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## Mediating Our Future: The Role of the Land Buy-Back Program in Rebuilding Confidence and Strengthening Trust Between Tribal Nations and the United States Government

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# Mediating Our Future: The Role of the Land Buy-Back Program in Rebuilding Confidence and Strengthening Trust Between Tribal Nations and the United States Government

BrieAnn West\*

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## I. INTRODUCTION

The trust relationship between the United States federal government and American Indian tribes is marked by a rich and complicated history. Spanning back to the arrival of European explorers to North America, it is a time that transformed and derailed the future of many. Under the early years of the Obama administration, the trust relationship between American Indian tribes and the federal government saw several impactful changes. Most notably, the December 2010 signing of the Claims Resolution Act by President Obama, resulting in the Cobell Settlement and followed by the Supreme Court's Decision in *Carcieri*.<sup>1</sup> The Cobell Settlement put an end to over thirteen years of litigation and was the result of the continuous efforts by Eloise Cobell to hold the Department of Interior accountable for decades of mismanaged trust assets.<sup>2</sup> Ultimately, the Cobell Settlement promised to allocate \$1.9 billion dollars towards the purchase of fractionated land interests from individual landowners for the purpose of unifying these lands for tribal benefit.<sup>3</sup>

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<sup>1</sup> *Cobell v. Salazar*, No. 96CV01285-JR (D. D.C.), *Class Action Settlement Agreement*, UNITED STATES DEPT. OF INTERIOR (Dec. 7, 2009), [http://www.doi.gov/cobell/upload/2009-12-07\\_Settlement\\_Agreement.pdf](http://www.doi.gov/cobell/upload/2009-12-07_Settlement_Agreement.pdf) [hereinafter *Cobell Settlement Agreement*]; *See also Cobell v. Salazar*, No. 96-cv-01285-TFH, *Judgment in Civil Action*, UNITED STATES DEPT. OF INTERIOR (Aug. 04, 2011), <http://www.doi.gov/cobell/upload/110804-AMENDED-FINAL-JUDGMENT.PDF>. President Obama signed the Claims Resolution Act in December of 2010 in front of an audience of approximately 130 guests, including members of Congress, Attorney General Holder, and former Department of Interior Secretary, Ken Salazar. In addition to funding the Cobell Settlement, the Claims Resolution Act also funded the Pigford II settlement with the USDA and several disputes over water rights. Press Release, Office of the Press Secretary, *Background on President Obama's Claims Resolution Act Signing Ceremony*, WHITE HOUSE (Dec. 8, 2010), <http://www.whitehouse.gov/the-press-office/2010/12/08/background-president-obamas-claims-resolution-act-signing-ceremony-today>; *See also Carcieri v. Salazar*, 555 U.S. 379 (2009).

<sup>2</sup> *Cobell Settlement Agreement*, *supra* note 1.

<sup>3</sup> Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

The role that government regulatory agencies like the Department of Interior, Bureau of Indian Affairs played in enforcing Native American land leasing and land rights issues has changed substantially over the past five years. Current changes include, empowering American Indian tribes to exercise autonomy over tribal land leases, and the introduction of the Land Buy-Back program.<sup>4</sup> Despite these positive strides, several questions remain; including, how reuniting previously divided allotments of land and placing them in trust will impact the current trust relationship? Should tribes have more say over which fractionated land allotments receive purchase offers and how these lands will be utilized? How has the federal government and regulatory agencies approached land rights issues in the past versus today? And finally, what will the relationships between tribal governments and the federal government look like under a new executive administration?

Part II of this comment analyzes the evolution of the federal government's interpretation of the trust responsibility to the American Indians and describes the historical progression of the federal government's policy approach towards American Indian tribes from colonization to the introduction of treaties. Part III covers the laws and policies that created the trust relationship between the federal government and American Indian tribes. Part IV explains the role of the Department of Interior, Bureau of Indian Affairs in managing the trust relationship since its inception and also discusses the evolution of perspectives on interpreting the meaning of the trust relationship. Part V details the road that led to fractionation of Indian lands through the federal government's attempts to assimilate American Indian tribes through the introduction of the Dawes Act, and the various land statuses that resulted from this legislation and still exist today. Part VI details the decades of mismanagement of Individual Indian Money (IIM) accounts by the Department of Interior, Bureau of Indian Affairs. Part VII covers the Cobell litigation from 1996 until the settlement agreement was reached in 2009. Part VIII discusses the creation of the Land Buy-Back program resulting from the Cobell Settlement, and the roles that the Department of Interior and tribes have in carrying out the duties of this settlement. Part IX considers possible changes to the trust

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<sup>4</sup> Cobell Settlement Agreement, *supra* note 1.

relationship that may be expected from the implementation of the Land Buy-Back program, and how a shift of administration will likely impact these changes. Part IX also discusses some issues facing tribes in 2015, and anticipated changes that may occur to the government-to-government relations. Finally, Part X proposes adopting alternative methods and considerations for improving the trust relationship.

## II. BRIEF HISTORY

### A. *The Spanish Approach to American Indians in the Late 15th and Early 16th Centuries*

When European settlers first arrived in North America in the 1400s, they approached the Native American people with a Christian-conquering mindset.<sup>5</sup> In this perspective, Native American tribes were viewed as pagan culture that needed to be subjugated and led back to the way of God.<sup>6</sup> Later, as philosophic scholarship in Europe advanced, scholars from Portugal and Spain started developing more humanistic approaches to the colonization process.<sup>7</sup> One such scholar, Francisco de Victoria,<sup>8</sup> expressed a divergent view on colonization, by asserting that Indian tribes must consent before tribal lands could be taken or before political dominion could be asserted over tribal people.<sup>9</sup> Unfortunately, this humanistic approach did not

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<sup>5</sup> FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.02 (2012) [hereinafter COHEN'S HANDBOOK]. This approach is often referred to as the Doctrine of Discovery. See Kevin Gover, *An Indian Trust for the Twenty First Century*, 46 NAT. RESOURCES J. 317 (2006).

<sup>6</sup> COHEN'S HANDBOOK, *supra* note 5 at § 1.02.

<sup>7</sup> *Id.* § 1.02 (citing ROBERT A. WILLIAMS, JR. THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 13 (Oxford Univ. Press 1990)).

