major objective of the Act – to reduce the number of fractionated lands.¹³¹ For example, if one’s land equals less than five percent of the total parcel, “heirs would receive the money paid for the decedent’s interest in the parcel instead of a share of the decedent’s interest in the parcel.”¹³² But “[i]f the decedent’s heirs’ entitlements constitute greater than or equal to 5% of the total interest in the parcel, or if they live on the parcel, the heirs’ consent to the purchase is required.”¹³³

While the laudable goals of the AIPRA are extraordinary and seek to eliminate the further fractionation of lands, problems still exist. First, the AIPRA merely reduces future fractionation; it does not adequately provide an efficient redress to over one hundred years of fractionation. Second, though future fractionation is reduced, tribal customs and beliefs are often ignored, and the new AIPRA could ultimately depreciate tribal sovereignty.¹³⁴ And, like the ILCA in *Irving* and *Youpee*, if the AIPRA is found to infringe upon the right to pass land to one’s heirs, it could be declared unconstitutional.¹³⁵ Despite the federal government’s continued efforts to solve the fractionation conundrum, a worthy solution has yet to be implemented.

129. *Id.* at 414-15.

130. *Id.* at 415.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 416.

135. Nina Brown, History of AIPRA 11 (Spring 2006) (unpublished article), available at http://www.colorado.edu/law/centers/programs/indianlaw/aipra/History_AIPRA.pdf (“The possibility that this right would be found to be fundamental is fairly substantial, given its roots in this nation’s history, and the protection given to land ownership stated in the Constitution.”).

IV. Cobell v. Salazar: *The Long Road to Justice*

A. *A Simple Accounting*

In June of 1996, Elouise Pepion Cobell, on behalf of herself and others,¹³⁶ filed a complaint in the United States District Court for the District of Columbia against the then-Secretary of the Interior, Bruce Babbitt, seeking redress for a breach of trust by the federal government regarding its administration of IIM accounts.¹³⁷ Specifically, the complaint sought declaratory and injunctive relief against the federal government for breach of its ongoing trust obligations, and requested an accounting of individual Indian trust assets.¹³⁸ In February of 1997, the court “granted the Plaintiffs’ Motion for Class Action Certification . . . ‘on behalf of a plaintiff class consisting of present and former beneficiaries of IIM Accounts.’”¹³⁹ In December 1999, the court found the defendants to be in breach of certain duties. It found that “[t]he Indian Trust Fund Management Reform Act . . . requires the defendants to provide plaintiffs an accurate accounting of all money held in the IIM trust” and “to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs.”¹⁴⁰ Moreover, defendants have duties to “establish written policies and procedures for collecting . . . missing information [and] . . . for the staffing of trust management functions,” to retain “documents necessary to render an accurate accounting,” and to establish “computer and business systems necessary to render an accurate accounting.”¹⁴¹ The court found the defendants to be in breach of these duties and ordered them promptly to comply.¹⁴²

136. Complaint at 4-5, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) (No. 96-1285) (“Plaintiff Cobell is an enrolled member of the Blackfeet Indian Tribe. . . . Plaintiff Old Person is an enrolled member of the Blackfeet Indian Tribe. . . . Plaintiff Cleghorn is an enrolled member of the Fort Sill Apache Tribe (Oklahoma). . . . Plaintiff Maulson is an enrolled member of the Lac du Flambeau Chippewa Tribe (Wisconsin). . . . Plaintiff LaRose is an enrolled member of the Winnebago Tribe of Nebraska. . . . All plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated.”).

137. Class Action Settlement Agreement at 2, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (No. 08-5500) [hereinafter Agreement].

138. *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 19 (D.D.C. 1999).

139. Agreement, *supra* note 137, at 2-3.

140. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999).

141. *Id.*

142. *Id.*

Less than two years later, the United States Court of Appeals for the District of Columbia Circuit upheld the district court's finding that the defendants were in breach of their statutory duties.¹⁴³ The court of appeals noted that "[t]he Interior Department has failed to discharge the fiduciary duties it owes to IIM beneficiaries for decades. Despite passage of the 1994 act, the Department is still unable to execute the most fundamental of trust duties – an accurate accounting."¹⁴⁴ These findings, however, did not cement guilt or cause the DOI to admit fault, and the litigation continued. In 2008, the court modified the 1997 Class Certification Order by determining that, "[o]n October 25, 1994, a statutory right to an accounting accrued for all then-living IIM beneficiaries: those who held or at any point in their lives had held IIM Accounts."¹⁴⁵ The district court and the court of appeals also imposed further restrictions by excluding funds received on a "direct pay" basis,¹⁴⁶ excluding funds "managed by tribes,"¹⁴⁷ excluding "accounts closed before the 1994 Act was passed,"¹⁴⁸ and finally, excluding "heirs to money from closed accounts" that were subject to final probate determinations.¹⁴⁹

B. Class Action Settlement Agreement

After nearly fifteen years of litigation and an "estimate[] that between 300,000 and 500,000 Indians [had] been deprived of between ten and forty billion dollars as a result of one hundred years of trust fund mismanagement by the federal government,"¹⁵⁰ the parties agreed in principle to a settlement¹⁵¹

143. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

144. *Id.* at 1110.

145. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 98 (D.D.C. 2008).

146. *Id.* at 95-96.

147. *Id.* at 96.

148. *Cobell v. Salazar*, 573 F.3d 808, 815 (D.C. Cir. 2009) (Act refers to the American Indian Trust Management Reform Act of 1994 which was passed on October 25, 1994).

149. *Id.*

150. *Bowman*, *supra* note 103, at 543-44; *see also* INDIAN TRUST SETTLEMENT, <http://cobellsettlement.com> (last visited Apr. 25, 2011).

