
FARM AND RANCH ISSUES IN INDIAN COUNTRY

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I. INTRODUCTION

In the mid-19th century, advocates calling themselves the “Friends of the Indians” began a campaign to categorically assimilate the Indians, viewing this as both a benevolent and an inevitable pursuit. The Friends of the Indians believed a forced system of private land ownership, with the express purpose of creating individual Indian farmers, would be the best vehicle for this transformation.

The federal government agreed. Through a process called “allotment,” federal treaty negotiators and other federal actors divested Indian lands from tribes, wiped clean whatever existing property regimes were in place, and “allotted” Indian land to individual tribal citizens in separate parcels of private property called allotments. This scheme of Anglo-American-style private property ownership was conceived with the specific purpose of converting individual Indians into a specific type of Christian farmer:

- “The primary agent of civilization and citizenship was to be private land ownership. . . . [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.”¹
- “Thomas Jefferson’s notion of civilized democracy, inextricably connected to agriculture, provided the foundation for allotment. Protestant evangelism fused with the Jeffersonian ideal of the yeoman farmer in a vision that saw the conversion of the Indian to property ownership as not merely a cultural but a spiritual transformation.”²
- “Sure in their Christian righteousness, allotment advocates had a messianic faith in the civilizing force of private property. Dividing reservation lands among individual Indians would, according to their story, overcome savage tribalism, convert the Indian into a yeoman farmer and prepare him for his ultimate absorption in the great body of American citizenship.”³

However, with a century and a half of hindsight, there is little dispute that allotment was, at best, a misguided effort. By replacing existing tribal mechanisms for efficient and flexible land use with a single, dysfunctional federal system, allotment wreaked havoc on indigenous communities. Today, allotment is blamed for significant land loss, poverty, and ongoing divestitures of tribal jurisdiction within reserved territories.

For many reasons, allotment did not produce the intended communities of autonomous Indian farmers within Indian Country. To the contrary, individual Indians who wish to farm or ranch within Indian Country today face compounding difficulties. First, as a

¹ Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 9 (1995).

² Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 Iowa L. Rev. 595 at n.3 (2000) (citation, quotation omitted).

³ Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1565 (2001).

result of allotment, much of Indian land now suffers from severe fractionation—the problem of multiple co-owners sharing many miniscule, undivided interests in a single tract of land. Because consent of these co-owners is generally required before almost anything can be done on fractionated land, actual beneficial use and management of land is difficult, if not impossible.

Allotment is also to blame, at least in part, for creating difficult jurisdictional questions in Indian Country. Today, states, counties, and tribes frequently dispute who governs where and who has jurisdiction over what. In addition, federal oversight in Indian Country has become so prevalent that Native American farmers and ranchers must deal not only with the United States Department of Agriculture (USDA) but also with the Bureau of Indian Affairs (BIA). The extent of this federal regulatory regime and the potential for jurisdictional uncertainty combine to complicate not only an Indian farmer’s or rancher’s land use but also his or her access to credit. For many private lenders, lending in Indian Country is simply too complex to pursue. Add to this a recognized history of discrimination against Indians, even within federal farm programs, and the prospect of farming or ranching in Indian Country is not extremely promising.

These CLE materials will review in some detail the status of Indian land tenure generally, describing how fractionation developed from the history of allotment and how its current consequences impact the ability of individual Indian producers to make beneficial use of their agricultural resources. These materials will also highlight some of the difficulties of the jurisdictional uncertainty sometimes encountered in Indian Country, and will review some of the modern federal regulatory regime affecting Indian farmers and ranchers, giving the reader a sense of its complexity and scope.

Finally, these materials ask, “What is a lawyer to do?” Some existing efforts to improve the landscape for Indian farmers and ranchers will be reviewed. However, the issue of remedies is enormously complex—covering questions of property, ancestry, how to define who is “Indian,” and whether tribal or individual pursuits should be pursued when the two conflict. And, of course, all of this begs the even harder question, “Who should decide?”

II. INDIAN LAND TENURE AND JURISDICTION⁴

A. Development of Federal Trust Responsibility

Despite the common perception that the land of this country was acquired by some monumental act of either robbery or force, the “historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.”⁵ Existing Indian nations ceded portions of their lands in government-to-government transactions, exchanging property rights for money as well as medical, education, and other services. At least in

⁴ Much of this section is drawn from Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729 (2003).

⁵ Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 35 (1947).

theory, tribes retained whatever pre-existing sovereign rights and powers were not specifically delegated away in their “reserved” territories.⁶

In 1790, Congress affirmed the government-to-government nature of its dealings with Indians and Indian nations, passing the Trade and Intercourse Act to mandate that only the federal government could execute and approve a sale of Indian land.⁷ In *Johnson v. McIntosh*, the Supreme Court further developed this principle, holding that the United States had obtained the exclusive right, as against other Europeans, to acquire all the lands of the new nation, but this was subject to the Indian right of use and occupancy—what came to be called Indian title—which the federal government could extinguish only through purchase or conquest.⁸

Despite early treaty promises of absolute and undisturbed use, and the theoretical consistency of subsequent government-to-government dealings, the mid-19th century brought an increasing hunger for Indian land and a paternalistic benevolence that led advocates, including the self-proclaimed “Friends of the Indians,” to argue for more assimilationist policies. By 1886, the U.S. Supreme Court accepted the introduction of a congressional plenary power in Indian Country.⁹ This overarching power was not based on any democratic consent to governance from the Indians to the United States. Instead, the Court construed a trustee role of the federal government, derived from its treaty promises, as well as tribal “weakness and helplessness,” that obligated the United States to act on behalf of the Indians.¹⁰

This plenary power facilitated the allotment policy, by which Congress sought to dismantle existing tribal systems and assimilate individual Indians. The federal government conducted initial experiments with allotment in the early 19th century in individual treaties and in special early statutes. Allotment became the official national

⁶ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (no state authority within Indian territory); *United States v. Winans*, 198 U.S. 371, 381 (1905) (“In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

⁷ Felix S. Cohen, *Handbook of Federal Indian Law* 109-10 & n.388 (1982) (discussing the history of the Trade and Intercourse Act). The Act stated:

No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. at 110 & n.391; see also 25 U.S.C. § 177.

⁸ 21 U.S. (8 Wheat.) 543, 543 (1823).

⁹ See *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (“[T]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. . . . It must exist in that government, because it never has existed anywhere else.”).

¹⁰ *Id.*; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (describing tribes as “domestic dependent nations”).

policy in 1887 with the passage of the General Allotment (or Dawes) Act.¹¹ In *Lone Wolf v. Hitchcock* in 1903, the Supreme Court held that the consent of affected tribes was not required to allot reserved territories.¹²

The federal government “allotted” land by reaching into the tribes’ reserved areas and assuming near-exclusive land management control. Allotment wiped clean whatever ownership patterns were in place and redistributed property, usually unilaterally and often without forethought or design, to individual tribal citizens in parcels ranging from 40 to 160 acres in size. Individuals were to “own” these small allotments individually; however, allotments were seen as a special kind of property right that was not absolute but was instead conceptualized as a beneficial ownership interest over which the federal government acted as trustee.¹³

This special trust status was designed to “protect” individual parcels of land while the Indian allottees completed their intended transformation to “yeoman farmers,” with the trust period intended to endure for just 25 years or until individual allottees were deemed “competent.”¹⁴ While held in trust, allotments were subject to complete federal restraints on alienation, which meant that individual Indians could not transfer their property freely nor could tribes effectuate local property norms or apply their common law of descent.¹⁵

In addition to the rigid restrictions during life, allottees were denied the right to devise or otherwise determine the distribution of their allotments at death.¹⁶ Instead, all allotments

¹¹ General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (*codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381*). The key section, as codified, provided that “in all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use . . . the President shall be authorized to . . . cause allotment to each Indian located thereon to be made.” 25 U.S.C. § 331 (1994) (repealed by 25 U.S.C. § 2202 (2000)).

¹² 187 U.S. 553, 564-68 (1903). In this case, Lone Wolf, a Kiowa tribal leader, argued that his tribe’s treaty with the United States required any cessations of tribal lands be approved by at least three-fourths of the adult male Indians; and that, without a fair vote on the issue, the implementation of allotment on his reservation was a violation of that treaty. *Id.* The Court held that Congress, when acting within its authority as “guardian” over the tribes, could pass laws in conflict with treaties and that it would “presume that Congress acted in perfect good faith . . . and that the legislative branch of the government exercised its best judgment.” *Id.* at 565, 568.

¹³ General Allotment (Dawes) Act, ch. 119, § 5; *see also* 25 U.S.C. § 348; *Tooahnippah v. Hickel*, 397 U.S. 598, 609 (1970).

¹⁴ *See* General Allotment (Dawes) Act, ch. 119, § 5 (providing for original 25-year trust period); Burke Act of 1906, ch. 2348, 34 Stat. 182 (amending § 6 of the General Allotment Act) (*codified at 25 U.S.C. § 349*) (authorizing early issuance of a fee (unrestricted) patent to any Indian allottee upon determination that the individual is “competent and capable of managing his or her affairs”).

¹⁵ *See* Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 Kan. J. L. & Pub. Pol’y 491, 493 (2001).