<sup>8</sup> COHEN'S HANDBOOK (citing FRANCISCUS DE VICTORIA, DE INDIS ET DE IURE BELLI REFLECTIONES 127-28 (Earnest Ns ed., J. Bate trans., Carnegie Institution 1917) (1557)). Francisco de Vitoria is noted for being a major contributor to the development of laws of war and treatment of dependent peoples during the sixteenth century. *Id.*

<sup>9</sup> Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942), see also ROBERT A. WILLIAMS, JR., THE

permeate into many of the European colonies in North America and later led to a bloody war.<sup>10</sup>

### *B. The British Approach*

In an attempt to stave off continued violence in the colonies where settlers were seeking further land expansion, the British monarchy issued proclamations for settlers to stop fighting Native American tribes for new land.<sup>11</sup> However, colonists were already tired of the monarchy's attempt to exercise control over the new lands and rebelled against the King's proclamations.<sup>12</sup> In response, the monarchy tried placing further restraints on the colonists because they feared the growing French influence over the new land.<sup>13</sup> Unsurprisingly, when the French started expanding their fur trade with the Native Americans, the British monarchy became deeply concerned over the colonial discontent with Indian tribes and attempted to backpedal by issuing harsh policies and proclamations to the colonies, forbidding land expansion.<sup>14</sup> The more King George III attempted to assert control over the colonies and settlements around Massachusetts, the more violence ensued, as the colonists fought the Native Americans for more land.<sup>15</sup>

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AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 96-97 (Oxford Univ. Press 1990).

<sup>10</sup> COHEN'S HANDBOOK, *supra* note 5 at 228-29.

<sup>11</sup> COHEN'S HANDBOOK, *supra* note 5 at 1-1 § 1.02.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1-1 §§ 1.02 – 1.03.

<sup>14</sup> *Id.* The Proclamation of 1763 declared the lands west of the Appalachian Mountains off limits for colonists and "reserved" them for American Indians under the sovereign control of the British Monarch. Wilcomb E. Washburn, *Indians and the American Revolution*, AMERICANREVOLUTION.ORG (Feb. 8, 2015), <http://www.americanrevolution.org/ind1.php>.

<sup>15</sup> *Id.* at 1-1 § 1.02.

*C. The Revolutionary War and Drafting of Formal Relationships*

The British monarchy's continued efforts to control the lives and politics of the American colonies ultimately led to the Revolutionary War.<sup>16</sup> After the bloody war of the Revolution came to an end, American colonists reasserted their land expansion efforts.<sup>17</sup>

In an attempt to address the continued hostilities towards American Indian tribes, the Second Continental Congress appointed leaders to represent the different colonies and to enter into diplomatic agreements with the tribes to end the violence and aggression.<sup>18</sup> The Continental Congress forged on with an interest in "securing and preserving the friendship of the Indian Nations"<sup>19</sup> and established the first of the federal offices charged with managing Indian affairs.<sup>20</sup>

Later in 1777, Article IX of the Articles of Confederation granted the Continental Congress sole authority to regulate trade and manage Indian affairs with tribes that were not members of a state.<sup>21</sup> Article

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<sup>16</sup> The cause of the Revolutionary War cannot be attributed to a single policy or restriction placed on the colonies by the British monarchy. COHEN'S HANDBOOK, *supra* note 5 at § 1.02. But, throughout the continued taxations and restrictions on land expansion, it was clear that the monarchy's limitations on colonial expansion into tribal lands fueled the conflict that led to the war. *Id.*

<sup>17</sup> STEVEN L. PEVAR, THE RIGHTS OF INDIANS & TRIBES, FOURTH EDITION (2012).

<sup>18</sup> 2 J. Continental Cong. 175, 183 (1775). The only formal written treaty during this period of diplomatic negotiations was with the Delaware Indians, known as the 1778 treaty of alliance. Treaty with the Delawares, 1778, arts. 1-7 Stat. 13. This treaty is recognized as the first treaty between an Indian tribe and the United States and consisted of drafted agreements on assistance during war times and also addressed the prosecution of criminal acts. *Id.*

<sup>19</sup> Continental Cong. 174-75 (1775) (W. Ford ed. 1905); *see also* Act of April 21, 1806 2 State 402.

<sup>20</sup> Between 1790 and 1834 the federal government created the Trade and Intercourse Acts that were intended to prevent exploitation and conflict between the Indian tribes and colonists. 23 Congress, 1st Session, 729 (1834), <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=776> (last visited, Feb. 8, 2015). The final Indian Intercourse Act was passed in 1834 after the forced Relocation Act of 1830. *Id.* The text of the Indian Intercourse Act of 1834 specifically limited the right to trade with Indian Country to those who possess a license granted by the federal government. *Id.*

<sup>21</sup> U.S. ARTICLES OF CONFEDERATION, art. IX (1777).

IX also reserved the right for states with tribal members to legislate over them.<sup>22</sup> Despite the Continental Congress' strongly implied policy interests of maintaining peaceful and respectful relationships with American Indian tribes,<sup>23</sup> many states became restless with the idea of Congress having so much power over Indian relations, and took matters into their own hands.<sup>24</sup>

The dispute between the states and the Continental Congress over who should maintain control over relations with American Indian Tribes was finally put to rest in art. I § 8, cl. 3 of the United States Constitution, which reserved the power for Congress to "regulate commerce with foreign nations, among the several states and with Indian tribes."<sup>25</sup> In art. II, § 2, cl. 2, the Constitution cleared up the question of who reserved the power to make treaties by stating that the president "shall have [p]ower, by and with the [a]dvice and [c]onsent of the Senate, to make Treaties."<sup>26</sup>

#### *D. Treaties*

The treaty making period between the United States government and American Indian tribes spanned from 1787-1871.<sup>27</sup> The initial

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<sup>22</sup> *Id.*

<sup>23</sup> Consider the strong language used in the passing of the Northwest Ordinance, Utmost Good Faith Law:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

<sup>24</sup> 21 J. Continental Cong. 340-41 (1787).

<sup>25</sup> One situation that caused tension was an agreement that Georgia entered into with a small number Creek Indians that did not represent the Creek government's interests and greatly angered the Creek government when settlers started moving into Creek territory as a result of this agreement. COHEN'S HANDBOOK, *supra* note 5 at 1-1 § 1.02.