151. *Settlement Agreement and Modifications*, INDIAN TRUST SETTLEMENT, <http://cobellsettlement.com/sa.php> (last visited Apr. 25, 2011). The original class action settlement agreement was dated December 7, 2009. *Id.* Eight subsequent modifications were made and extensions for settlement granted by the United States District Court for the District of Columbia. *Id.* The final modification, dated November 17, 2010, concluded the modifications to the settlement agreement, which were subsequently adopted by both the United States House of Representatives and the United States Senate, and signed into law on December 8, 2010 by President Obama. *Id.*; David Jackson, *Obama Signs \$4.6B Settlement with Black Farmers, Native Americans*, USA TODAY, Dec. 8, 2010 available at <http://content.usatoday.com/comm>

to bring an end to “the largest class-action suit ever filed by Indians.”¹⁵² 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.”¹⁵³ When analyzing the impact that the settlement could potentially have on IIM account holders, it is important to note that these IIM accounts contain not only land, but also royalties from oil, natural gas, and other minerals, as well as rents from timber operations, grazing, water rights, and any other resources controlled by individual Indians.¹⁵⁴

The settlement establishes three distinct categories to which funds are to be distributed, of which \$1.412 billion will be deposited into an Accounting/Trust Administration Fund,¹⁵⁵ \$60 million will be used to create an Indian Education Scholarship Fund to improve access to higher education,¹⁵⁶ and (most importantly for purposes of solving the Indian land fractionation problem) \$1.9 billion will be used to finance a Trust Land Consolidation Fund (Consolidation Fund).¹⁵⁷ The Consolidation Fund seems incongruent with the original goals of the *Cobell* litigation. The original complaint makes no mention of or request for a land consolidation fund. So how did it end up in the settlement? The answer can be found through a backward-looking examination of the failed policies that have haunted the federal government’s trust administration duties since reorganization. The settlement agreement itself states “that an integral part of trust reform includes accelerating correction of the fractionated ownership of trust or restricted land, which makes administration of the individual Indian trust more difficult.”¹⁵⁸ Moreover, the parties are seeking to address the problems of escheat and takings under the Fifth Amendment that were encountered in *Youpee* and *Irving*, which, without these available avenues for redress,

unities/theoval/post/2010/12/obama-signs-46-billion-settlement-with-black-farmers-native-americans/1(last visited Apr. 25, 2011).

152. Timothy Egan, *A Computer Shutdown Plays Havoc at Interior*, N.Y. TIMES, Feb. 14, 2002, at A20.

153. Agreement, *supra* note 137, at 5.

154. *What Are Individual Money (“IIM”) Accounts?*, INDIAN TRUST SETTLEMENT, <http://www.cobellsettlement.com/faq.php> (last visited Apr. 25, 2011).

155. Agreement, *supra* note 137, at 26.

156. *Id.* at 40.

157. November 17, 2010 Modification of December 7, 2009 Class Action Settlement Agreement at 3, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (No. 08-5506).

158. Agreement, *supra* note 137, at 4.

continued to propagate fractionation, increasing the already daunting administrative burden of reconciling the Indian trust.¹⁵⁹

The most important function of the Consolidation Fund is “acquiring fractional interests in trust or restricted lands.”¹⁶⁰ Yet, equally important are the administrative costs of “implementing the Land Consolidation Program” and “the costs related to the work of the Secretarial Commission on Trust Reform.”¹⁶¹ Though the latter two are limited to only fifteen percent of the overall fund monies, these three components comprise the sole uses for purposes of the fund.¹⁶²

Moreover, any lands acquired shall be for the full fair market value of the lands.¹⁶³ Ironically, it will be up to the reasonable efforts of the Secretary of the Interior “to prioritize the consolidation of the most highly fractionated lands.”¹⁶⁴ This should theoretically be a relatively easy task. Given the lack of proper accounting for decades, however, it seems probable that the DOI could have a difficult time properly prioritizing consolidation efforts without a full and accurate accounting of the lands to be consolidated. From the time final approval is granted for the agreement, the DOI has, at most, ten years to completely exhaust the monies in the Consolidation Fund, otherwise the monies must be returned to the Treasury.¹⁶⁵

V. The Wheat Fields Waving and the Dust Clouds Rolling: Potential Solutions to the Indian Land Fractionation Problem

A. The Big Bail-Out

The *Cobell* Settlement authorizes the expenditure of \$1.9 billion dollars to acquire and consolidate highly fractionated Indian lands. Previous attempts to do so, such as the ILCA, resulted in unconstitutional takings in violation of the Fifth Amendment. Essential to this analysis, however, is that previous attempts to rectify allotment policies failed to properly provide just compensation for the takings. While a goal of the *Cobell* settlement is to reacquire lands that are highly fractionated, for the first time, significant

159. *Id.*

160. *Id.* at 35.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 36.

monies are being devoted to help restructure the recovery from the damage of over one hundred years of failed allotment policy.

One billion nine hundred million dollars is no small amount of money. Consider this: \$1.9 billion will buy you eighty-six percent of a B-2 bomber; \$1.9 billion will allow you to wage war for ninety-one hours on two Middle-Eastern countries; \$1.9 billion is equal to nearly two years of profits for General Mills; \$1.9 billion is roughly the amount of taxes collected from 197,000 Americans in any given year.¹⁶⁶ Some may therefore be surprised that this extraordinary amount of money is still insufficient to properly bring an end to the Indian land fractionation problem.

Federal purchase of fractionated interests is not a new solution to the fractionation problem. As early as 1994, programs were proposed whereby the federal government would buy highly fractionated interests and turn control of them over to individual Indian tribes. "A three-year pilot program was established with three tribes in Wisconsin and 36,000 interests were acquired."¹⁶⁷ Early estimates showed that the federal government could save over \$2.5 million in administration costs currently used to maintain the fractionated interests.¹⁶⁸ Prior to 2006, \$97 million was spent on land consolidation, resulting in the acquisition of 243,000 interests.¹⁶⁹ Even more stunning is that the purchase of these interests "prevent[ed] the creation of roughly 600,000 new interests."¹⁷⁰

Fractionation has continued for so long and is continuing to grow at such an unprecedented pace that these interests were just a fraction of the total number of interests created. Moreover, consider that even without any increase, it is estimated "that it would cost \$135 million each year just to maintain the current level of fractionation."¹⁷¹ Thus, of the \$1.9 billion in funds delegated to acquire highly fractionated lands, half of the total that would otherwise be spent to prioritize and consolidate highly fractionated lands under the *Cobell* settlement would be expended simply to maintain current levels of fractionation.¹⁷² This is because the money expended to

166. *Visualizing One Billion Dollars*, WALLSTATS, <http://www.wallstats.com/blog/visualizing-one-billion-dollars/> (last visited Apr. 25, 2011).

167. Brian Sawers, *Tribal Land Corporation: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 403 (2010).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.* Multiplying the \$135 million per year that it would take to maintain current levels of fractionation by the maximum of ten years to distribute the funds from the settlement

maintain the already fractionated lands takes away from the outright purchase of highly fractionated lands that would continue to grow. Moreover, that seventy percent of heirs would voluntarily agree to the sale of their fractionated interests indicates that a large portion of the most highly fractionated land could readily be acquired, thus creating an unfunded opportunity to prevent future fractionation and reducing strain on the already low settlement figure.¹⁷³

Nationally, “there are approximately four million owner interests in the 10 million acres of individually owned trust lands.”¹⁷⁴ Research indicates that “[t]hese four million interests could expand to 11 million interests by the year 2030.”¹⁷⁵ Oklahoma has roughly one million acres of trust land and about one million acres of restricted land.¹⁷⁶ In 2000, 391,900 Oklahomans voluntarily self-identified as tribal members or as being of Native American descent.¹⁷⁷ Obviously, not all Oklahoma tribal members or trust lands are subject to IIM accounts or beneficiary monies.¹⁷⁸ For the sake of simplicity, however, assume that the average cost of an acre of land that would be comparable to the size of an original allotment in the state of Oklahoma is \$1,483.¹⁷⁹ Applying simple multiplication, the value of the roughly one million acres of land held in trust would equal approximately \$1.483 billion. The value of the

yields a value of \$1.35 billion dollars, which would exhaust over half of the designated \$1.9 billion allocated for land consolidation.