¹⁶ Before allotment, tribal land passed by tribal inheritance systems. *See, e.g., Jones v. Meehan*, 175 U.S. 1, 29 (1899) (determining that right to inherit unrestricted land owned by Indian chief “was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Montana, nor by any action of the Secretary of the Interior”). These varied by tribe, with some

necessarily passed by the intestacy laws of the state that surrounded them, often to multiple children and relatives.¹⁷ The United States recognized the right of individual Indians to write federally approved wills—a concept culturally foreign and even repulsive to some tribal citizens—in 1910; however, little else changed until 1934.¹⁸

B. Modern Consequences of Allotment

In 1934, allotment was acknowledged as a disaster. Congress responded by passing the Indian Reorganization Act (IRA), which instituted an arguably more pro-Indian policy and was intended to reestablish, with federal support, tribal governments. The IRA renounced the allotment policy and extended the trust status of remaining allotments indefinitely—preserving the restrictions on Indians’ alienation of trust land and cementing a major federal role in Indian land management and control.¹⁹ Today, much of Indian land is still defined by a protective trust status and administered under the government’s trust responsibility to individual Indians and Indian tribes.²⁰

1. Fractionation of Indian Land

In Indian Country, fractionation has reached crisis proportions, hindering Indian use of Indian resources and creating an enormous administrative burden for the federal government as trustee. Frequently, hundreds of co-owners now share trust land as tenants in common. These small ownership interests are represented as fractional shares of the whole parcel, and the average common denominator of these fractional interests regularly reaches into the millions.²¹

carried out in existing family or clan organizations or in other more tribal mechanisms. Bobroff, *Retelling Allotment*, *supra* note 3, at 1615; *see also* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, Part II, 46 *Amer. J. Comp. Law* 509, 530-35 (1998) (describing various traditional inheritance patterns).

¹⁷ General Allotment (Dawes) Act, ch. 119, § 5; *see also* Cohen, *Handbook*, *supra* note 7, at 230-31, 618-19.

¹⁸ Act of June 25, 1910, ch. 431, § 2 (*codified as amended at* 25 U.S.C. § 373).

¹⁹ Indian Reorganization (Wheeler-Howard) Act, ch. 576, § 1, 48 Stat. 984 (1934) (current version at 25 U.S.C. § 461) (“No land of any Indian reservation, created or set apart by treaty shall be allotted in severalty to any Indian.”); *id.* § 2 (current version at 25 U.S.C. § 462) (“The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.”).

²⁰ *See generally United States v. Navajo Nation*, 537 U.S. 488 (2003) (discussing modern scope of secretarial discretion in Indian Country); *see, infra*, Part II.

²¹ Guzman, *Give or Take an Acre*, *supra* note 2, at 598. For example:

Consider an 1898 allotment of 80 acres, where the allottee and two successive generations die intestate leaving five heirs apiece. Roughly 125 tenants in common would each own a 1/125th equitable interest in one half of a quarter section. [In reality,] many allotments exceed several hundred owners. As a result, common denominators have reached 54 trillion, billions are not uncommon, and millions [approach the norm].

a. Causes

Fractionation ensued directly from allotment for three main reasons.²² First, the complete restrictions that originally prohibited any transfer of ownership interests in allotments, even among tribal citizens, clearly mandated the division of property among an extended group of intestate heirs, regardless of any individual wishes or circumstances. Then, even if these new heirs later wanted to transfer or consolidate their interests, the newly imposed system either forbade it or was so unduly cumbersome as to make that effort unrealistic.

Second, the allotment policy also provided that whatever tribal lands not allocated and divided for individual allotment—the euphemistically titled “surplus” lands—were to be opened for non-Indian settlement.²³ This practice left no reservation land on which future generations of Indian owners could spread out and develop as their numbers grew.²⁴ Instead, the descendants of the original individual allottees had no choice but to share what their ancestors had held individually—which was often too small to support individual families even at that time.²⁵

Finally, the start of fractionation is also indirectly rooted in the increase in non-Indian leasing of allotments during this period. Originally, the General Allotment Act contained no language to permit allottees to lease their lands, as leasing to non-Indians would be counterproductive and inconsistent with the original purpose of transforming Indians into assimilated farmers. However, many non-Indians grew impatient with land lying fallow and with the new-to-farming Indians’ often unproductive yields, which resulted both

Id.

²² In 2000, Congress specifically found that “the problem of the fractionation of Indian lands . . . is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal law.” Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 101(13), 114 Stat. 1991, 1991-92 (*codified at* 25 U.S.C. 2201 (2000)).

²³ See Royster, *The Legacy of Allotment*, *supra* note 1, at 13-14 (2005). Many commentators suggest that this opening of additional lands for non-Indian western expansion was really the driving motive behind allotment. Cohen, *Handbook*, *supra* note 7, at 613 (“Their motives varied from a sincere wish to benefit Indian people to thinly veiled desires to obtain Indian land.”).

²⁴ See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 *Ariz. L. Rev.* 963, 978 (1996). The United States opened these lands to non-Indians, but:

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

Id.

²⁵ In total, 60 million acres of Indian land left Indian ownership through these surplus land sales. Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934*, at 121 (1991).

from lack of training and the fact that allotted land was often inherently unsuitable for farming.²⁶

In 1891, the Dawes Act was amended to allow leasing for allottees who could not personally “occupy or improve” the land “by reason of age or other disability,” with the Secretary of the Interior overseeing and managing the process.²⁷ In 1910, this authorization was extended to permit leasing on all allotments so long as the Secretary supervised the expenditure of the rent income.²⁸ Essentially, this made it “easier for Indians to transfer land to whites, harder for them to transfer it to other Indians, and much more difficult to reorganize Indian land holdings to increase efficiency.”²⁹ While leasing provided allottees an immediate source of income, it left many effectively landless and living off (often meager) rent incomes.

b. Scope of Problem

Today, statistics of the current fractionated conditions often defy imagination, precisely because of the monstrous proportions of the problem. In 1987, the Supreme Court cited one now-standard example to help bring fractionation to life:

Tract 1305 [on the Sisseton-Wahpeton Lake Traverse Sioux Reservation] is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.³⁰

In 2004, the Department of Interior reassessed the status of Tract 1305 and found:

Today, this tract produces \$2,000 in income annually and is valued at \$22,000. It now has 505 owners but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the

²⁶ *Id.* at 46 (“Indian Office officials . . . remained torn [because leasing] could also harm the Natives by enabling them to live off rentals rather than farm.”).

²⁷ Act of February 28, 1891, ch. 383, § 3, 26 Stat. 794.

²⁸ Act of June 25, 1910, ch. 431, § 4, 36 Stat. 856 (*codified at* 25 U.S.C. § 403); *see also* 25 C.F.R. Part 162 (modern BIA regulations for most leasing oversight).

²⁹ Bobroff, *Retelling Allotment*, *supra* note 3, at 1614 (*citing* Leonard Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* 90 (1981)).

³⁰ *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

505 owners could agree) for its estimated \$22,000 value, the smallest heir would now be entitled to \$.00001824.³¹

In 1992, the U.S. General Accounting Office (GAO) conducted a study of fractionation and found that the BIA maintained 1.1 million separate ownership records on just 12 sample reservations used for the study.³² On these 12 reservations, 20 percent of the land still held in trust had at least one ownership interest equivalent to 2 percent or less of the total tract size, and 67 percent of all ownership interests recorded were smaller than 2 percent of their total tract size. Some were “as small as one four-hundred-thousandth of 1 percent,”³³ and if these small interests were physically partitioned out, at least three out of the 12 reservations would have had at least one parcel of land smaller in size than the paper the report was printed on.³⁴

In 2002, Interior “attempted to replicate the audit methodology used by the GAO to update the GAO report . . . and found that [fractionation] had grown by over 40 percent between 1992 and 2002.”³⁵

2. Jurisdictional Checkerboard

In addition to fractionating the land of individual Indians, allotment caused the total loss of 90 million acres of Indian land. Indian landownership dropped from 138 million acres to only 48 million in 1934, and 20 million of those remaining acres were considered desert and undesirable for non-Indian settlement anyway.³⁶ Such significant land loss resulted both from the opening to non-Indian settlement of the “surplus” lands not allotted to individual Indians, and from the fact that as individual allottees were deemed “competent”—often without the ability to speak English or fully participate in the foreign legal system to which their new grant of an unrestricted fee patent would yield—the protective trust status was removed and alienation of Indian land to non-Indians or tax foreclosures prevailed.³⁷

³¹ Ross O. Swimmer, Testimony Before the House Committee on Resources, Hearing on S. 1721, “The American Indian Probate Reform Act of 2004” (June 23, 2004), *available at* <http://resourcescommittee.house.gov/archives/108/testimony/2004/rossswimmer0623.htm> [hereinafter Swimmer, *Testimony on S. 1721*].

³² U.S. Gen. Accounting Office, *Profile of Land Ownership at 12 Reservations*, No. GAO/RCED-92-96BR, at 1-2 (1992) (Briefing Rep. to the Chairman, Select Senate Comm. on Indian Affairs) [hereinafter GAO Report].