<sup>26</sup> U.S. CONST. art. 1, § 8, cl. 3.

<sup>27</sup> U.S. CONST. art. 2, § 2, cl. 2.

<sup>27</sup> WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL, 115 (5th ed. 2009).

treaties were intended to serve as agreements for the exchange of government services for the use of tribal lands.<sup>28</sup> Hundreds of treaties were established during this time, all of them differing from one another in several ways; but mainly, all were focused on the ceding of tribal lands to the federal government in exchange for hunting and fishing rights and peace.<sup>29</sup> Many of the treaties placed American Indian tribes under the United States government's protection and included provisions for both tribes and the government to punish "bad men."<sup>30</sup>

Treaties were not viewed as jointly pursued agreements between tribal nations and the United States government; rather, treaties were imposed upon tribal nations with little to no room for negotiation.<sup>31</sup> During the beginning of the treaty making process, the tribes held the bargaining power, but later this power shifted towards federal favor.<sup>32</sup> This shift of power had a lot to do with the disadvantages American Indian tribes faced because of their English language abilities at the time.<sup>33</sup> Most of the treaties were written in English with complex terms that were not well explained to the signatories.<sup>34</sup> Tribes also sent representatives to treaty negotiations with the federal government that were not viewed as the true leaders.<sup>35</sup>

Despite the advantages that the federal government carried later in the treaty making period, tribes still retain important rights that were conferred to them, such as: "beneficial ownership of Indian lands, hunting and fishing rights and entitlement to certain federal services such as education or health care."<sup>36</sup> While the United States

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<sup>28</sup> COHEN'S HANDBOOK, *supra* note 5 at 1-1 §1.03.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 115-16. *See also* the Major Crimes Act (1885).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> COHEN'S HANDBOOK, *supra* note 5 at 1-1 §1.03.

<sup>34</sup> *Id.*

<sup>35</sup> CANBY, *supra* note 27 at 116.

<sup>36</sup> *Id.* In interpreting treaties made during this period of time, courts often take into consideration the specific cultural and language barriers in the formation of treaty agreements in order to construe them in a way that is most beneficial to the injured party. More specifically:

In recognizing the disadvantage of the tribes entering into treaties with the federal government and to better carrying out the trust

was charged with the “solemn guarantee” of protecting the American Indian’s rights to live on these lands under their own laws and ways of life, the government adopted policies that directly conflicted with these agreements.<sup>37</sup> A strong example of this conflicting ideal is the May 6, 1828 treaty with the Cherokee, where the United States government enticed, and later forced, the Cherokee tribe to move farther west for a “permanent home, which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever.”<sup>38</sup> However, the Native Americans were “not considered to own the fee title to the land on which they lived,” instead, they had the right to exclusive use and occupancy of the land — a right that could only be ceded to the United States.<sup>39</sup>

Later, the United States’ expansion policy surpassed the government’s desire to maintain the enforcement of promises and the United States became “unable or unwilling to prevent the states and their citizens from violating Indian rights.”<sup>40</sup> After again forcing another American Indian tribe to move, namely the Choctaw Indians to move west of Arkansas, the United States:

[P]romised to convey the land to the Choctaw Nation in fee simple to inure them while they shall exist as a nation and live on it . . . [and] pledged itself to secure the Choctaws the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation and no part of

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responsibility of the United States to the tribes, the Supreme Court created rules of construction for interpreting the treaties in a way that took into consideration the tribal representatives that participated in the negotiations.

*Id.* at 122.

<sup>37</sup> *Id.* at 624. See also U.S. INTERIOR DEPT., FEDERAL INDIAN LAW 180-282 (1958) (noting that the United States government already decided to move towards extinguishing Indian title within the limits of the States as soon as possible, on reasonable terms).

<sup>38</sup> Passage of the Indian Removal Act of 1830, 4 Stat. 411.

<sup>39</sup> Choctaw Nation v. Oklahoma, 397 U.S. 620, 623 (1970) (citing Johnson v. McIntosh, (8 Wheat.) 543 (1823)) (internal quotations omitted). For a more detailed explanation of the ownership interest that Native American tribes have in trust lands. See *infra* Part V and accompanying notes.

<sup>40</sup> *Id.* at 625.

the land granted to them shall ever be embraced in any Territory or State.<sup>41</sup>

The passage of the Indian Removal Act of 1830 resulted in a systematic, and often times violent, removal of tribes, despite the existence of treaties.<sup>42</sup> The forced removal of Native Americans from territories within states west of the Mississippi river corroded positive relations once existing between them and the federal government. These kinds of blatant treaty violations later, in more modern times, led the Supreme Court to approach the interpretation of treaties between tribal nations and the United States government in the light most favorable to the tribes.<sup>43</sup> In the notable Supreme Court opinion in *Choctaw Nation*, the Court stated “disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”<sup>44</sup>

Generally, treaty interpretation rests heavily on a firm knowledge and understanding of the canons of construction and historical narratives. One aspect of treaties that is not widely understood is the unilateral power that Congress holds. While it is encouraging that the Supreme Court has often interpreted treaties in the light most favorable to American Indian tribes, it is important to note that if statutes are passed that are inconsistent with the language of a treaty, that portion of the treaty is abrogated and the statute becomes the governing law over the inconsistency.<sup>45</sup> However, if Congress does not expressly include language in the statute that modifies the treaty,

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<sup>41</sup> *Id.* (citing Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334).

<sup>42</sup> *Milestones: 1830-1860, Indian Treaties and the Removal Act of 1830*, UNITED STATES DEPT. OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited, Feb 8, 2015). President Jackson’s plan for forced removal of the Native American tribes to the west is commonly referred to as the “Trail of Tears.” *Id.* American Indian tribes and the federal government entered into approximately seventy treaties, with tribes agreeing to move to large tracts of land west of the Mississippi. *Id.* Many tribes made this long journey, however, those that resisted were forcibly removed by the United States military, and as a result many did not survive. *Id.*

<sup>43</sup> *Choctaw Nation*, 397 U.S. 620 at 634.

<sup>44</sup> *Id.* at n. 4.