173. JOHN DOSSETT, NAT’L CONGRESS OF AM. INDIANS, OPTIONS FOR IMPROVEMENT CONSOLIDATION OF FRACTIONATED INTERESTS AS A PART OF THE COBELL SETTLEMENT LEGISLATION 2 (2006) [hereinafter NCAI, COBELL SETTLEMENT].

174. RESTORING TRUST, *supra* note 54, at 5.

175. *Id.*

176. *Did You Know That...*, 81 OKLA. B.J. 357 (2010) (advertisement for the Indian Law Section of the Oklahoma Bar Association). “Restricted land” means that an individual Indian or “tribe holds legal title but with legal restrictions against alienation or encumbrance.” *Definitions of Common Terminology Related to Tribal and Indian Land Ownership*, TRIBAL & INDIAN LAND, <http://teeic.anl.gov/triballand/index.cfm> (last visited Apr. 25, 2011).

177. Gina Claczko, *Native American Statistics*, NATIVE VILLAGE, <http://nativevillage.org/Messages%20from%20the%20People/Population%20statistics.htm> (last visited Apr. 25, 2011).

178. It is currently unknown how many IIM account holders are members of Oklahoma tribes. Attempts were made to calculate an accurate number from a variety of sources but for fear of speculation and non-verification specific numbers have been removed from this comment.

179. *Oklahoma Agricultural Land Values by Size of Tract*, OKLA. STATE U.: AGRICULTURAL ECON. EXTENSION HOME, <http://agecon.okstate.edu/oklandvalues/tracts.asp?id=F> (last visited Apr. 25, 2011). This figure denotes land sales over the past three years involving the sale of acreage between forty and one hundred acres of land. This figure was chosen due to the fact that most original allotments were between forty and eighty acres. *See id.*

ten million acres using the average Oklahoma value would be nearly \$15 billion.¹⁸⁰

The actual number of parcels in Oklahoma that would be classified as highly fractionated is likely low, but the sheer value of the Oklahoma trust lands is astonishing. While lands vary in value according to their highest and best use,¹⁸¹ it can reasonably be anticipated that the initial \$1.9 billion allocation for the purchase of highly fractionated lands will not even scratch the surface of the overall allotment problem. Moreover, even the level of fractionation among allotted lands is not proportional. Estimates of the number of highly fractionated parcels – those having more than two hundred owners per parcel – are somewhere in the range of two thousand.¹⁸² Applying the average Oklahoma land values (\$1,483) to these parcels and multiplying by an estimated parcel size of eighty acres would yield an estimated value of roughly \$237 million. One would logically conclude that the initial \$1.9 billion would be sufficient to handle the fractionation problem with respect to these highly fractionated parcels. Yet, research reveals that only seventy percent of interest holders would be willing to sever their interests in exchange for a payment.¹⁸³ This figure leaves thirty percent of interest holders without a means to avoid having their lands surreptitiously fractionated upon death, perhaps basing their refusal to sell on strong ties with the land for religious or ancestral reasons.

Another troubling factor in the initial allocation of monies with the *Cobell* settlement is that the monies are subject to identification and time limitations to correct land fractionation. First, the DOI is to “use reasonable efforts to prioritize the consolidation of the most highly fractionated tracts of land.”¹⁸⁴ Yet, within the settlement document itself, there are no guidelines for how to identify the most highly fractionated lands. In essence, the class is allowing the DOI to impose its own timeline and formula for determining highly fractionated lands. Perhaps it is undeserved skepticism, but have we not seen this exact behavior before and did it not result in over fifteen years of

180. This figure does not take into account the effects of trust status on land values. Because of the restrictions on alienation, the value of trust land is ostensibly less, though the degree to which the encumbrance affects land values is difficult precisely to ascertain.

181. BLACK'S LAW DICTIONARY, *supra* note 37, at 1682 (defining highest and best use in the valuation of property as “the use that will generate the most profit” and noting that it is the “standard used especially to determine the fair market value of property subject to eminent domain”).

182. NCAI, COBELL SETTLEMENT, *supra* note 173, at 4.

183. *Id.* at 2.

184. Agreement, *supra* note 137, at 35.

litigation? The litigation arose because the BIA failed to properly identify accounts and lands subject to its trust responsibilities to IIM account holders. Now, the class is essentially giving them the reins to once again violate the trust.

Second, the DOI is limited to ten years to liquidate the monies in the Consolidation Fund.¹⁸⁵ If the account is not liquidated within the time period, the money must be returned to the Treasury.¹⁸⁶ 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.¹⁸⁷ These additional procedures are notice-related, and, if satisfied, the owners are deemed to consent 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.¹⁸⁸ Moreover, the limited time period restricts the legal rights of those owning fractionated interests by denying them sufficient time to seek legal advice. Though there is strong evidence that a high percentage would be willing to sell their individual interests, the time constraints inherent in identification, providing appropriate notice, receiving competent legal advice, and making a decision to purchase or sell will place a significant burden on interest holders.

The government, in lieu of a specific time period acquisition, should instead move to a continuous acquisition process. The ability of the DOI to acquire lands regardless of a specific time period allows the prioritization sought by *Cobell*, and provides the opportunity to continue to foster a relationship with interest holders to ultimately solve the fractionation problem. Chiefly, this will help to address the limited resources budget that the DOI is afforded to consolidate highly fractionated parcels. The expansion of the pool of resources will allow the DOI to collectively consolidate lands, without the pressure of continued fractionation from a lack of congressional funding.

While monetary resources are definitely necessary to solve the fractionation problem, it is difficult to estimate the true cost. Land values fluctuate over time and interest holders are each unique in their desire for

185. *Id.* at 36.

186. *Id.*

187. *Id.*

188. *Id.* at 36-38.

their property. The initial \$1.9 billion dollars to be allocated to the land consolidation fund is a start, but for continued viability, Congress needs to create a sustaining body or account with the sole purpose of preventing the future fractionation of Indian lands. Until proper resources are allocated, fractionation will continue to deprive future generations of Indian land holders the opportunity to prosper.