³³ *Id.* at 2, 23.

³⁴ *Id.* at 20. However, in their calculations, the report’s authors “did not attempt to identify ownership interests smaller than one ten-millionth of one percent.” *Id.*

³⁵ Swimmer, *Testimony on S. 1721*, *supra* note 31.

³⁶ Guzman, *Give or Take an Acre*, *supra* note 2, at 605.

³⁷ McDonnell, *Dispossession*, *supra* note 25, at 88-90; Guzman, *Give or Take an Acre*, *supra* note 2, at 605. Twenty-seven million acres—two-thirds of all originally allotted land—passed out of Indian allottees’ hands between 1887 and 1934 as a result of these “competency” determinations,

Although the IRA in 1934 established a \$10 million revolving loan fund for the repurchase of land that had been taken out of trust, and provided for the return of “surplus” lands not yet homesteaded by non-Indians,³⁸ the continual taking of Indian lands under eminent domain combined with inadequate resources produced negative results—still more land was taken than was returned.³⁹

The result is that today land within reservation boundaries is held in a variety of ownership types—tribal, individual Indian, non-Indian, as well as a mix of trust and fee lands. This pattern of mixed ownership is often referred to as a “checkerboard,” and this checkerboarded land base has had serious jurisdictional consequences for Indian tribes.

Although originally Indian tribes retained their sovereignty throughout their territories, recent Supreme Court cases have consistently developed a dwindling definition of tribal jurisdiction, with the question of who governs where in Indian Country now often determined largely by who owns what.⁴⁰ Indeed, a string of modern Supreme Court cases have judicially redrawn, and effectively diminished, reservation boundaries, with the decisions justified based on allotment’s introduction of non-Indian settlers into Indian Country and the reduced Indian land mass itself.⁴¹

often done unilaterally in response to mounting pressure for more land and more productive uses, that made the land eligible for sale. *Id.* Competency determinations were often sought and even effectuated by corrupt land speculators who then pounced to purchase or swindle land from unsuspecting allottees. *Id.* Allotments taken out of the trust status were also subject to frequent tax foreclosures and sheriff sales as the Indian allottees were suddenly thrust into a foreign legal system with all its obligations and no resources for its use. *Id.*

³⁸ Indian Reorganization Act §§ 5, 10 (current version at 25 U.S.C. §§ 465, 470); *id.* § 3 (current version at 25 U.S.C. § 463).

³⁹ Royster, *The Legacy of Allotment*, *supra* note 1, at 17 n.90 (“Between 1936 and 1974, some 595,157 acres were restored to tribal ownership, but more than three times that many acres of existing tribal lands, a total of 1,811,010, were condemned for other purposes.”).

⁴⁰ See *United States v. Montana*, 450 U.S. 544, 566 (1981) (tribe cannot regulate non-Indian fishing on a reservation river); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (tribal court cannot hear case arising from car accident on state highway running across tribal land); *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (tribe cannot regulate access to land condemned by the federal government to build a dam); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998) (tribe cannot enact zoning ordinances in a “diminished” area of reservation characterized by a concentration of non-Indian ownership); *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (holding that the tribal court has no jurisdiction to adjudicate tribal citizen’s tort claims arising from state official’s execution of process on tribal member’s trust land on reservation).

⁴¹ *Yankton Sioux Tribe*, 522 U.S. 329; *Hagen v. Utah*, 510 U.S. 399 (1994); *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 409-13 (1989); *Solem v. Bartlett*, 465 U.S. 463, 464-65 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *Yale L.J.* 1, 7 (1999) (arguing that the “Court has assumed a legislative function—that of implementing the ongoing colonial process”).

The resulting jurisdictional divestitures raise immediate issues about the meaningfulness of tribes' sovereignty, treaty promises of reserved rights, and the current federal policy of promoting tribal self-governance.⁴² However, aside from these self-determination issues, the existence of these jurisdictional questions throughout Indian Country has a significant impact on the practical ability of individual Indians to use their land for any purpose, including for farming and ranching. The lack of predictability and transparency about which laws apply where necessarily affects anyone's confidence in investing any time or money within Indian Country.

III. FEDERAL REGULATION OF INDIAN FARMERS AND RANCHERS⁴³

In 2003, the Indian Land Tenure Foundation (ILTF) conducted community surveys aimed to measure "how Indian people view[] land ownership and management" and discovered that "overall, the respondents [74.31 percent of them] perceived Indian control and management of land as having the most importance in securing a better life for future generations and tribal sovereignty."⁴⁴ However, the survey revealed that "in reality, property rights are not, or cannot be, used effectively in Indian country. In other words, the respondents perceived great systemic barriers in the use of property rights related to land and natural resources."⁴⁵

Barriers identified that hindered Indian use and management of land included:

⁴² In enacting the Indian Self-Determination Act of 1975, Congress specifically found that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons." 25 U.S.C. 450(a)(2). Congress also found that:

the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.

Id. at 450(a)(1).

⁴³ For a comprehensive overview of federal regulation of Indians and Indian tribes, see Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. Pub. L.* 1, 62-70 (2004).

⁴⁴ Indian Land Tenure Foundation, *Community Survey: Importance of Land and Value of Property Rights* at 3 (Jan. 2003), at http://www.indianlandtenure.org/publications/survey_results.pdf.

⁴⁵ *Id.* at 4. Only 44.5 percent said property rights "work for Indians." *Id.* More specifically, only 15.1 percent think these rights are secure and respected by federal and state governments"; 16.1 percent perceive information about property rights as "accessible and understandable"; and only 38.5 percent feel that land is available and property rights are attainable for Indian people who do not currently own land. *Id.* at 4.

- BIA ineffectiveness; excessive “red tape”; and federal bureaucracy unable to provide answers or act quickly and insensitive to traditional ways and knowledge; slowness of action;
- Fractionated ownership of lands and checkerboarding; and
- Problems with heirship and lineal descent.

Thus, the survey concluded that “despite the primary importance of land, there is substantial pessimism throughout the various Indian communities about securing, retaining and using land and property rights.”⁴⁶

Interestingly, despite the extent of federal regulation over Indians and Indian tribes, the United States Commission on Civil Rights recently found significant disparities in federal funding between Indians and other groups. This report found that, when adjusting for inflation between 1975 and 2000, BIA programs within Indian Country experienced a yearly appropriations *decline* of \$6 million, leaving unfunded more than \$7.4 billion in unmet needs in 2000.⁴⁷ Indeed, there is less spent per capita for the benefit of Indians than for the rest of the population.⁴⁸

Not surprisingly, the Commission also noted that “Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator,” compared to other groups in American society, suffering “higher rates of poverty, lower educational achievement, more substandard housing, and higher rates of disease and illness.”⁴⁹

Published reports indicate that, of the 55 million or more acres of Indian land today, 75 percent of that land is agricultural and the remaining 25 percent is forest land.⁵⁰ Thus, successful agricultural production is the most likely source of economic development and future growth for Indian Country. However, the problems associated with the on-the-ground reality of fractionation and checkerboarded jurisdiction create significant hurdles—particularly in the pursuit of efficient and sustainable agricultural land use, even by Indian landowners.

Certainly, all farmers face a maze of federal regulations whenever they seek to participate in a USDA farm loan or benefit program. However, for Indian producers, the difficulty of garnering multiple landowners’ consent to act on fractionated land and the potential for jurisdictional “gaps” within the reservation at least in part support the continuation of an additional layer of extensive federal regulation by Interior for Indian land use.

⁴⁶ *Id.* at 5-6.

⁴⁷ U.S. Comm’n on Civil Rights, *A Quiet Crisis, Federal Funding and Unmet Needs in Indian Country* at 24 (2003), at <http://www.usccr.gov/pubs/na0703/na0731.pdf> [hereinafter *A Quiet Crisis*].

⁴⁸ *Id.* at 10-12.

⁴⁹ *Id.* at ix.

⁵⁰ Darla J. Mondou, *The American Indian Agricultural Resource Management Act: Does the Winters Water Bucket Have a Hole in It?*, 3 Drake J. Agric. L. 381, 387 (1998).

In addition, recent federal legislative efforts are still changing the regulatory landscape, though these changes often take years to implement—if they even are. For example, the American Indian Probate Reform Act of 2004 (AIPRA)⁵¹ and the Indian Land Consolidation Act (ILCA)⁵² are recent attempts to slow the rate of future fractionation of the Indian land base and have radically changed Indian land use and probate regulations, often controversially. In addition, the American Indian Agriculture Resource Management Act of 1993 (AIARMA)⁵³ was enacted to address the issue of Indian agricultural land often remaining idle and other barriers to sustainable and efficient Indian use of Indian agricultural resources.

This section attempts to incorporate some of these legislative reforms and to highlight some of the existing regulations that uniquely affect Indian farming and ranching. However, the regulations themselves cover several hundred pages of the *Code of Federal Regulations*, and due to relatively recent legislative changes, including the fact that AIPRA in particular is still being implemented, these regulations remain somewhat in flux. In addition, in practice, interpretations of these regulations often vary among BIA's multiple regional offices. Therefore, this section provides a limited slice of the picture and illustrates just some of the most obvious impacts of this complicated system.