<sup>45</sup> CANBY, *supra* note 27 at 131.

then courts retain the opportunity to interpret the congressional intent.<sup>46</sup>

Even though the proper methods for construing treaties in the court is well established, inconsistency in the enforcement of laches to treaty rights by courts has led to cases like *City of Sherrill v. Oneida Indian Nation*.<sup>47</sup> In this case, tribal land passed out of Indian ownership several hundred years ago and the tribe purchased the land back in the open market, trying to establish sovereignty and local tax exemption.<sup>48</sup> However, the Court refused to enforce the treaty rights because of “settled expectations of local governments and adjacent land owners.”<sup>49</sup> By 1871, treaty-making rights were abolished because of a perceived conflict between the House of Representatives and the Senate that the process created.<sup>50</sup> From this point on, congressional law would determine all matters related to American Indians.<sup>51</sup>

### III. THE CREATION OF THE TRUST RELATIONSHIP

The trust relationship between the United States government and Native Americans began as a promise of protection from seizure and takings by colonial citizens that were expanding west, and to prevent

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<sup>46</sup> *Id.*

<sup>47</sup> 544 U.S. 197, 219 (2005) (determining whether or not the Oneida tribe had equitable claim to their ancestral lands, the Court applied the following three factor test: (1) “the length of time at issue between an historical injustice and the present day;” (2) “the disruptive nature of claims long delayed;” and, (3) “the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs’ injury.”). *Id.* at 127. See also *Onondaga Nation v. New York*, 500 F. App’x 87 (2d Cir. 2012) (affirming the lower courts decision and denying the Onondaga Nation recovery of ancestral lands because of the decision of equity in *Sherrill v. Oneida*, applying the same three factor test and noting that 183 years was too much time to have passed). *Id.* at 88-90.

<sup>48</sup> *Sherrill*, 544 U.S. 197 at 216.

<sup>49</sup> *Id.*

<sup>50</sup> *The United States Trust Responsibility to the American Indians*, MILLE LACS BAND OF OJBWE (2014) <http://millelacsband.com/mille-lacs-band-ojibwe/economy/businesses-and-economic-impact-home/u-s-government-trust-responsibility-to-american-indians/>.

<sup>51</sup> *Id.*

war.<sup>52</sup> Unfortunately, the ferocity of the westward expansion took many victims, including any trust that the American Indians had in the United States government to protect them.<sup>53</sup> The language of the Treaty with the Six Nations was commonly referenced in Supreme Court cases when trying to clarify the relationship between the United States government and American Indian tribes.<sup>54</sup> In this instance, a treaty was considered a process in which the United States was “receiving Indian [t]ribes into their protection.”<sup>55</sup> Later, there was argument surrounding the language in the Constitution and the care that Congress had in exercising control over the Indian tribes and whether or not these tribes could be considered to be “foreign states” or just “states.”<sup>56</sup> In 1942, the Supreme Court resolved this argument by ruling:

[T]here is a distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.<sup>57</sup>

Some scholars characterize the trustee relationship between the United States government and the American Indian tribes as being a legal obligation for the executive branch, and a moral or political obligation for Congress.<sup>58</sup> Regardless, the Constitution places Indian

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<sup>52</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>53</sup> COHEN’S HANDBOOK, *supra* note 5 at 1-1 § 1.03.

<sup>54</sup> Treaty with the Six Nations, 1784, 7 Stat. 15 (Treaty at Fort Stanwix).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* See also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), where the trust was made into a sword rather than a shield and the dependency status of the Native Americans on the federal government was defined in Congressional terms, as being only a moral and political obligation, rather than a fiduciary one. *Id.*

<sup>57</sup> Armen H. Merjian. *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 615 n.14 (2010) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

<sup>58</sup> U.S. CONST. art. IV, cl. 2.

affairs solely in the hands of the federal government.<sup>59</sup> The Marshall Court case *Cherokee v. Georgia*, originally defined the trust relationship.<sup>60</sup> Here, the Cherokee nation sued the state of Georgia ultimately seeking an injunction to prevent state actors from trying to enforce state laws on tribal land.<sup>61</sup> Instead of recognizing the Native American tribe as being autonomous, the Marshall Court characterized Indian tribes as “domestic dependent nations,” marking their relationship with the government as being a “ward to his guardian.”<sup>62</sup>

The trust relationship of today is still finding its way through political discourse. There is a strong push to get the federal government to enforce the trust relationship while also learning to respect tribal sovereignty and self-determination. Self-determination calls for a continued government commitment to honor the programs and services it promised, while also allowing tribal governments to delegate resources as they deem fit.<sup>63</sup>

#### IV. WHAT DOES THE TRUST RELATIONSHIP MEAN: AGENCY OBLIGATIONS

##### A. *Department of Interior*

Congress established the Department of Interior (DOI) in March of 1849 in order to consolidate a number of domestic offices being operated within agencies without similar objectives.<sup>64</sup> Today, the

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<sup>59</sup> *Id.*

<sup>60</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 8 (noting that the dissent in the Marshall court believed that the injunction should have been issued).

<sup>63</sup> Gover, *supra* note 5.

<sup>64</sup> *History of Interior*, UNITED STATES DEPT. OF INTERIOR, <http://www.doi.gov/whoweare/history.cfm> (last visited, Feb. 8, 2015). The Department of Interior was originally named the “Department of Home” which consolidated the following offices: General Land Office; the Patent Office; Bureau of Indian Affairs Office; and the Military Pensions Offices. *Id.* Later, some people affectionately referred to the Department of Interior as “[t]he Department of Everything Else.” *Id.* See also ROBERT M. UTLEY & BARRY MACKINTOSH, *THE DEPARTMENT OF EVERYTHING ELSE: HIGHLIGHTS OF INTERIOR HISTORY* (1988).