B. A Dormant Tribal Fractional Interests Act

Indian land fractionation has continued to grow at an unprecedented pace. Despite the attempted actions of the ILCA and the subsequent revisions, there has remained a stalemate of sorts to the final resolution of the fractionation problem. Other areas of the law, however, have allowed local governments to reach beyond the takings clause of the Fifth Amendment to prevent further fractionation of interests in land. One such example is the adoption of dormant mineral acts across the United States.¹⁸⁹ Dormant mineral acts are highly specialized to prevent waste and increase the productivity of natural resources by “terminat[ing] mineral interests and reunite[ing] them with the interest from which they were carved . . . [and] identify[ing] and locat[ing] mineral interest owners.”¹⁹⁰ A Dormant Tribal Fractional Interests Act could help to solve the problem of fractionation of Indian lands while passing power to individual tribes to control and dispose of the land for its highest and best use.

1. The History and Development of Dormant Mineral Acts

The concept for a dormant mineral act was first introduced by the state of Indiana. In 1971, Indiana passed the Dormant Mineral Act.¹⁹¹ The Act defined “interest” as one that is either granted, assigned, reserved, or any other interest.¹⁹² The Act provided that if any of the interests were “unused for a period of twenty (20) years, [the interest would be] extinguished and the ownership [would revert] to” the primary interest holder from which the interests were carved out.¹⁹³ In addition, the Act set out a list of approved uses.¹⁹⁴ Most importantly, the Act provided that each interest holder must make a statement of claim before the end of the statutory period, to be filed

189. JOHN S. LOWE ET AL., *CASES AND MATERIALS ON OIL AND GAS LAW* 69 (5th ed. 2008).

190. *Id.* at 69-70.

191. IND. CODE §§ 32-23-10-1 to -8 (2002).

192. *Id.* § 32-23-10-1.

193. *Id.* § 32-23-10-2.

194. *Id.* § 32-23-10-3.

in the county in which the land is located.¹⁹⁵ Failure to make a claim would extinguish the interests, limited by a small set of exceptions that usually centered on individuals with a larger number of interests within the county.¹⁹⁶ Notice of the lapse *may* be given through some sort of publication, and be recorded.¹⁹⁷

The Act was subsequently challenged as an unconstitutional taking when, in 1982, the Supreme Court heard arguments in *Texaco, Inc. v. Short*.¹⁹⁸ Justice Stevens, writing for the majority, stated that the state “has the power to enact the kind of legislation at issue” because it furthers the state’s goals of encouraging the development of interests.¹⁹⁹ The Court reasoned that there could not be an unconstitutional taking where an interest holder has had twenty years to take actions to retain possession, and is thus deemed to have abandoned the property.²⁰⁰ It noted that “[i]t is the owner’s failure to make any use of the property – and not the action of the State – that causes the lapse of the property right.”²⁰¹ Additionally, the Court agreed that

[t]he statute cannot be said to impair a contract that did not exist at the time of its enactment. . . . [A] mineral owner may safeguard any contractual obligations or rights by filing a statement of claim . . . [and] a minimal “burden” on contractual obligations is not beyond the scope of permissible state action.²⁰²

Finally, the Court stated that the lack of a notice requirement does not render the statute unconstitutional because citizens are charged with knowing the laws of the state,²⁰³ and “[t]he 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms.”²⁰⁴

Since the decision in *Short*, several states have enacted dormant mineral acts.²⁰⁵ The acts became such a hot topic in the early 1980s that the National

195. *Id.* § 32-23-10-4.

196. *Id.* § 32-23-10-5.

197. *Id.* §§ 32-23-10-6, -7.

198. 454 U.S. 516 (1982).

199. *Id.* at 529.

200. *Id.* at 530.

201. *Id.*

202. *Id.* at 531.

203. *Id.* at 532.

204. *Id.* at 532.

205. Michigan, Indiana, California, Connecticut, Kansas, North Dakota, Oregon, South

Conference of Commissioners on Uniform State Laws adopted a model Uniform Dormant Mineral Interests Act.²⁰⁶ The model act differs from the Indiana act in that it requires that notice be given to the individual interest holders prior to the recording of the termination claim.²⁰⁷ Several states have enacted this provision as well, mostly to combat the argument that land, fundamental to our system of wealth, is being taken simply because it remains idle.²⁰⁸ Kansas, for example, requires notice by publication, and, if the address of the interest holder is known, that he be mailed a copy within ten days by restricted mail.²⁰⁹ A similar provision can be found in North Dakota's dormant mineral act.²¹⁰ These limiting provisions seem to defeat the entire purpose of the dormant mineral acts. The risk, of course, is that after the statutory period, when a party prepares and expends significant resources obtaining legal advice, the interests can be reclaimed by the holder upon receipt of notice of the pending action.

2. *The Model Dormant Tribal Fractional Interests Act*

While Congress has rarely granted such expansive powers to the Indian tribes, the creation of a Dormant Tribal Fractional Interests Act could facilitate an end to the fractionation problem. Arguably, the initial distinction that must be made is that most of the interests involved in Indian land fractionation are interests in the whole of the parcel, rather than severed mineral rights. The conundrum that interest holders often face is that they are unable to productively use the land because there are so many interest holders

Dakota, Tennessee, Washington, Wisconsin, and Wyoming have enacted dormant mineral statutes. Other states, such as Louisiana, Florida, Minnesota, and North Carolina, use marketable title laws. See SCOTT HOWARD, MINERAL RIGHTS AND LAND CONSERVATION IN THE MIDWEST 2 (2008), available at <http://www.landtrustalliance.org/conservation/conservation-defense/CDdocuments/Mineral%20and%20gas%20rights%20extraction%20March202008.pdf>.

206. UNIF. DORMANT MINERAL INTERESTS ACT (1986), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/udmia86.pdf>.

207. *Id.* § 4(a) ("The action must be in the nature of and requires the same notice as is required in an action to quiet title.").

208. See, e.g., *Wilson v. Bishop*, 412 N.E.2d 522, 525 (1980) ("While we recognize the beneficial purpose of the statute to facilitate the production of existing oil, gas and other mineral resources, particularly where ownership of the interests has become increasingly fractionalized and scattered, the record owners are vested with property interests entitled to the procedural safeguards of due process. Failure to provide these owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional.").