A. Land Use

The federal government, through a power allocated primarily to the Secretary of Interior and, more specifically, the BIA, maintains ownership records and manages almost any transaction involving trust land.⁵⁴ As a general rule, trust property cannot be transferred, alienated, or leased without the approval of the Secretary of the Interior.⁵⁵ These approvals are granted on a case-by-case basis, and typically require lengthy appraisal and other documentation processes.⁵⁶

⁵¹ American Indian Probate Reform Act of 2004, Pub. L. 108-374.

⁵² The Indian Land Consolidation Act (the "ILCA"), first passed in 1983. ILCA of 1983, Pub. L. No. 97-459, 96 Stat. 2515, 2517-19 (1982) (*codified at* 25 U.S.C. §§ 2201-2210 (1982)). ILCA was modified in 1984. ILCA of 1984, Pub. L. No. 98-608, 98 Stat. 3171 (amending 25 U.S.C. §§ 2203-2206, and adding § 2211). Finally, ILCA was amended again in 2000. ILCA Amendments of 2000 (amending 25 U.S.C. §§ 2201, 2204-2207, and adding §§ 2212-2219). These amendments were included in the 2000 Edition of the *U.S. Code*; however, most were never certified or implemented.

⁵³ American Indian Agricultural Resource Management Act of 1993, Pub. L. No. 103-177, 107 Stat. 2011 (*codified at* 25 U.S.C. §§ 3701-45 (1994)).

⁵⁴ *See* 25 C.F.R. §§ 150.1-150.11 (2006).

⁵⁵ 25 U.S.C. §§ 177, 348, 464, 2216, 2218; *see also* 25 C.F.R. § 152.17 (2006).

⁵⁶ *See generally* 25 C.F.R. Parts 150-52, 162, 166 (2006).

1. Selling Trust Land

Selling Indian trust lands requires consent of the co-owners and the Secretary.⁵⁷ The Secretary can approve a sale if the transaction clearly appears justified in light of the long-range best interests of the owner.⁵⁸ An appraisal is to be obtained prior to approving a sale.⁵⁹ BIA regulations normally do not permit an Indian and non-Indian to negotiate a sale; instead, these exchanges must be through an advertised sale.⁶⁰

The Secretary can also grant rights of way across all trust and restricted lands, usually with majority consent but also unilaterally in cases where “owners . . . are so numerous that the Secretary finds it would be impracticable to obtain their consent.”⁶¹

Recently, in AIPRA, Congress added a new authority by which a single owner, often without the consent of any co-owners, will be able to execute a partition sale of some highly fractionated parcels of trust land.⁶² There is no parallel authority for partitions in kind, except as has already existed in theory at probate and by Secretarial initiative.⁶³

2. Leasing Trust Land

The BIA is also very involved in administering leases, monitoring rights of way, and collecting and distributing lease incomes. To give a sense of the size of this undertaking, Interior recently reported it is “involved in the management of 100,000 leases for individual Indians and tribes on trust land.”⁶⁴ Lease and other revenues for individual Indians are managed in individual Indian money (IIM) accounts. The BIA currently has “approximately 240,000 open IIM accounts, the majority of which have balances under \$100 and annual throughput of less than \$1,000.”⁶⁵ In all, Interior has “over 20,000 accounts with a balance between one cent and one dollar, and no activity for the previous 18 months”—with a total sum in all of these accounts of \$5,700 and an average balance 30 cents.⁶⁶

In terms of its regulations of Indian leasing, BIA practices vary depending on the type of lease at issue.⁶⁷ However, generally BIA requires any Indian co-owner in a tract to get a

⁵⁷ 25 C.F.R. § 152.17 (2006).

⁵⁸ *Id.* § 152.23.

⁵⁹ *Id.* § 152.24.

⁶⁰ *Id.* § 152.25.

⁶¹ 25 U.S.C. § 324.

⁶² *Id.* § 2204(c) (2006).

⁶³ 25 C.F.R. § 152.33 (2006).

⁶⁴ Swimmer, *Testimony on S. 1721*, *supra* note 31.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ BIA regulations for leasing and permitting Indian lands for most purposes are set forth at 25 C.F.R. Part 162, with separate subparts for agricultural and non-agricultural leases.

lease before using or possessing the land, allowing only an “Indian landowner who owns 100 percent of the trust or restricted interests in a tract [to] take possession without a lease or any other prior authorization from us.”⁶⁸ Unauthorized possession, even by a co-owner, may be treated as trespass.⁶⁹

Leases of Indian trust lands are subject to the National Environmental Policy Act (“NEPA”) and other federal land use statutes.⁷⁰ However, neither the Secretary nor the BIA is a party to the lease.⁷¹ Yet, the BIA does have significant enforcement authority upon violation of a lease.⁷²

a. Agricultural Leases: American Indian Agriculture Resource Management Act of 1993 (AIARMA)

AIARMA was passed in 1993 to:

provide for the establishment of a viable system for the management and administration of Indian owned agricultural lands; to enhance the capability of Indian ranchers and farmers to produce crops and products from such lands; to affirm the authority of the Indian tribal governments in the management and regulation of Indian agricultural lands; and to enhance the educational opportunities for Indian students in the management of Indian natural resources.⁷³

Pursuant to AIARMA, Indian agricultural lands should be managed:

(1) To protect, conserve, utilize, and maintain the highest productive potential on Indian agricultural lands through the application of sound conservation practices and techniques. . . .

Regulations for forestry are found in Part 163, grazing permits in Part 166, and mineral leasing in Parts 200-27.

⁶⁸ 25 C.F.R. § 162.104(a) (2006).

⁶⁹ *Id.* § 162.106.

⁷⁰ McCarthy, *Bureau of Indian Affairs*, *supra* note 43, at 65.

⁷¹ *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 371 (1968) (“Although the approval of the Secretary is required, he is not the lessor.”).

⁷² *E.g.*, 25 C.F.R. § 162.108 (2006).

⁷³ S. Rep. No. 103-186 at 1 (1993) (analyzing H.R. 1425). AIARMA’s findings and purposes are also codified at 25 U.S.C. §§ 3701-02. The congressional findings, in particular, note that “Indian agricultural lands . . . are vital to the economic, social, and cultural welfare of many Indian tribes and their members” and planned development and management of these lands “will produce increased economic returns, enhance Indian self-determination, promote employment opportunities, and improve the social and economic well-being of Indian and surrounding communities.” 25 U.S.C. § 3701(3)-(4).

- (2) To increase production and expand the diversity and availability of agricultural products . . . through the development of agricultural resources on Indian lands.
- (3) To . . . protect and maintain other values such as wildlife, fisheries, cultural resources, recreation and to regulate water runoff and minimize soil erosion.
- (4) To enable Indian farmers and ranchers to maximize the potential benefits available to them through their land. . . .
- (5) To develop Indian agricultural lands and associated value-added industries of Indians and Indian tribes to promote self-sustaining communities.
- (6) To assist trust and restricted Indian landowners in leasing their agricultural lands for a reasonable annual return, consistent with prudent management and conservation practices, and community goals. . . .⁷⁴

Thus, under AIARMA, tribes are encouraged to develop and implement an “approved” Indian agriculture resource management plan,⁷⁵ and Interior is to conduct all agricultural land management activities in accordance with that plan and in accordance with tribal laws and ordinances pertaining to Indian agricultural lands.⁷⁶ Agricultural leases, in particular, must conform to any agricultural resource management plan developed by the tribe with jurisdiction over the land.⁷⁷ These resource plans can, in theory, be used to establish an Indian preference in leasing, establish local processes for handling the leasing of highly fractionated lands, and set rates for leasing tribally owned agricultural land.⁷⁸

Indian rangeland and farmland may be leased for up to ten years or up to 25 years where a “substantial investment” is required.⁷⁹

Agricultural leases may be negotiated directly with the landowners but are generally still subject to BIA approval.⁸⁰ However, most recently, in AIPRA, Congress passed new authority allowing all of the owners of undivided trust or restricted interests in a parcel of land to submit applications to the Secretary to convert the land to “owner-managed” status, by which the owners may, without approval from the Secretary, enter into agricultural leases for a term not to exceed ten years.⁸¹

⁷⁴ 25 U.S.C. § 3711(a).

⁷⁵ *Id.* § 3711(b).

⁷⁶ *Id.* § 3712(a)-(c).

⁷⁷ *See generally id.* § 3711-15; 25 C.F.R. § 162.201 (2006).

⁷⁸ *See id.* § 3715(b).

⁷⁹ *Id.* § 3715(a)(1).

⁸⁰ 25 C.F.R. § 162.206 (2006). The BIA should assist potential lessees upon request, including providing the names and addresses of the Indian landowners. *Id.*

⁸¹ 25 U.S.C. § 2220(c)(1) (2006).