Department of Interior is responsible for carrying out the following duties: managing the trust responsibilities to the American Indian tribes; managing the nations' natural resources, trust lands, and national parks; and, protecting the United States' cultural heritage.<sup>65</sup>

Later, the Department of Interior took over oversight responsibility of the Committee on Indian Affairs, known today as the Bureau of Indian Affairs (BIA), which was officially founded in 1824 and was later transferred to the Department of Interior in 1849.<sup>66</sup>

### *B. Bureau of Indian Affairs*

In 1824, the Secretary of War John C. Calhoun established the BIA in order to oversee the relations between the federal government and American Indian tribes.<sup>67</sup> The BIA's authority originates from the Secretary of the Interior, who secures their authority from the President of the United States.<sup>68</sup>

In 2003, the Bureau of Indian Affairs was reorganized. This reorganization eliminated the Office of the Commissioner and assigned the duties of the Secretary of the Interior to the Assistant Secretary of the BIA.<sup>69</sup> The Director of the BIA is responsible for "administer[ing] all law governing non-education portions of Indian Affairs," reports to the principal deputy, and has the responsibility to manage tribal and individual trust funds with the Special Trustee for American Indians."<sup>70</sup> During the reorganization process, the Bureau of Indian Affairs also inherited the responsibilities of the Office of Special Trustee for American Indians (OST), which was in charge of the trust asset responsibilities to tribes and individuals.<sup>71</sup>

The BIA's statutory authority rests in title 25, sections two, nine, and thirteen.<sup>72</sup> These three statutory sections empower the BIA to

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<sup>65</sup> *Department of Interior*, WHITE HOUSE, OFFICE OF BUDGET MANAGEMENT, [http://www.whitehouse.gov/omb/factsheet\\_department\\_interior/](http://www.whitehouse.gov/omb/factsheet_department_interior/) (last visited, Feb. 8, 2015).

<sup>66</sup> H.R. Doc. No. 19-146 (1824).

<sup>67</sup> *Id.*

<sup>68</sup> 25 U.S.C. § 1 (2015).

<sup>69</sup> 109 Interior Dep't Manual 8 (2003).

<sup>70</sup> 130 Interior Dep't Manual 3.1-3.2 (2003).

<sup>71</sup> 25 U.S.C. § 4041 (2015); 209 Interior Dep't Manual 11 (2003).

<sup>72</sup> 25 U.S.C. §§ 2, 9, 13 (2015).

deal with all matters arising from Indian affairs, to prescribe any regulations in the settlement of the accounts of Indian affairs, and confer the responsibility to expend, supervise and direct congressional funds for the benefit care and assistance for Indians, including general administration of property.<sup>73</sup>

The powers of the Bureau of Indian Affairs are interpreted as being: the authority to create regulations over tribal lands, but not necessarily, the right to dictate what happens on tribal lands. Thus, these regulations cannot undermine tribal rights, which are reserved exclusively for the tribe.<sup>74</sup> This is delineated in *United States v. Eberhardt*, where the BIA's fishing regulations were designed with the intention of allowing the free exercise of Indian fishing rights as long as they were consistent with conservations regulations.<sup>75</sup>

It is also the responsibility of the Bureau of Indian Affairs to manage trust assets.<sup>76</sup> In carrying out trust asset management responsibilities, the BIA created several statutory obligations regarding land leases, allotments, alienation, grazing, mineral resources, timber, fishing, and gaming rights of tribal lands.<sup>77</sup> The BIA faced more restructuring after Kevin Gover, the Assistant Secretary of the Bureau of Indian Affairs, publically apologized on behalf of the BIA, expressing deep remorse for enforcing and enacting policies that proved, not only harmful to Native American tribes, but also racist and injurious to tribal identities.<sup>78</sup>

In order for a tribe to receive the benefits of government-to-government relations through any agency, tribes must be federally recognized. This process was introduced in 1978 and was revised in

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<sup>73</sup> *Id.*

<sup>74</sup> Indian Self Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as 25 U.S.C. § 450).

<sup>75</sup> 789 F.2d 1354, 1359 (9th Cir. 1986) (affirming the Department of Interior's authority to regulate natural resources, including fishing rights; therefore, Bureau of Indian Affairs regulations apply to tribal rights for conservation outside of the reservation).

<sup>76</sup> *Bureau of Indian Affairs: History*, UNITED STATES DEPT. OF INTERIOR, <http://www.bia.gov/WhoWeAre/BIA/> (last visited, Feb. 8, 2015).

<sup>77</sup> *Id.*

<sup>78</sup> Press Release, *Gover Apologizes for BIA's Misdeeds: Agency's 175th Anniversary Occasion for Reflection*, UNITED STATES DEPT. OF INTERIOR (Sept. 8, 2000), <http://www.bia.gov/cs/groups/public/documents/text/idc011935.pdf>.

1994.<sup>79</sup> Federal recognition is governed by the code of federal regulations,<sup>80</sup> which requires a petition by the non-recognized tribe be submitted to the Office of Federal Acknowledgement (OFA), situated within the Office of the Assistant Secretary, Department of Interior.<sup>81</sup> The OFA considers the documentation submitted by the tribe seeking official recognition, including: a letter of intent, anthropological documents, historical research and genealogy reports that would designate the historical context of the tribe.<sup>82</sup> The OFA then makes a recommendation to the Assistant Secretary, who has ultimate authority over whether or not the tribe is approved for federal recognition, also known as the Final Determination.<sup>83</sup>

These Federal Regulations<sup>84</sup> include specific requirements that must be met before the tribe can apply, including:

- (1) identification as an American Indian entity since 1900;<sup>85</sup>

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<sup>79</sup> *The Office of Federal Acknowledgement*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS (2013), <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024417.pdf>

<sup>80</sup> 25 C.F.R. § 83 (2015).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Compare The Office of Federal Acknowledgement*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS (2013), <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024417.pdf> (providing a basic overview of the internal procedures for the acknowledgement process of tribes applying for Federally Recognized status), and *How Does An Indian Tribe Become "Federally Recognized"? An Overview Of The Administrative Process For Federal Recognition*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS (2013), [http://fcnl.org/issues/nativeam/Federal\\_Tribal\\_Recognition-Administrative.pdf](http://fcnl.org/issues/nativeam/Federal_Tribal_Recognition-Administrative.pdf) (offering a more detailed, step-by-step list of the administrative approval process). See also *Indian Entities Recognized and Eligible To Receive Services From The United States Bureau Of Indian Affairs*, 80 FED. REG. 1942, 1943 (Jan. 15, 2015), <http://www.bia.gov/cs/groups/webteam/documents/document/idc1-029026.pdf>, for a current list of Federally Recognized Tribes in the United States.

<sup>84</sup> 25 C.F.R. § 83 (2015).