209. KAN. STAT. ANN. § 55-1605 (2005).

210. N.D. CENT. CODE § 38-18.1-06.1 (2009).

to each individual parcel.²¹¹ The tribal tradition of passing land to family members without wills has created a distribution scheme where the interest holders often do not know one another or are so far removed from the controlling holders that identifying them is nearly impossible.²¹²

Congress has already recognized the problematic effects of land fractionation. The development and passage of the AIPRA is palpable evidence that the problem is still at the forefront of issues troubling Indian Country. The passage of such expansive legislation as a Dormant Tribal Fractional Interests Act would be the first complete break from the government's so-called protectionist mentality.²¹³

The development of a Dormant Tribal Fractional Interests Act would help to alleviate the fractionation burden and allow productive use of the interests. The initial problem would be deciding to which interests the Act would apply. Several examples advance the line of thought that any devise of property should be covered.²¹⁴ This approach would encompass the totality of all

211. Bobroff, *supra* note 3, at 1617-18 ("Fractionated ownership greatly increases the difficulty of developing land, both for co-owners seeking to use the land for their own purposes and for tribal communities seeking to provide infrastructure and services across allotted lands. Putting in utilities, establishing roads, harvesting forestry and mineral resources, developing commercial uses, and obtaining homesite leases for residences all become increasingly expensive in time, money, and effort as fractionation grows.").

212. *See id.* at 1618 ("[F]ractionation grows worse with each owner's passing as ownership is divided among another generation. Occasionally, an owner will have made provisions to pass his or her interest to a single family member. More often, however, allotment interests pass through intestate succession. Some owners have long since left the reservation, if they ever lived there, or have lost ties that their families once had. Many owners have such small interests that it is not worth their time or energy to address the question of inheritance of their interests."); Guzman, *supra* note 3, at 607 ("It is difficult to identify and locate allottees, given the infamous multiple successive intestate estates, probate backlog, and outdated, incomplete, or irretrievable records with limited rights of access that often characterize allotted lands.").

213. *See* Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM. 899, 950 (1998) ("Tribal self-determination is denied whenever the United States asserts its trust responsibility and imposes its view of ensuring the well-being of the Indian nations. While treaty provisions acknowledged that the United States would provide 'protection' to the Indian nations, the Supreme Court expanded this limited and negotiated protection into a full-blown 'guardian-ward' relationship that has justified the suppression of tribal self-determination.") (citation omitted).

214. For example, the Uniform Dormant Mineral Interests Act covers interests created by reservation, deed, profit, or leasehold. *See* UNIF. DORMANT MINERAL INTERESTS ACT prefatory note, at 1 (1986), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/udmia86.pdf>.

Indian land interests, which is beneficial to preventing fractionation over the long term no matter the size or scope of the interest to which it pertains.

Timing is of the essence, as fractionation continues with each passing day.²¹⁵ In the over 120 years since the inception of the fractionation problem, millions – if not billions or trillions – of interests have been created in Indian lands, all stemming from the original allotments.²¹⁶ Because of the immediacy of the problem, a departure from the dormant mineral acts is necessary, as a twenty-year period of non-use allows the continued fractionation of lands and the potential for millions of interests to be created in the interim. Therefore, a much shorter time period should be employed for tribes or individual interest holders to exercise their right to bring the interests to productive uses. One potential option is a time period of non-use for five years, following a grace period for the law to take effect and tribal members to educate themselves. The five-year period allows sufficient time for interest holders to discover their holdings, make a recording with the individual Indian tribes, and work with the other interest holders to create an environment that will put the land to its highest and most productive use. For ease of application, once the term has lapsed, no quiet title action need be brought. Instead, a recording in the office of the tribe or the jurisdiction in which the land is located will provide sufficient record title to the interest.²¹⁷

Next, Congress must determine factors for defining “use” as related to the interests. Potential uses could include participating in maintenance and repairs, visiting the property, leasing the property collectively, engaging in recreational activities, payment of taxes, or acceptance of IIM transactions. The bottom line is that the use should be an active use. The interest should not be permitted to remain in perpetuity despite inaction. Yet, some case law suggests that leasing of property is insufficient to prevent a lapse.²¹⁸ Leasing, however, is a common right included in the “bundle of sticks,” and by signing or negotiating a lease, one asserts a right to an interest in that property. Under

215. Shoemaker, *supra* note 38, at 730 (“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.”).

216. Guzman, *supra* note 3, at 598 (“[C]ommon denominators have reached 54 trillion, billions are not uncommon, and millions [approach the norm].”) (alteration in original) (internal quotation marks omitted).

217. See, e.g., IND. CODE § 32-23-10-3 (2002) (suggesting in comments that a quiet title action is not necessary to effectuate the lapse of a mineral interest); *McCoy v. Richards*, 623 F. Supp. 1300 (S.D. Ind. 1984), *aff’d*, 771 F.2d 1108, 1110 (7th Cir. 1986) (noting that the filing of a statement of claim was necessary to prevent a lapse).

218. E.g., *Kirby v. Ashland Oil, Inc.*, 463 N.E.2d 1127, 1129 (Ind. App. 1984).

the proposed Act, leasing should therefore constitute an active use, sufficient to prevent a lapse.

The filing of a statement of claim could also be burdensome to interest holders seeking to make their interests more productive. Most statutes require that, after the initial lapse, the recording contain the name of the interest holder against whom the action is brought, as well as a description of the land.²¹⁹ While the land description should easily be satisfied, fractionation has created so many interests that it can be unreasonably burdensome to track down each interest holder. Congress could alleviate this pressure by supplanting the name and address requirements with an allowance for all owners of an individual parcel to screen for IIM numbers. This allowance would help to preserve confidential information of the interest holders, while still allowing interest holders seeking to consolidate interests the opportunity to track developments within their particular parcels.

Another interesting complexity that must be resolved is where the initial statement of claim should be recorded. Tribal governments may ensure access to all tribal members, but there remains the possibility that interest holders are not enrolled members of those tribes. Accordingly, tribal land recordation systems may not adequately provide notice to interest holders who live outside Indian Country. Perhaps a logical system could include the formation of a federal government filing system whereby tribal members can track their IIM interests in fractionated lands, similar to the patent and trademark filing systems,²²⁰ but to which nonmembers and non-Indians may also gain access to monitor their holdings. While this could potentially create initial ambiguity, after the lapse of the time period, individual holders could also file their instruments in state recordation systems, which would further help to quiet title. Regardless, the potential claimants should be given the permissive capability to serve notice on holders to be deprived, but should not be required to do so. This system will allow interest holders who are vigilant

219. *E.g.*, KAN. STAT. ANN. § 55-1605 (2010); N.D. CENT. CODE § 38-18.1-06 (2009).

220. Similar to the patent filing system, the Dormant Tribal Fractional Interests Act would require a written application with certain required information, such as the name of the party seeking the action and a legal description of the land. A fee could be collected to cover the costs of administration. The DOI and BIA could then grant provisional land status while awaiting official publication. This publication would supply the public with the requisite information to apprise potential interest holders of their fractionated interests and an opportunity to take corrective action to assert their rights. Ideally, the entire process would be electronic and updated instantaneously with each application. For regulations governing the patent filing system, see 35 U.S.C. §§ 111, 122 (2006).

in their efforts and who have complied fully with the statute to create a larger interest, and, in turn, to once again make the land economically productive.