For non-owner-managed land still requiring the Secretary's approval, only the consent of a majority of the trust interests in a tract is required to grant an agricultural lease or permit, and this majority can bind the minority owners, sometimes without notice to the non-consenting co-owners.⁸² If a majority of the co-owners cannot come to an agreement on agricultural leases, the BIA gives them 90 days to negotiate a resolution and then assumes the advertisement and leasing responsibility upon the owners' behalf.⁸³

Before approving a lease, the BIA must typically determine the fair market annual rental of the land.⁸⁴ Leases below "appraised rates" are permitted in limited circumstances, but only when the rate received is from the highest bid at an advertised sale and Interior deems that the lower rate is in the best interest of the land and landowner.⁸⁵ The BIA reviews all agricultural leases before granting approval to ensure compliance with a host of other detailed regulations.⁸⁶

b. Non-agricultural Leases

Federal law generally limits the leasing of Indian lands for non-agricultural purposes to a maximum term of 25 years, with some exceptions.⁸⁷

For non-agricultural leases, a sliding percentage of the trust ownership of a given allotment must consent to grant the lease, subject to BIA approval. The "minimum consent" requirement for these "non-agricultural" leases is a bare majority for tracts with 20 or more Indian owners and 90 percent for tracts with five owners or fewer.⁸⁸ Interior also has authority to impose some flexibility—and grant approvals—when the heirs cannot or will not agree.⁸⁹

⁸² 25 U.S.C. § 3715(c)(2)(A); 25 C.F.R. §§ 162.207(c), .209 (2006).

⁸³ See 25 C.F.R. §§ 162.209, .212 (2006). For example, each spring, the Fort Peck Agency sends out approximately 10,000 ninety-day notices to individual owners of 1,200 leases. See Indian Lands Consolidation: Hearing on H.R. 2743 Before the House Committee on Resources to Reduce the Fractionated Ownership of Indian Lands, and for Other Purposes, 108th Cong. (July 29, 1998) (statement of Edward B. Cohen, Deputy Solicitor, Dept. of Interior), available at 1998 WL 425978 (Fed. Doc. Clearing House).

⁸⁴ 25 C.F.R. § 162.211 (2006).

⁸⁵ 25 U.S.C. § 3715(a)(2); see also 25 C.F.R. § 162.222 (2006).

⁸⁶ See generally 25 C.F.R. Part 162; McCarthy, *The Bureau of Indian Affairs*, supra note 43, at 67-70.

⁸⁷ 25 U.S.C. § 415. The maximum lease term has been extended to 99 years for leases on certain reservations. *Id.* In addition, the Native American Housing Assistance and Self-Determination Act of 1996 authorizes leases for housing and residential purposes of up to 50 years. *Id.* § 4211.

⁸⁸ *Id.* § 2218(h) (2006). AIPRA reduced this from the 100 percent needed for lease consent when there are five or fewer owners under ILCA. See Pub. L. 108-374, Sec. 6(a)(10).

⁸⁹ See, e.g., 25 U.S.C. § 415a; 25 C.F.R. § 162.601 (2006).

3. Grazing Permits

The regulatory landscape for grazing permits was recently articulated succinctly by the Interior Board of Indian Appeals:

With limited exception, federal regulations require a party wishing to use Indian trust land for grazing to obtain a permit to do so. 25 C.F.R. § 166.200. Permits may be issued by the Indian landowner, whether a tribe or an individual Indian, subject generally to BIA approval. *Id.* § 166.203. Alternatively, permits may be issued by BIA under certain circumstances, including if the Indian landowner requests it to do so. *Id.* § 166.205(a).

BIA establishes the grazing rental rate for individually owned Indian lands and for tribal land where the tribe has not established the rate. *Id.* § 166.400(b). The grazing rental rate is to represent the “fair annual rental,” which is defined as “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.” 25 C.F.R. § 166.4. The established rental rate may be determined by an appraisal completed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), or by other methods, including competitive bids or negotiations, used in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with USPAP. *Id.* § 166.401. The total grazing rental payment for any permit is determined by multiplying the grazing rental rate by the number of animal unit months (AUMs) or acres covered by the permit. *Id.* § 166.409.

BIA may adjust the grazing rental rate to ensure that Indian landowners are receiving fair annual return. *Id.* § 166.408. The rate may be adjusted based upon an “appropriate valuation method, taking into account the value of improvements made under the permit, unless the permit provides otherwise, following the [USPAP].” *Id.* BIA is to review the rental rate annually or as specified by the permit. *Id.*⁹⁰

Most disputes regarding grazing permits have to do with the rental rate, with on-reservation grazing rates often significantly exceeding their counterparts on other federally managed public land.

Trespass is another issue that arises with some regularity on Indian grazing lands. The BIA has jurisdiction to enforce trespass regulations for any unauthorized use or occupation of Indian lands.⁹¹ The BIA may respond to a trespass on Indian agricultural lands by impounding livestock or other property involved in the trespass and assessing

⁹⁰ *Rosebud Indian Land and Grazing Ass’n. v. Acting Great Plains Regional Director, BIA*, 41 IBIA 298, 298-99 (2005).

⁹¹ 25 C.F.R. § 166.800 (2006).

damages and penalties.⁹² The BIA determinations of trespass are not subject to administrative appeal within the agency.⁹³

4. Changing Trust Status

An Indian landowner may apply to have Indian land removed from trust status in order to use land free of all of the above restrictions. However, this may pose jurisdictional and other risk for Indian communities, and therefore the Secretary may withhold action on any application for a fee patent that would adversely affect the best interests of other Indians or the tribe until those affected parties have had a reasonable opportunity to acquire the land from the applicant and keep it in trust.⁹⁴

The Secretary of Interior may also acquire land for Indians and put it into trust for individuals or tribes.⁹⁵ The BIA's policy is to permit acquisition of land into trust for an Indian tribe when (1) the property is within or adjacent to the tribe's reservation, (2) the tribe already owns an interest in the land, or (3) the property is determined by the Secretary to be "necessary" to the tribe.⁹⁶ The Secretary has discretion in the decision whether to take land into trust for a tribe, subject to consideration of several factors.⁹⁷

B. Probate

The Secretary of the Interior is responsible for the probate of Indian trust property and the approval of any Indian wills.⁹⁸

Traditionally, the BIA has probated all the trust property of individual Indians by applying state law when approved tribal codes or specific federal laws are not in place, with trust assets in practice passing primarily by state intestacy laws.⁹⁹ Until recently, every trust estate received a special hearing in front of either a hearing examiner or an administrative law judge, who carried out extensive duties of providing notice, determining heirs, approving wills, paying claims, and distributing an accurate inventory of the decedent's trust assets—regardless of size or value—based on a probate package prepared in advance by a BIA probate specialist.¹⁰⁰ Recently, however, Interior passed

⁹² *Id.* § 166.806.

⁹³ *Id.* § 166.805.

⁹⁴ *Id.* § 152.2.

⁹⁵ 25 U.S.C. § 465 (for tribes that adopted IRA); 25 U.S.C. § 2202 (extending to all tribes).

⁹⁶ 25 C.F.R. § 151.3 (2006). The BIA's fee-into-trust regulations are found in 25 C.F.R. Part 151.

⁹⁷ *Id.* §§ 151.10-11 (2006); *see also McAlpine v. United States*, 112 F.3d 1429, 1433-35 (10th Cir. 1997).

⁹⁸ 25 U.S.C. § 372; 25 C.F.R. § 15.302 (2006).

⁹⁹ 25 U.S.C. § 348 (2000) (applying state intestacy laws).

¹⁰⁰ 25 C.F.R. Parts 15, 150 (2000); 43 C.F.R. Part 4, Subpart D (2000).

new regulations allowing an Agency Superintendent or an Attorney Decision-Maker rather than an ALJ to make initial probate decisions.¹⁰¹

Concerns that the prevalence of distribution by state intestacy laws both created more fractionation (as more already small interests were divided among multiple heirs) and resulted in more land going out of trust (as non-Indian heirs inherited the decedent's trust land in fee) has caused increasing Congressional attention to Indian probate in the last two decades. Arguably, much of this action is truly motivated by the cost to the government as trustee in accounting for these fractional interest records. The GAO estimated that, based on 1984 figures, maintaining these landownership records cost the BIA between \$40 and \$50 per record per year.¹⁰² Interior recently estimated that the average cost for a probate process exceeds \$3,000.¹⁰³ In 1999, the BIA reported that management of undivided fractional interests absorbed 50 to 75 percent of its total land management budget.¹⁰⁴

a. Indian Land Consolidation Act (ILCA)

The first major modern response to the fractionation problem was ILCA, originally passed in 1983, modified in 1984, and then amended again in 2000.¹⁰⁵

ILCA actually began as a piece of special legislation to address fractionation on the Devils Lake Sioux Reservation in North Dakota and was designed to allow the tribe to purchase individual fractional interests and permit individuals to exchange their small interests for a single larger piece of consolidated tribal land. ILCA ultimately recognized that all tribes have the ability to create and carry out similar efforts, subject to Interior approval, in order to eliminate fractional interests and consolidate land holdings.¹⁰⁶

While persuasive in theory, the prospect of exchanging several fractional interests for a single equivalent piece of tribal land was not jumped on in practice by many individual Indian owners, largely due to the effort required for such an exchange given all the other restrictions and bureaucracy involved in Indian land transactions. The director of the Land Office at Pine Ridge, for example, reported in June of 1995 that the process for completing such a consolidation could be expected to take six years.¹⁰⁷

¹⁰¹ 25 C.F.R. §§ 15.205-.206, .301 (2006); *see generally* 43 C.F.R. Part 4, Subpart D (2006).