<sup>85</sup> *25 CFR Part 83 Procedures For Establishing That An American Indian Group Exists As An Indian Tribe*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/public/documents/text/idc-001219.pdf> (last visited Feb. 8, 2015); See also 25 C.F.R. § 83 (2015), for a full textual listing of the criteria for establishing an American Indian group exists as an Indian Tribe.

(2) being comprised as a group of a distinct community that has been historically autonomous and is so currently;<sup>86</sup>

(3) serving as an entity that has political influence over the community;<sup>87</sup>

(4) providing current documentation for governance including, membership requirements or, absent documentation, a statement that describes the membership criteria;<sup>88</sup>

(5) proof that the group is descended from a historical Indian tribe and is under a single autonomous leadership or political entity;<sup>89</sup>

(6) not being comprised of individuals already members of a recognized North American Indian Tribe; and<sup>90</sup>

(7) not being subjected to congressional legislation expressly terminating the federal relationship.<sup>91</sup>

Tribes that meet these requirements can form their own governments, make and enforce civil and criminal laws, tax their tribal members, establish and determine citizenship and membership, and license and regulate activities in jurisdiction regarding zoning and the exclusion of people from tribal lands.<sup>92</sup> However, there are some limitations on tribal self-governance; specifically, tribes cannot legally coin money, declare war, or establish foreign relations.<sup>93</sup>

During John Collier's tenure with the Bureau of Indian Affairs, Collier engaged substantial efforts in trying to reverse legislation that served as a roadblock to American Indian growth and development.<sup>94</sup> A good example Collier's efforts to end this kind of harmful

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> 25 *CFR Part 83 Procedures For Establishing That An American Indian Group Exists As An Indian Tribe*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/public/documents/text/idc-001219.pdf> (last visited Feb. 8, 2015).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> John Collier, *Commissioner of Indian Affairs, Defends the Indian New Deal*, Excerpt from *Collier, Annual Report, Bureau of Indian Affairs* (Washington D.C., GPO, 1935), <http://www.colorado.edu/AmStudies/lewis/issues/collier2.pdf>

legislation is the Indian Reorganization Act (IRA) of 1934.<sup>95</sup> The IRA ended the destructive Dawes Act<sup>96</sup> by eliminating further allotment of Indian lands and restricting the sale of allotted land to Indian tribes.<sup>97</sup> The IRA was a tool to “revers[e] the disintegration policy” that took place under Dawes and return Native Americans to their land by setting aside appropriations for the purchase of lands for Indians without land interest.<sup>98</sup> The IRA also created a consolidation process that allowed individual Native American land to return to a tribally protected status.<sup>99</sup>

While this comment does not cover matters related to jurisdiction over criminal or civil matters on federally recognized tribal lands, it is important to mention a few items regarding jurisdiction as they relate to trust assets and probate.<sup>100</sup> The Indian Tribal Justice Act of 1993 empowered well-established tribal courts to proffer justice in matters related to the adjudication of claims involving trust assets.<sup>101</sup> However, if a tribe does not currently have an established policy on probate matters, or if a tribal member dies intestate, then the state that the tribe presides in will have dominion over the assets.<sup>102</sup>

The Tribal Self-Governance Act of 1994, granted tribes self-governance power over programs and services formerly administered by the Bureau of Indian Affairs.<sup>103</sup> Generally, these benefits are given to a reservation created by treaty and executive orders are permanent on trust land.<sup>104</sup> Specifically, these benefits include, no tax on lands held in trust, and no income tax on wages earned while working on a reservation. However, some compacts were created where a tribe is

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<sup>95</sup> 25 U.S.C. § 461 *et seq.* (2015).

<sup>96</sup> See *infra* Part V and accompanying notes.

<sup>97</sup> *History of Allotment*, INDIAN LAND TENURE FOUNDATION, <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited Feb. 8, 2015).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See The Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. (2005) (regarding civil jurisdiction over people residing on, or with businesses on, tribal reservation land, including non-Indians).

<sup>101</sup> 25 C.F.R. § 115 (2012).

<sup>102</sup> 25 U.S.C. § 2205 (2015).

<sup>103</sup> 25 C.F.R. § 1000.351 (2010).

<sup>104</sup> *Id.*

not federally recognized but is instead a State Indian Reservation held in state trust.<sup>105</sup> These tribes are not subject to state tax but subject to state law and were created by treaties between tribes and state government.<sup>106</sup>

## V. THE ROAD TO FRACTIONATION

In the Trade and Intercourse Act of 1790, Congress disallowed non-natives from acquiring land from American Indians unless by treaty under the Federal Constitution; however, this Act did not characterize the legal ownership status.<sup>107</sup> The order to understand the rights American Indians have while residing on lands held in federal trust, one must be aware that the bare legal title of land being held in trust for tribes always belongs to the United States government.<sup>108</sup> With the United States holding legal title to the trust land, the benefit and interest of the land is reserved for the tribes.<sup>109</sup> However, this benefit status is impacted by several nuances that depend on the “chain of ownership” of the land or how the interests were conveyed.<sup>110</sup> The benefit status of lands held in trust is complicated and detail specific. Lands can also be held under restriction or with an attribute specific to the Indian status of the owners or beneficiaries.<sup>111</sup> However, this does not characterize the interests that Native Americans held in the land.<sup>112</sup>

### *A. Allotted Lands, Created by the Dawes Act or General Allotment Act of 1887*

Before delving into the current status of trust lands today, the Dawes Act of 1887 must be discussed. In 1829, United States President Andrew Jackson introduced the Indian removal policy to

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> CANBY, *supra* note 27 at 410.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> CANBY, *supra* note 27 at 410-12.

Congress.<sup>113</sup> The Indian Removal Act of 1830 was designed and enacted with the intention of relocating most tribes located within state boundaries of the east, to areas west of the Mississippi river.<sup>114</sup> Many American Indians died during the forced marches west. To justify this inhumane treatment, American Indians were “accused of allowing fertile farmland to lie fallow,” but the truth was that the government wanted the Indian lands for the settlers, by any means necessary.<sup>115</sup> Due to the “Native American’s refusal to break up territory into privately owned parcels,” non-natives had a hard time acquiring American Indian land.<sup>116</sup> This communal system allowed American Indians the opportunity to “maintain their cultural and linguistic unity in the face of an assimilationist, ethnocidal mob lurking at the gates.”<sup>117</sup>

However, the forced removal process later led to the Dawes General Allotment Act, a policy pressed upon the President of the United States to approve surveying and individual allotment of tribal land in order to discourage the continued community adhesion of tribes and instead promote a deviation away from those cultural practices.<sup>118</sup> The intention was also to open up land gifted through treaties for settlers moving west to acquire.<sup>119</sup> The Act declared the following:

[T]he allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue there-for in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment.<sup>120</sup>

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<sup>113</sup> Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM.INDIAN L. REV. 1, 2 (1997).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Merjain, *supra* note 57 at 615.