The following is a humble attempt to fashion a Dormant Tribal Fractional Interests Act. Its purpose is to respond to the problems posed above and to contribute to the ongoing effort to combat fractionation.

Model Dormant Tribal Fractional Interests Act²²¹

§ 1. Short Title

This act may be cited as the Dormant Tribal Fractional Interests Act.

§ 2. Purpose of Act

(A) The public policy of this Act is to enable and encourage the marketability of Indian-owned real property and to mitigate the adverse effects of the allotment policy and the resulting fractionation of lands on the full use and development of individual and tribal interests in real property.

(B) This Act shall be construed to effectuate its purpose to provide a means for terminating dormant interests in highly fractionated lands that impair the development and marketability of those lands.

§ 3. Definitions

(A) "Dormant" means a state of non-use for a term of not less than five years.

(B) "Fractionated ownership" means ownership of an interest of less than the whole.

(C) "Recordation" is the act of making an official record within the Department of the Interior's Indian Land Interest Recordation System to apprise third parties of an interest and its whereabouts.

(D) "Tribal fractional interest" means an interest in land held by multiple joint owners as the result of allotment.

221. This proposed Act is based in large part and follows the format of UNIF. DORMANT MINERAL INTERESTS ACT (1986), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/udmia86.pdf>.

§ 4. Termination of Dormant Tribal Fractional Interests

(A) A co-owner of a highly fractionated parcel of previously allotted lands may maintain an action to terminate a dormant tribal fractional interest. A tribal fractional interest is dormant for the purpose of this Act if the interest is unused within the meaning of subsection (B) for a period of five or more years preceding the action, and that has not been preserved pursuant to subsection (B). The action must be in the nature of and requires the same as is required for quiet title actions to be administered within the Department of the Interior, namely asserting: the legal description of the property, the names of all parties to the action, and a statement of the factual and legal basis for seeking the action. The action may be maintained regardless of whether the whereabouts of the owner of the dormant tribal fractional interest is known. Disability or lack of knowledge of any kind on the part of any person does not suspend the running of the five-year period.

(B) For purposes of this section, any of the following actions taken by or under the authority of the owner of a tribal fractional interest in relation to any fractional share that is part of the total fractional interest constitutes use of the entire fractional interest:

(1) Active operations regarding the surface or subsurface of the real property, including leasing, production, exploration, development, improvement, and maintenance.

(2) Recordation of an instrument in the electronic filing system that creates, reserves, or otherwise evidences a claim to or the continued existence of the fractional interest, including an instrument that transfers or leases the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any fraction that is the subject of the instrument, and (ii) any recorded fractional interest in the property owned by any party to the instrument.

§ 5. Preservation of Tribal Fractional Interest by Notice

(A) An owner of a fractional interest may record at any time notice of intent to preserve the fractional interest in the recordation system maintained by the Department of the Interior. The fractional interest is preserved upon publication. A tribal fractional interest is not dormant if the notice is recorded within

five years preceding the commencement of the action to terminate the fractional interest or pursuant to Section 8 after commencement of the action.

(B) Notice may be executed by the owner of a fractional interest or by a third-party representative acting on behalf of the owner. The notice may be executed by or on behalf of a co-owner for the benefit of any or all co-owners in the parcel.

(C) The notice must contain the name of the owner of the fractional interest or the co-owners or other persons for whom the fractional interest is to be preserved or, if the identity of the owner cannot be established or is uncertain, the name of the class of which the owner is a member, and must identify the fractional interest to be preserved by the following means:

(1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest, or of the judgment or administrative decree that confirms the interest.

(2) A legal description of the fractional interest.

§ 6. Late Recording by Fractional Owners

(A) In this section, “litigation expenses” means costs and expenses that the Administrative Law Judge determines are reasonably and necessarily incurred in preparing for and prosecuting an action, including reasonable attorney’s fees.

(B) In an action to terminate a fractional interest pursuant to this Act, the Administrative Law Judge shall permit the owner of the fractional interest to record a late notice of intent to preserve the fractional interest as a condition of dismissal of the action, upon payment to the Department of the Interior for the benefit of the other fractional owners of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the notice is recorded.

(C) This section does not apply in an action in which a fractional interest has been unused within the meaning of Section 5(A) for a period of five or more years preceding the commencement of the action.

§ 7. Effect of Termination

An administrative order terminating a fractional interest, when published, merges the terminated fractional interest with the fractional interest of the co-owner(s), bringing the action in proportion to their fractional ownership of the estate.

§ 8. Savings and Transitional Provisions

(A) Except as otherwise provided in this section, this Act applies to all fractional interests, whether created before, on, or after its effective date.

(B) This Act does not limit or affect any other procedure provided by law for clearing abandoned fractional interests from title to real property.

§ 9. Uniform Application and Construction

This Act shall be applied and construed to effectuate its purpose of restoring viability to highly fractionated lands throughout all states, territories, and districts of the United States containing Indian lands.

§ 10. Severability

If any provision of this Act is unlawful or unenforceable, it shall not affect the validity or enforceability of any other provision herein. To that end, the provisions of this Act are severable.

C. Sovereign Powers: Eminent Domain and Tribal Governments

Voluntary acquisition of fractionated lands is most certainly the preferred outcome for resolving the Indian land fractionation problem. The likelihood of complete voluntary compliance and acquisition, however, is relatively low. It is estimated that seventy percent of fractionated lands could be acquired voluntarily,²²² leaving a significant portion of fractionated lands in the hands of multiple holders. It is impossible to analyze which holders would be willing to sell lands or continue in possession. Yet, it is important to consider the forced taking of some interests to reduce the possibility of further fractionation.

222. NCAI, COBELL SETTLEMENT, *supra* note 173, at 4.

Eminent domain is defined as “[t]he inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking.”²²³ Governments have used eminent domain to promote the public welfare and have recently expanded the definition to include even economic returns from tax revenues as public benefits.²²⁴ The tribes, as sovereign entities, should exercise this power to provide a level of control over lands that would be the highest since European expansion.