¹⁰² GAO Report, *supra* note 32, at 24-25.

¹⁰³ Swimmer, *Testimony on S. 1721*, *supra* note 31.

¹⁰⁴ Indian Land Consolidation Act Amendments: Joint Hearing Before the Senate Comm. on Indian Affairs and the House Comm. on Resources on S. 1586, S. 1315, and H.R. 3181, 106th Cong. 83 (1999) (statement of Kevin Gover, Assistant Sec'y for Indian Affairs, Dept. of the Interior).

¹⁰⁵ *See, supra* note 51.

¹⁰⁶ 25 U.S.C. § 2203(a) (1982).

¹⁰⁷ Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. Rev. 231, 251 n.165 (1997).

Aside from this complicated consolidation authority, the first two versions of ILCA are most notorious for forcing small interests with limited income earning potential to “escheat” back to the tribe upon the death of the fractional interest holder. The Supreme Court found both of these acts to be unconstitutional takings without just compensation.¹⁰⁸

Later, the probate reform portions of the 2000 ILCA Amendments were perhaps equally controversial in Indian Country. This provided that interests in trust land may be devised only to, or inherited by, another Indian or the tribe with jurisdiction over the land.¹⁰⁹ Any attempted devise to a non-Indian created only a life estate, with the remainder going to extended Indian heirs or, if there were no such heirs, eventually to the tribe.¹¹⁰ ILCA was particularly controversial for its exceedingly narrow definition of “Indian.”¹¹¹

These amendments also recognized a somewhat broader tribal authority to enact tribal probate codes—although still subject to Interior approval and the requirement that they comport with federal law and the federal goal of reducing fractionation.¹¹²

In the absence of an approved tribal code, the amendments imagined the implementation of uniform federal rules of descent and distribution, but did not include sufficient detail to implement this goal in practice.¹¹³ The amendments also included complicated presumptions in favor of joint tenancies with the right of survivorship for any interest constituting less than 5 percent of the total tract sense.¹¹⁴

However, ultimately most of the 2000 ILCA Amendments were never certified by the Secretary of Interior and therefore never took effect in Indian Country, leaving most Indian landowners in another difficult state of uncertainty.

b. American Indian Probate Reform Act of 2004 (AIPRA)

AIPRA amends ILCA and replaces many of the 2000 ILCA Amendments relating to probate. AIPRA is intended to answer many of the issues raised by the 2000 ILCA Amendments and includes significantly more detailed provisions than the prior amendments.

¹⁰⁸ *Hodel*, 481 U.S. at 717; *see also Babbitt v. Youpee*, 519 U.S. 234, 242-43 (1997) (finding the amended version of the escheat also unconstitutional). Of course, this holding has created an administrative nightmare of its own—requiring tribes to return their escheated interests, and Interior to divide and re-distribute these interests back among the decedents’ heirs as they would have passed had they not been subject to the escheat provision.

¹⁰⁹ 25 U.S.C. § 2206 (2000).

¹¹⁰ *Id.*

¹¹¹ *See id.* §§ 2201(2), 2205 (2000).

¹¹² *Id.* § 2205 (2000).

¹¹³ *Id.* § 2206 (2000).

¹¹⁴ *Id.* § 2206(c)(2)(B).

Most prominently, AIPRA includes a detailed uniform federal probate code that will apply in place of state intestacy laws in Indian Country—absent an applicable tribal probate code.¹¹⁵ AIPRA also introduces a “single heir policy” into its intestacy rules so that interests smaller than 5 percent of the total tract will pass to a single surviving spouse or the single oldest heir.¹¹⁶ In addition, AIPRA expands the definitions of “Indian” and “eligible heirs,” and provides that any of these parties may inherit or receive by devise trust or restricted property in the same status as it was held by the decedent.¹¹⁷ In most cases, the surviving spouse will generally inherit a strong life estate, without regard to waste.¹¹⁸

AIPRA also includes ILCA’s presumption that devises to multiple parties will be read as joint tenancies with the right of survivorship.¹¹⁹

Heirs or devisees may make flexible agreements at probate to consolidate the decedent’s interests.¹²⁰ There is also an expanded purchase option at probate for tribes, co-owners, and other eligible heirs.¹²¹

Many of AIPRA’s provisions are set to become effective starting June 20, 2006.

C. Credit

An individual Indian owner of trust land may, with BIA approval, execute a mortgage or deed of trust to such land. Typically, in the event of foreclosure, the Indian owner is treated as if he or she has an unrestricted fee simple title to the land, and the United States is not a necessary party to the action.¹²² A foreclosure must be conducted “in accordance with the laws of the tribe which has jurisdiction over such land” or by state law if no tribal law exists.¹²³

However, a lease of either individual or tribal trust land may also be mortgaged, again with the required consent of the landowners and the BIA.¹²⁴

There are many practical difficulties to private commercial lending in Indian Country. Title insurance is nearly impossible to get on Indian trust land because only a few title insurance companies will offer it. Loans secured by trust land require BIA approval, and

¹¹⁵ See *id.* §§ 2205(a), 2206(a)(1)(A) (2006).

¹¹⁶ *Id.* § 2206(a)(2)(D)(iii) (2006).

¹¹⁷ *Id.* §§ 2201(2), (9), § 2206(a)(5) (2006).

¹¹⁸ *Id.* § 2206(a)(2)(A), (a)(2)(D)(ii) (2006).

¹¹⁹ *Id.* § 2206(c) (2006).

¹²⁰ *Id.* § 2206(e) (2006).

¹²¹ *Id.* § 2206(o) (2006).

¹²² *Id.* § 483(a).

¹²³ *Id.*

¹²⁴ *E.g.*, 25 C.F.R. §§ 162.230, .244 (2006).

different BIA offices handle the approval process differently. Where a lease is the only available security interest, maximum lease terms may be too short to suffice as sufficient collateral. Tribes, as sovereign entities, have their own sovereign immunity that may make private lenders wary of loaning to them. Finally, any dispute—including a supervised foreclosure—would likely be heard in tribal court, which creates perceived uncertainties and potentially greater transaction costs for lenders.¹²⁵

USDA is traditionally the largest single lender to Indian producers and has an affirmative obligation to pay special attention to the needs of Indian producers, as well as those of other minority farmers and “socially disadvantaged applicants.” USDA’s obligation includes providing outreach, education, and targeted funds for these producers.¹²⁶

However, as the former Director of USDA’s Civil Rights Office stated in Congressional testimony, “[USDA] is frequently in noncompliance with civil rights requirements at the local level.” Indian farmers and ranchers have reported outright discriminatory practices at the local level, and Indian producers have been frequently excluded from participation in the election of Farm Service Agency (FSA) county or area committees, the local decision-making bodies for USDA credit and farm payment programs. Without Indian participation in the democratic governance and decision-making structure of USDA county committees, they have suffered disproportionately from turn-downs on applications and informal appeals.

For Indian producers who receive federal farm program loans, there are some specific statutory requirements for how inventory property within an Indian reservation must be administered.¹²⁷ However, FSA regulations implementing these statutes have been imperfect and often inconsistent.¹²⁸

IV. CURRENT ISSUES AND ONGOING REMEDIAL EFFORTS

Finding a solution to the challenges of modern Indian agriculture is exceedingly difficult. In part, this is due to the historic complexity of Indian land tenure, the presence of ongoing jurisdictional disputes, and the extent and range of the current federal regulatory regimes. In addition, with the passage of time, all parties in Indian Country have developed their own settled expectations, and it is likely impossible to craft a single unified solution that will satisfy and serve all parties at once—accounting for the

¹²⁵ See Dept. of Treasury, *Guide to Mortgage Lending in Indian Country*, at <http://www.occ.treas.gov/events/country.pdf> (last visited June 1, 2006).

¹²⁶ See 7 U.S.C. § 2279. Native American farmers are considered members of a socially disadvantaged group and are eligible for targeted funds. 7 C.F.R. §§ 1943.4, .10 (2006). The Farm Credit Division also administers a farm ownership outreach program. See 7 C.F.R. § 1943.13 (2006). The purpose of this program is to make farm ownership loan funds and FSA’s inventory farm land more available to applicants and borrowers who are members of socially disadvantaged groups.

¹²⁷ 7 U.S.C. § 1985(e)(1).

¹²⁸ See generally 7 C.F.R. § 1955.66(d) (2006).

potentially divergent perspectives of individual Indian landowners, individual Indian producers, Indian tribes, and Indian people as a whole.

This section highlights some of the most notable recent remedial efforts and leaves the reader with the final question, “What next?”

A. Class Action Challenges for Systemic Change

1. *Cobell v. Norton*

Filed in 1996, *Cobell v. Norton* is an ongoing class action challenge by Indian beneficiaries of individual Indian money (“IIM”) accounts, most of whom hold individual land allotments under this federal accounting system. The plaintiffs allege that the BIA has mismanaged at least 300,000 of these accounts, which contain billions of dollars, and that the government is now unable to account for hundreds of millions of dollars owed to individual Indian beneficiaries.