<sup>117</sup> *Id.*

<sup>118</sup> *History of Allotment, supra* note 97.

<sup>119</sup> *Id.*

<sup>120</sup> General Allotment Act, ch. 119 § 5, 24 Stat. 389 (1887) [hereinafter General Allotment Act] (codified as 25 U.S.C. §§ 331–333 (1887)) (repealed 2000).

The Dawes Act of 1887, also known as the General Allotment Act, was introduced for the purpose of breaking up Indian communal land holdings by creating the allotment process, which created individual tracts of land held in trust for twenty-five years.<sup>121</sup> At the end of the twenty-five years, the land would pass into a fee simple ownership and be taxable like all other land ownership.<sup>122</sup> The ultimate goal of this program was to enact a process of forced assimilation for Indians into the American culture.<sup>123</sup> The sale of these allotments caused, what is now commonly referred to as, “checker boarding” of reservation lands. The General Allotment Act and Taxes<sup>124</sup> stated that allotments “in fee [shall be] free of all charge or incumbrance [*sic*] whatsoever.”<sup>125</sup> However, when allotted land passes into fee and a patent is issued, full taxation power over the land and activities on the land take effect.<sup>126</sup>

The release of the Meriam Report in 1928 caused the government to reevaluate the purpose of the Dawes Act because of a general belief by the government that the American Indians lacked competence to farm their allotments.<sup>127</sup> When in reality, many times the allotment was not even farm suitable.<sup>128</sup> By making allotments fully applicable to the laws of heirship and inheritance, the allotments over time passed to as many as one hundred owners. The passing of the land to heirs and not assigns was due to the fact that wills were not a common cultural practice with Native Americans. Finally, in

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 25 U.S.C.A. § 348 (West).

<sup>125</sup> *Id.*

<sup>126</sup> CANBY, *supra* note 27 at 290.

<sup>127</sup> THE INSTITUTE FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928), <http://files.eric.ed.gov/fulltext/ED087573.pdf> (last visited March 3, 2015). The Meriam Report (officially named “The Problem of Indian Administration”) was a report compiled by the Institute for Government Research, known today as the Brookings Institute. The reports surveyed the economic and social conditions of American Indian’s during the 1920s, focusing on the following areas: (1) general policy for Indian Affairs, (2) health, (3) education, (4) general economic conditions, (5) family and community life and the activities of women, (6) migrated Indians, (7) legal aspects of the Indian problem, and (8) missionary activities among Indians. *Id.*

<sup>128</sup> *Id.*

1934 the Indian Reorganization Act repealed the Dawes Act and reaffirmed the duties of the Department of Interior to act as trustee over American Indian affairs. The Dawes Act also extended the trust period for any lands still under allotted status.<sup>129</sup> The lasting effect that land allotments have on American Indians is discussed later in the next section.<sup>130</sup>

### B. Current Land Statuses

In *Johnson v. McIntosh*, the Supreme Court ruled that Indians could not convey land to individuals because “they are the rightful occupants of the soil with legal claim to retain possession but they were not a complete sovereign and thus could not dispose of the land as they chose.”<sup>131</sup> This allowed the United States to grant Indian land to others as a “right of occupancy” where only the United States could extinguish this right through purchase or conquest<sup>132</sup> “[l]ater, this right of occupancy became known as ‘original Indian title or aboriginal title.’”<sup>133</sup> The reality is that this designation allowed the federal government to take title of the land or allow purchase of the land in order to extinguish the aboriginal title.<sup>134</sup> Sadly, this kind of taking does not require compensation.<sup>135</sup> The only way to obtain compensation for a governmental taking of Native American land would be by filing a claim under the Indian Claims Commission Act of 1946.<sup>136</sup> It is argued that this sort of action would further require that the title belong to the tribe, not an individual.<sup>137</sup> As it stands today, “nearly all land today is in trust—with the United States

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<sup>129</sup> Indian Reorganization Act of 1934, 48 Stat. 984 (1934) (codified as amended 25 U.S.C. § 461 *et seq.*).

<sup>130</sup> It is estimated that between 1887 and 1934, Native Americans lost ninety million acres, or about sixty-five percent of their land. *See also infra* Part VI and accompanying notes.

<sup>131</sup> 21 U.S. (8 Wheat.) 543, 585 (1823). *See also* CANBY, *supra* note 27 at 410-11.

<sup>132</sup> CANBY, *supra* note 27 at 411.

<sup>133</sup> *Id.* at 410-11. *See also* Delaware Nation v. Pennsylvania, 446 F.3d 410 (3d Cir. 2006).

<sup>134</sup> CANBY, *supra* note 27 at 410-11.

<sup>135</sup> *Id.* at 411.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 414.

holding the naked legal title and the Indians enjoying the beneficial interest,” and, typically, this benefit does not include water.<sup>138</sup>

The *McIntosh* case offers a good understanding of how these various forms of land designations happened.<sup>139</sup> In communally held land, the United States holds legal title, but tribes hold all beneficial interest as a single entity.<sup>140</sup> The use of land can be approved by a single owner or can follow the owner’s own channels for decision-making.<sup>141</sup> Communal land ownership status allows more autonomy for the benefit of the tribe to make decisions over how to manage the land.<sup>142</sup> Furthermore, this communal land designation allows for a freer and less hindered use of the land without need to pay close attention to individual ownership restrictions that may exist because of historical allotment.<sup>143</sup>

### 1. Restricted Land

Restricted land, also called restricted fee, occurs where a private individual or tribe owns the land. The caveat being, that in a restricted fee ownership, conveyance is limited by approval from the Secretary of the Interior.<sup>144</sup> When an American Indian owns non-Indian lands, the owners are subject to all of the laws, taxes, and regulations of the state and locality.<sup>145</sup>

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<sup>138</sup> *Id.* at 424.