“By its terms, the Constitution does not apply to Indian tribes.”²²⁵ Thus, the tribes, in their sovereign capacities, “are not restricted by constitutional protections in the same way as states.”²²⁶ This is not, however, without its limitations. The Indian tribes are subject to the Indian Civil Rights Act.²²⁷ “Section 1302(5)(8) mirrors the language of the Fifth Amendment” protections,²²⁸ and provides in pertinent part, “No Indian tribe exercising powers of self-government shall . . . take any private property for public use without just compensation.”²²⁹ Despite this ability to wield power and take land through a tribal takings clause, few tribes have taken advantage.²³⁰ Perhaps the Navajo Nation is the best example of a tribe that has exercised such powers. In *Dennison v. Tucson Gas & Electric Co.*,²³¹ private land was taken for the use of a right of way.²³² The Navajo Supreme Court held that eminent domain “is an inherent power and authority which is essential to the existence of all governments.”²³³ But even those tribes that are exercising the power are extremely cautious because of recent United States Supreme Court decisions limiting the sovereign powers of tribes.²³⁴ The powers that *are* authorized are limited to lands owned by tribal citizens.²³⁵ As a result, one could logically conclude that fractionated lands of tribal members could be

223. BLACK’S LAW DICTIONARY, *supra* note 37, at 601.

224. *See Kelo v. City of New London*, 545 U.S. 469, 486-487 (2005).

225. *Sawers*, *supra* note 167, at 423.

226. *Id.*

227. 25 U.S.C. §§ 1301-1303 (2006).

228. *Sawers*, *supra* note 167, at 423.

229. 25 U.S.C. § 1302(5).

230. Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 74 (2005).

231. 1 Navajo Rptr. 95 (Navajo 1974).

232. *Id.* at 96.

233. *Id.* at 98.

234. Leeds, *supra* note 230, at 74.

235. *Id.*

acquired by tribal authorities through eminent domain to solve the Indian land tenure problem. But this ignores that much of the land interests may now be outside tribal member control.²³⁶ To overcome this obstacle, the federal and state governments could exercise eminent domain cooperatively with the tribes to facilitate restoring the fractionated interests to productive use.

The public use definition has recently opened itself to incredibly broad interpretations. In 1984, the Supreme Court, in *Hawaii Housing Authority v. Midkiff*,²³⁷ stated that the public purpose of combatting high real estate prices could be served by reducing “concentrated property ownership.”²³⁸ The Court stated that this taking was “rationally related” to a public purpose.²³⁹ The *Midkiff* decision invoked little anger and went largely undisputed or challenged as an unconstitutional taking.²⁴⁰ The 2005 Supreme Court decision of *Kelo v. City of New London*²⁴¹ is a rather different story. Public outrage enveloped the country as families were uprooted from their homes when the city condemned property to make way for an economic development initiative to free it from the burden of being a “distressed municipality.”²⁴² The Court recognized that “public purpose” had been defined broadly.²⁴³ Logically, reducing “fractionated heirship” could be stretched to accommodate a public purpose because the perpetuation of fractionated interests “leads to environmental degradation, poverty, and unemployment.”²⁴⁴

Compensation (or a lack thereof) could present some problems. Just compensation is an essential element to any takings claim.²⁴⁵ Compensation typically involves the payment of money equal to the fair market value²⁴⁶ of

236. Whether the tribes would have jurisdiction over non-Indians in such a case is unsettled, but would likely fall in favor of the non-Indians. See Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians: South Dakota v. Bourland*, 27 Creighton L. Rev. 605, 652 (1993-1994) (noting that the current law “condones a presumption against tribal sovereignty over non-Indians on non-Indian fee land, which presumption can be overcome by demonstrating a significant tribal interest or consent on the part of the non-Indians”).

237. 467 U.S. 229 (1984).

238. *Id.* at 245.

239. *Id.* at 241.

240. Leeds, *supra* note 230, at 56-57.

241. 545 U.S. 469 (2005).

242. *Id.* at 473.

243. *Id.* at 480.

244. Sawers, *supra* note 167, at 423 (citing Shoemaker, *supra* note 38, at 752).

245. U.S. CONST. amend. V.

246. BLACK'S LAW DICTIONARY, *supra* note 37, at 1691 (defining fair market value as “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in

the property to be condemned.²⁴⁷ “Fair market value implies a willing, informed buyer and a willing, informed seller.”²⁴⁸ The inherent problem with eminent domain and the calculations of just compensation is that “fractionated heirship interests may not be sold freely.”²⁴⁹ Even if they could be sold unencumbered, the calculation of these individual interests would be virtually impossible. Appraisers often use three approaches to calculate the value of other lands and property: comparable sales, cost, and income capitalization.²⁵⁰ The most widely used of these is the comparable sales approach.²⁵¹ A limiting factor is that no appraiser would have sufficient data or information to calculate the true value of these highly fractionated lands.²⁵² Moreover, once a value is established, it is likely to be inaccurate.

[M]ore owners impose real costs and depress the value of the land. Simply to divide the total value of the allotment by the shares held by individual interest holders would actually over-compensate them since the analysis ignores a significant determinant of value. Interest-holders would receive significantly more than the economic value of their interest. Adequate compensation should reflect the diminution in value caused by the large number of owners.²⁵³

Furthermore, Indian land values have unique characteristics and often require the consideration of special restrictions on use that can diminish the value that

an arm’s-length transaction”).

247. Sawers, *supra* note 167, at 423.

248. *Id.*

249. *Id.*

250. BLACK’S LAW DICTIONARY, *supra* note 37, at 320 (defining a comparable as “[a] piece of property used as a comparison to determine the value of a similar piece of property”); *id.* at 399 (defining cost approach as “[a] method of appraising real property, based on the cost of building a new structure with the same utility, assuming that an informed buyer would pay no more for the property it would cost to build a new structure having the same usefulness”); *id.* at 832 (defining income approach as “[a] method of appraising real property based on capitalization of the income that the property is expected to generate”).

251. Interview with Dr. Notie Lansford, Professor and Extension Economist, Okla. State Univ. (Mar. 21, 2011) (stating that the comparable sales approach is the “preferred approach by most appraisers because it is easily understood by appraisal readers and jurors in a courtroom”).

252. See Sawers, *supra* note 167, at 423 (“The more difficult part of the comparable sales approach is not finding similar parcels in the local area; instead, the challenge is deciding whether and how to adjust the value for the large number of owners.”).

253. *Id.* at 423-24.

a willing buyer would pay.²⁵⁴ These reductions in land values are difficult to calculate, thus making it more difficult for tribal governments to determine and secure enough funds to provide the just compensation required.

“Tribes [] do not have significant sources of capital.”²⁵⁵ Like those of most governmental entities, tribal budgets are limited, and the scarce resources that do exist are already allocated to essential government operations such as education, healthcare, and government services.²⁵⁶ As previously discussed, “the federal government has shown itself unwilling to devote more than trivial resources to land consolidation.”²⁵⁷ In fact, the government has spent only a fraction of the monies specifically designated – a little less than six million of the more than eighty million dollars allocated to the BIA between 1934 and 1974.²⁵⁸ Of course, failure by Congress to appropriate adequate funding to compensate fractional interest holders renders the program effectively useless.