In 1999, U.S. District Judge Royce Lamberth found the government had breached its fiduciary duties to these account holders and announced that the court would continue to oversee the overhauling of the government’s historic accounting system:

It would be difficult to find a more historically mismanaged federal program than the Individual Indian Money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbitt testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now plaintiffs in this lawsuit. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, however. “If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15, 8 L. Ed. 25 (1831) (Marshall, C.J.).

Notwithstanding all of this, defendants, the trustee-delegates of the United States, continue to write checks on an account that they cannot balance or reconcile. . . . It is fiscal and governmental irresponsibility in its purest form.

The United States’ mismanagement of the IIM trust is far more inexcusable than garden-variety trust mismanagement of a typical donative trust. For the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States. . . . The United States reaped the “benefit” of this imposed program long ago—sixty-five percent of what were previously tribal land holdings quickly opened up to non-Indian settlement. But the United States has refused to act in accordance with the fiduciary obligations attendant to the imposition of the trust, which are not imposed by statute.

The defendants cannot provide an accounting of plaintiffs' money, which the United States has forced into the IIM trust. This problem, which has been handed down from administration to administration of apologetic United States trustee-delegates to generation upon generation of helpless beneficiaries, continues today and is the basis for this lawsuit. It imposes far more than pecuniary costs, although those are clear and cannot be overstated. Plaintiffs' class includes some of the poorest people in this nation. Human welfare and livelihood are at stake. It is entirely possible that tens of thousands of IIM trust beneficiaries should be receiving different amounts of money-their own money-than they do today. Perhaps not. But no one can say, which is the crux of the problem. . . .

[T]he court finds that the United States government, by virtue of the actions of defendants and their predecessors, is currently in breach of certain trust duties owed to plaintiffs. The government recently has taken substantial steps toward bringing itself into compliance in several respects. Nonetheless, given the long and sorry history of the United States' trusteeship of the IIM trust, the defendants' recalcitrance toward remedying their mismanagement despite decades of congressional directives, and the consequences of allowing these enumerated breaches of trust to continue, the court will retain continuing jurisdiction over this matter. It would be an abdication of duty for this court to do anything less.¹²⁹

However, despite the court's willingness to keep jurisdiction, and the subsequent decisions to hold several high-level Interior officials in contempt, including Secretaries Babbitt and Norton,¹³⁰ the court's role is necessarily limited:

Plaintiffs bring this lawsuit to force the government to abide by its duty to render an accurate accounting of the money currently held within the IIM trust. But plaintiffs must remember that this is a lawsuit. They cannot treat the court as a grievance committee for the United States' mishandling of the trust. Whether plaintiffs like it or not, only Congress can play that type of role. For everyone involved must consider not only plaintiffs' rights, but also the constitutional role of courts in American government. This court can consider only plaintiffs' soundly grounded causes of action, and it cannot provide relief beyond them. The component of the case currently before the court concerns the issue of whether defendants are in breach of any trust duties such that plaintiffs should be afforded some prospective relief to prevent further injury of their legal rights.

¹²⁹ *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6-7 (D.C.C. 1999). With the change of office, the case has become *Cobell v. Norton*. On interlocutory appeal, the D.C. Circuit Court of Appeals generally upheld Judge Lamberth's principal findings and actions. *Cobell v. Norton*, 240 F.3d 1081 (Fed. Cir. 2001).

¹³⁰ *E.g.*, *Cobell v. Babbitt*, 37 F. Supp. 2d. 6 (D.C.C. 1999) (finding Interior Secretary Bruce Babbitt, Treasury Secretary Robert Rubin, and Assistant Interior Secretary Kevin Gover in civil contempt for failure to comply with certain document production orders and imposing a \$625,000 fine on the federal government).

Plaintiffs have stated and proved certain valid legal claims that entitle them to relief.¹³¹

Thus, the remedy is, and will be, far from complete. Currently, a court-appointed special master oversees the preservation and production of trust documents and a federal monitor provides the judge with assessments of the accuracy of Interior's reports of progress at trust reform. In addition, BIA continues to operate "off line" because of security breaches in its computer systems.

Currently, Congress is debating whether and how to step in to settle the government's liability.

2. *Keepseagle v. Veneman*

Keepseagle v. Veneman is an ongoing class action lawsuit brought by and on behalf of Indian farmers and ranchers who applied for USDA farm loans and other USDA farm programs. Essentially, the class claims: (1) that USDA discriminated against them on the basis of race in processing their farm program applications; and (2) that USDA did not investigate their complaints of discrimination.¹³²

The class includes all Indian farmers and ranchers who farmed between 1981 and 1999, applied to the USDA for participation in a farm program at that time, and filed a discrimination complaint with the USDA.¹³³

The complaint cites a number of reports and findings in support of its discrimination allegations, including a 1997 report by the USDA Civil Rights Action Team. This report, quoted at length by the district court in its decision denying the government's motion for a judgment as a matter of law, detailed the obstacles faced by minority farmers seeking USDA loans:

The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA county office might claim to have no applications available and ask the farmer to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversight in the loan application. Often those requests for correcting the application could be stretched for months, since they would come only if the minority farmer contacted the office to check on the loan processing. By the time processing is completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the strength of an expected FSA loan to plant a small

¹³¹ *Cobell*, 91 F. Supp. 2d at 7.

¹³² See Fifth Amended Class Action Complaint, No. 99-03119 (D.D.C.), available at <http://www.cmht.com/pdfs/keepseagle-compl.pdf> (last visited June 2, 2006).

¹³³ *Keepseagle v. Veneman*, 2001 U.S. Dist. LEXIS 25220, No. 99-03119, (D.D.C. 2001) (order certifying class).

crop, usually without the fertilizer and other supplies necessary for the best yields. The farmer's profit is then reduced.¹³⁴

This report also describes the impact USDA discrimination had on minority farmers' ability to make a living:

If the farmer's promised FSA loan finally does arrive, it may have been arbitrarily reduced, leaving the farmer without enough money to repay suppliers and any mortgage or equipment debts. In some cases, the FSA loan never arrives, again leaving the farmer without means to repay debts. Further operating and disaster loans may be denied because of the farmer's debt load, making it impossible for the farmer to earn any money from the farm. As an alternative, the local FSA official might offer the farmer an opportunity to lease back the land with an option to buy it back later. The appraised value of the land is set very high, presumably to support the needed operating loans, but also making repurchase of the land beyond the limited resource farmer's means. The land is lost finally and sold at auction, where it is bought by someone else at half the price being asked of the minority farmer. Often it is alleged that the person was a friend or relative of one of the FSA county officials.¹³⁵

The *Keepseagle* complaint includes numerous allegations that the individually named plaintiffs had these identical experiences.¹³⁶ There are ongoing disputes about whether current and future foreclosures of Indian farm loans should be suspended pending a decision in this case and, if the plaintiffs prevail, what the relief for Indian farmers and ranchers should be.

B. International Efforts to Remedy Historic Harms

1. *Mary and Carrie Dann v. United States*

Several Indian grievances about historic land takings have been resolved through the establishment in the late 1940s of the Indian Claims Commission (ICC).¹³⁷ However, the ICC was controversial both in the amount and type of relief awarded and because it remedied only a narrow class of tribal claims.

At least some tribes have refused to accept the monetary "relief" provided by ICC. For example, the Oglala Sioux Nation currently refuses to accept a multi-million-dollar

¹³⁴ Civil Rights Action Team at USDA, Civil Rights at the United States Department of Agriculture ("CRAT Report") at 15 (1997).

¹³⁵ *Id.* at 16.

¹³⁶ Fifth Amended Complaint, *supra* note 132, at ¶¶ 3-67.

¹³⁷ *See* Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v.

settlement from the United States for illegally taking the Black Hills. Instead, they hold out, asserting the return of the land is the only true remedy for their unique injury.¹³⁸

Aside from the fact the ICC provided only limited monetary relief, it was also narrow in that substantive relief was available only to groups or tribes of Indians and not to individual Indians.¹³⁹ As one commentator explained:

A final type of claims which was not considered by the Commission is that which resulted from the government's policy of allotment, which was a misguided attempt to make Indians into small farmers on the model of white Americans by allotting plots of land to individual Indians, who would receive title after a period of years. Any remaining reservation land was sold. This policy was, as termination, repudiated by the government but not until after it had resulted in disastrous losses, largely at the hands of land hungry whites who were successful in obtaining Indian lands, often fraudulently and at prices much below market value. These claims were not heard because they would have been filed by individual Indians, which was beyond the jurisdiction of the Act. The government has left unsettled this type of legitimate grievance.¹⁴⁰

This situation is highlighted best by the case of two individual members of the Western Shoshone Nation, Mary and Carrie Dann, who have been repeatedly cited by the Bureau of Land Management (BLM) for grazing cattle on public land without a grazing permit. The Dann sisters began raising livestock on that land in northeastern Nevada in the 1940s, but the Danns claim their family and tribe have used that land for similar agricultural pursuits since time immemorial.

The struggle between the Danns and the federal government has been heated since the 1970s, as the Danns have continued to resist BLM and BIA efforts to limit their grazing of livestock, including through trespass actions and impoundment of their horses and livestock.¹⁴¹

As a defense to a trespass action brought by BLM, the Danns alleged they had an individual aboriginal title to this land and thus did not need a permit to graze on it.

¹³⁸ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374, 424 (1980) (awarding the Sioux Nation \$17 million plus interest from the federal government for illegally taking the Black Hills); John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 *Great Plains Nat. Resources J.* 40, 64-68 (2001) (providing "compensation in the form of money rather than the return of Papa Sapa, the *Sioux Nation* decision failed to deliver justice to the Great Sioux Nation").

¹³⁹ 25 U.S.C. § 70a.

¹⁴⁰ Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 *N.D.L.Rev.* 359, 394 (1973).

¹⁴¹ For a more detailed history of this case, see Allison M. Dussias, *Squaw Drudges, Farm Wives, and Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 *N.C.L.Rev.* 637 (1999).

However, their tribe, the Western Shoshone, had obtained a final ICC award of \$26 million in an action for tribal land takings. Based on this settlement, the Supreme Court held that any tribal claim to the land had been extinguished and therefore refused any relief to the Danns.¹⁴² However, in fact, the Western Shoshone had never collected the settlement money and had objected to a monetary remedy in the process. In addition, of course, the ICC did not address the Danns' claims of personal title to the land.

In December 2002, the Danns took their case to the Inter-American Commission on Human Rights, which declared that the ICC "did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests."¹⁴³

In July of 2004, President Bush confirmed federal plans to use more Shoshone land for gold extraction, nuclear testing, and to expand the Yucca Mountain nuclear waste repository, and signed into law a bill providing for the distribution of 15 cents per acre to compensate the Western Shoshone Nation for these plans.¹⁴⁴

Although Mary Dann died in an ATV accident in April 2005 (she was in her early 80s), Carrie Dann has continued this fight. Most recently, in March 2006, the United Nations Committee for the Elimination of Racial Discrimination utilized its early warning and urgent action procedure to express concern about the Danns' right to continue to farm and ranch on their ancestral lands. The U.N. Committee was particularly troubled by the United States's position that the "Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns." The Committee acted because "past and new actions" taken by the United States disrespect its obligations to provide equality before the law, without discrimination, and to indigenous peoples in particular.¹⁴⁵

Although the United States did not respond to several requests for information before this urgent action and early warning decision was issued, the U.N. Committee has requested a report from the United States by July 15, 2006, on its efforts to remedy the dispute.¹⁴⁶

¹⁴² *United States v. Dann*, 470 U.S. 39 (1985).

¹⁴³ *Mary and Carrie Dann v. United States*, Case 11.140, IACHR Report No. 75/02 (Dec. 27, 2002).

¹⁴⁴ Pub. L. No. 108-270.

¹⁴⁵ Committee for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America.

¹⁴⁶ *Id.*

C. Indian Farmers' and Ranchers' Challenges Within BIA

1. *Rosebud Indian Land and Grazing Ass'n. v. Acting Great Plains Regional Director, BIA*

Many Indian ranchers have objected that the grazing rates set by BIA are too high in comparison to off-reservation rates on other federal lands. Although BIA has a legal responsibility as trustee to maximize the benefits to Indian landowners for whom the rent is collected, rates set by the BIA are often four to five times higher than their off-reservation competitors pay to the BLM or the United States Forest Service. BIA sets these rates by establishing average “fair market” rental rates, based on appraisal methods including a survey of other sales and leases of private land in the region. However, this survey system is often based on rates for land parcels that are not comparable in size or degree of development to those trust parcels which Indian producers seek to lease, and this disadvantages Indian farmers and ranchers who seek to make effective use of Indian resources.

Recently, FLAG prevailed on two issues in an ongoing challenge to particular grazing rates on Rosebud Reservation lands before the Interior Board of Indian Appeals: BIA's failure to justify the use of a statewide rate and their failure to explain why they are not making adjustments for the additional expenses that on-reservation permittees have relative to off-reservation lessees.¹⁴⁷ Although this is a victory for Indian producers, the ultimate result—due to the nature of these administrative proceedings—is a remand of the entire matter back to the Regional Director for reconsideration.

D. Outreach and Education

1. USDA Indian Land Acquisition Program

USDA administers the Indian Land Acquisition Loan Program, which is designed to assist tribes in the reacquisition of land within reservation boundaries.¹⁴⁸ As of 2002, this program has provided 27 land acquisition loans to tribes; however, the income derived from consolidated interests are still often inadequate to repay the tribes' loan debt, forcing tribes to find other funding or revert to leasing the land, often to non-Indians.¹⁴⁹

¹⁴⁷ *Rosebud Indian Land and Grazing Ass'n. v. Acting Great Plains Regional Director, BIA*, 41 IBIA 298 (2005).

¹⁴⁸ 7 C.F.R. pt. 1823.

¹⁴⁹ See Mark Welliver, Comment, *CP 87 and CP 100: Allotment and Fractionation Within the Citizen Potawatomi Nation*, 2 U. N.M. Tribal L.J. 2, text accompanying nn. 259-60 (2002), available at <http://tlj.unm.edu/articles/mark/index.htm>.

2. Farm Service Agency (FSA) Outreach

FSA does now have an Outreach Program that includes a full-time national Native American Liaison.¹⁵⁰ The emphasis is on education, with FSA seeking to heighten awareness of USDA services available to American Indian and Alaska Native communities. This has included some efforts to inform Indian tribes about FSA county committee elections.

3. Agriculture Education

AIARMA includes an entire section in Indian agricultural education and training. It establishes a cooperative education program; an internship program; a scholarship program; and a method for those Indian resource students who have graduated to repay student loans. This section also requires the establishment of an agricultural resource education outreach program and that an adequate number of qualified, professional Indian agricultural resource managers be trained to manage BIA and tribal resource programs.¹⁵¹

There is also an increased effort to have on-reservation Indian extension systems.

4. Indian Credit Outreach Program

FSA and the National Tribal Development Association have, through a cooperative agreement, developed the National FSA Indian Credit Outreach Program.¹⁵² This program employs many outreach liaisons and farm advocates throughout the country to assist Indian producers with their access to credit needs and issues.

E. Tribal and Local Initiatives

Certainly any discussion of ongoing efforts to facilitate Indian agriculture would be incomplete without mention of the many important pursuits of tribal governments and their tribal enterprises.

Some of these efforts happen legislatively and administratively within tribal governments. For example, as has already been discussed, both AIARMA and AIPRA both specifically encourage more tribal control over agricultural and probate practices within the reservation—with tribal agricultural resource management plans and tribal probate codes, respectively. In addition, current law allows tribes who meet eligibility requirements to contract with the federal government to take over certain BIA functions

¹⁵⁰ U.S. Department of Agriculture, Office of Congressional and Intergovernmental Relations, *Guide to USDA Programs for American Indians and Alaska Natives, Program Aid 1617*, available at <http://www.usda.gov/news/pubs/indians/open.htm>.

¹⁵¹ See 25 U.S.C. §§ 3731-34.

¹⁵² See <http://www.indiancreditoutreach.com/> (last visited June 6, 2006).

and effectively step in to become a surrogate for the BIA on the reservation; however, Interior retains ultimate authority even in these contracted-for areas.¹⁵³

Moreover, groups of Indian producers have been able to creatively work to promote and develop Indian agricultural resources. The Intertribal Agriculture Council (IAC) in particular is a consortium of at least 64 Indian tribes that control about 80 percent of the Indian land base. Founded in 1987, IAC is dedicated to the pursuit and promotion of conservation, development, and use of Indian agricultural resources for the betterment of Indian people.¹⁵⁴ It also includes work on a “Made by American Indians” label.¹⁵⁵

Finally, as just one local example, Winona LaDuke has started the White Earth Land Recover Project—the mission of which is to “facilitate recovery of the original land base of the White Earth Indian Reservation, while preserving and restoring traditional practices of sound land stewardship, language fluency, community development, and strengthening our spiritual and cultural heritage.”¹⁵⁶ As part of this larger mission, the Project includes a “Native Harvest” store and a food-delivery project that includes wild rice, maple syrup, and fruit harvested by individuals on the reservation.¹⁵⁷

V. CONCLUSION

Both fractionation at the individual property level, and checkerboarding at the reservation-wide level, create complex and compounding difficulties. Everything works together, and both tribes and individual Indians have much at stake. Every party has some expectations that will be unsettled by any potential solution. The question of remedy has been unanswered for as long as an injury has been recognized. Yet, the question is worth asking and, for the future of Indian agriculture, continuing to try to answer.

¹⁵³ See Indian Self-Determination and Education Assistance Act of 1975, §§ 103, 104(b) (current version at 25 U.S.C. §§ 450f, 450h).

¹⁵⁴ See <http://www.indianaglink.com/> (last visited June 6, 2006).

¹⁵⁵ See <http://www.fas.usda.gov/info/agexporter/1999/articles/council.html> (last visited June 6, 2006).

¹⁵⁶ See <http://www.nativeharvest.com/index1.asp> (last visited June 6, 2006).

¹⁵⁷ See <http://www.nativeharvest.com/Scripts/default.asp> (last visited June 6, 2006) (online Native Harvest store).