But other possibilities exist for compensating fractional interests owners. Several scholars have suggested a type of land swap with other tribal lands to reduce fractional ownership.²⁵⁹ Under this type of scheme, each owner would receive a piece of property elsewhere on the reservation or other tribal lands in proportion to his current ownership fraction.²⁶⁰ Land, however, is the most precious of resources. It is often regarded as the preeminent stake-hold of one’s achievements.²⁶¹ This conception of land can present great challenges when dealing with fractional ownership. Indian lands are often sacred to the ancestral descendants,²⁶² who are now among the fractionated owners. Any forced relocation, even if in proportion, would be considered a taking in the most dramatic sense of the word.

254. *See id.* at 424.

255. *Id.*

256. *E.g.*, *Services*, CHOCTAW NATION OF OKLAHOMA, available at <http://choctawnation.com/services> (last visited Apr. 25, 2011).

257. Sawers, *supra* note 167, at 424.

258. *Id.* (citing BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF THE INTERIOR, REPORT ON PURCHASE OF INDIAN LAND AND ACRES OF INDIAN LAND IN TRUST: 1934-1975, at 4-5 (1976)).

259. *E.g.*, Sawers, *supra* note 167, at 425; NCAI, COBELL SETTLEMENT, *supra* note 173, at 3.

260. NCAI, COBELL SETTLEMENT, *supra* note 173, at 3.

261. *See* Jean O. Lanjouw & Philip Levy, *A Difficult Question in Deed: A Cost-Benefit Framework for Titling Programs*, 45 WM. & MARY L. REV. 889, 892 (2004) (“Property rights are commonly regarded as a fundamental underpinning of a capitalist economic system.”).

262. Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 313 (2008).

It is important to note that individual tribes could adopt the distribution systems that they prefer. Tribal members are likely more willing to engage in negotiations with tribal leaders than outside administrators or the federal government. Tribes could ultimately even determine specific shares and allocate them among the property owners of a given parcel, destroying the classification of multiple interest holders as tenants in common, and creating a free exchange among interest holders. Such a system would allow some owners with larger interests to increase their shares by purchasing the smaller, independently unusable shares, while giving other owners with smaller interests the option to profit from their otherwise unproductive fractional interests. Such a proposal vastly ameliorates the problem of continued land fractionation and enhances the economic well-being of the interest holders by giving them a parcel with the potential for economically productive use.

The Indian tribes traditionally have not been in positions for entrepreneurial gain.²⁶³ Only recently, with the expansion of the Indian gaming industry, have tribes been able to provide outreach services and other newfound public service functions for tribal members.²⁶⁴ The development of these capabilities opens a whole new world to help solve the fractionation issue. Tribal governments could use their powers of eminent domain and draw on these outside sources of revenue to generate monies for the acquisition of highly fractionated lands. Essentially, the tribes hold dual hats in this game, operating as the governmental power taking the land for a greater public use, and serving as a bank for the individual owners to invest their compensation into other land or financial ventures. These types of activities would allow the tribes to rectify the land tenure problem by creating a clearinghouse specifically for the constant acquisition of land to prevent further fractionation. The monies from the initial deposits into an account would accrue interest until enough is compounded either to increase the tribal

263. See Sawers, *supra* note 167, at 409 (noting that “[t]ribal funds are limited”).

264. *Gaming*, NAT’L CONGRESS OF AM. INDIANS, available at <http://www.ncai.org/gaming.43.0.html> (last visited Apr. 25, 2011) (“Like state and local governments, the revenues accruing to tribal governments from any source are used as a tax base to fund essential services, such as education, law enforcement, tribal courts, economic development, and infrastructure improvement. In fact, Indian tribes are required by IGRA to use their gaming revenues for such purposes. Much like the revenues from state lotteries, tribal governments also use gaming revenues to fund social service programs, scholarships, health care clinics, new roads, new sewer and water systems, adequate housing and chemical dependency treatment programs, among others. Furthermore, many tribal governments are sharing their proceeds with local non-Indian communities through philanthropic institutions providing funds to local schools, clinics and social programs.”).

holdings or to purchase highly fractionated parcels. Once these lands are consolidated, the tribes could then make further investment ventures to provide activities and services such as education centers, business development incubators within the tribal territories, or necessary health facilities.

Individual tribal members also stand to gain from this type of investment and development scheme. Tribal members could simply opt to take the compensation, or they could invest in other projects that the tribes are promoting in hopes of capitalizing on greater returns in the future. Plans could be devised to minimize risk or even guarantee returns and prevent default through investment contracts.²⁶⁵ The opportunity for tribal members to profit from their interests, no matter how small, could help to alleviate some of the economic hardships caused by the Indian land fractionation problem.

VI. Conclusion

Indian land fractionation has plagued the United States for over one hundred years. Despite attempts to reverse the failed policy of allotment, fractionation continues. It is clear that Congress, acting alone, is unable to solve the fractionation problem. The tribes should provide input and take control of some aspects of reform.

The federal government has cleared the way for comprehensive reform with the *Cobell* settlement. These initial steps still lack the substance to stop current, let alone prevent future, fractionation. Though the settlement provides \$1.9 billion dollars for the consolidation of land interests, this amount represents only a fraction of the total needed to rectify more than one hundred years of failed Indian land policy. But full compensation to all IIM account holders would bankrupt the government altogether.

Creating a Dormant Tribal Fractional Interests Act modeled after state dormant mineral acts could offer a solution. Given the state of many highly fractionated parcels, the forfeiture of land after inaction for a particular time period allows the other interest holders an opportunity to make those lands more economically productive.

Moreover, the governmental power of eminent domain could create a wealth not seen in generations for tribes and tribal members. Though some

265. An investment contract is "an expectation of profits arising from a common enterprise" that depends "solely" for its success on the efforts of others. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946).

takings would likely be disputed, the contemplated compensation provides far better relief than the current settlement plans. Some will be unhappy with a forced taking. But the benefits to all interest holders and tribes could be astronomical both in terms of short-term use and long-term economic development and viability.

These proposed solutions still speak to the pervasive divide that has plagued many Native American policies for decades. Power-sharing is essential to the successful resolution of the land fractionation problem. Tribes need to empower themselves and volunteer schemes to deal with fractionation issues on their land, and the federal and state governments must be willing to work cooperatively with the tribes.

Realizing that each distinct tribal government's needs will be different, it is important that all nations work cooperatively to establish a workable system for solutions to the land fractionation problem. For over one hundred years, tribes and tribal governments have had their lands taken from them. How fitting would it be to use the same takings doctrines to reconcile the atrocities of land fractionation? After all, this land is your land, this land is my land.