<sup>139</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>140</sup> CANBY, *supra* note 27 at 427.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* See *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1995) for an example of the challenges created by joint ownership over communal land with Navajo.

<sup>143</sup> *Id.*

<sup>144</sup> See 25 U.S.C. § 415 (2012).

<sup>145</sup> *Id.*

## 2. Land Lease Laws<sup>146</sup>

Title 25, section 177 allowed for the purchases or grants of lands from Indians.<sup>147</sup> Later, Public Law 280<sup>148</sup> granted six states the right to enforce civil or regulatory laws on tribal land and allowed states to attempt regulate land use of tribal lands.<sup>149</sup> Now, land acquisition for tribes takes place at the direction of the Secretary of the Interior.<sup>150</sup> Leases of restricted land and the Non-Intercourse Act require approval the Secretary of Interior and are typically contracted for twenty-five years. However, there are situations, such as with the Native American Housing Assistance and Self-Determination Act of 1996, where housing development leases are approved for up to fifty years. Some reservations even allow ninety-nine year leases, which are dependent on the minerals and resources as other acts may place limitations because of such things. The American Indian Agricultural Resource Management Act of 1993 (AIARMA) allowed for “rangeland and farmland to ten years, and up to twenty-five years only if substantial investment.”<sup>151</sup>

The oversight of the Bureau of Indian Affairs in approving and managing the land lease process has been criticized for several reasons, including accusations that the BIA entered into some agreements on behalf of tribes, that are not economically sound.<sup>152</sup>

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<sup>146</sup> Compare *Final rule on Residential, Business, and Wind and Solar Resource Leases on Indian Land*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/mywcsp/documents/text/idc-037326.pdf> (last visited, Feb. 8, 2015); 25 C.F.R. § 162 (2012); and *Salzar Finalizes Reforms To Streamline Leasing, Spur Economic Development on 56 Million Acres of American Indian Trust Land*, UNITED STATES DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/public/documents/text/idc-037323.pdf> (last visited, Feb. 8, 2015).

<sup>147</sup> 25 U.S.C. § 177 (2015).

<sup>148</sup> Codified in 18 U.S.C. § 1162 (2015), 28 U.S.C. § 1360 (2015).

<sup>149</sup> *Id.*

<sup>150</sup> 25 U.S.C. § 415 (2015).

<sup>151</sup> Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 64, <http://www.law2.byu.edu/jpl/Vol%2019.1/01Mccarthy.pdf> (last visited, Feb. 8, 2015) (citing Pub. L. No. 103-177, 107 Stat. 2017; 25 U.S.C. § 3715 (2004)).

<sup>152</sup> See *United States v. Navajo Nation*, 556 U.S. 287 (2009).

The main purposes for land leases tend to be for grazing, farming, housing, mining, industrial development, timber cutting, oil, and gas exploration and production.<sup>153</sup> Lessee's interest is subject to foreclosure based on Secretary of Interior agreements.

Historically, leases tend to deliver low financial returns to the tribes — a reality that has been noted by some to be a violation of the trust relationship.<sup>154</sup> Conversely, courts have accused the Secretary of abuse of discretion where the Secretary refuses renewal of mineral leases to allow more favorable negotiations for the tribes.<sup>155</sup> However, in a more recent case, *United States v. Navajo Nation*, “the court held that there was no enforceable fiduciary duty for damages when the Secretary caused a tribe to receive below-market royalties for coal.”<sup>156</sup> The Court reasoned that the “Secretary has no duties beyond approval under the Indian Mineral Leasing Act,” even though it requires secretarial approval for any mineral leases negotiated by the tribe.<sup>157</sup>

### 3. Assignments

Assignments of land occur when a tribe grants a license to someone for the use of tribal land for a specific purpose.<sup>158</sup> Usually, this purpose is for building a house or erecting a business for a fixed location. The assignment of this land for the specific purpose agreed upon, generally expires after a term of years and allows no guarantee to right of renewal personal to assignee.<sup>159</sup> However, historical trends show that tribes will grant renewal of land assignments and also agree to transfer of the land assignment to the deceased's assignee.<sup>160</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *United States v. Mitchell*, 463 U.S. 206 (1983).

<sup>155</sup> *See Woods Petroleum Corp. v. Dep't of Interior*, 47 F.3d 1032 (10th Cir 1995).

<sup>156</sup> 537 U.S. 488 (2003). *CANBY*, *supra* note 27 at 436.

<sup>157</sup> *Id.*

<sup>158</sup> *CANBY*, *supra* note 27 at 428-29.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

Additionally, land certificates granted to individuals by the government when these lands taken into trust.<sup>161</sup>

#### 4. Allotments

Allotments are the real source of pain and distrust in Native American communities when it comes to land rights. They are completely different from the benefits afforded to tribes under a communal land holding.<sup>162</sup> Again, allotments were introduced under the Dawes Act, where Congress allotted tribal lands to be divided into farm-sized tracts for individual use.<sup>163</sup> These allotments carried with them a twenty-five year trust period.<sup>164</sup> After the trust period expired the allotment was fully alienable and taxable. However, if the allotted lands were sold they were no longer considered in trust, even if repurchased by a tribe and thus state tax would apply.<sup>165</sup>

Reservation allotments that become alienable are not subject to state land use laws. Many of the trust periods were extended by statute and the 1934 Reorganization Act extended some trusts indefinitely, which also provided no further allotment. Most allotments today are held by the United States in legal title with benefit to the individual.<sup>166</sup> Some of these allotments have patents in fee and some have restraint on alienation, regardless, they are treated the same, where use and distribution decisions can be made by an individual, not the tribe, as long as they are “with the concurrence of the United States.”<sup>167</sup> Although the United States holds bare legal title to the allotted lands, they cannot deal with mortgage creditor and seize the land without the allottee’s participation and cooperation in the process.<sup>168</sup> When a transfer of allotted land to tribe takes place,

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 429.

<sup>163</sup> See *supra* Part V and accompanying notes.

<sup>164</sup> CANBY, *supra* note 27 at 429.

<sup>165</sup> See *Cass County Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

<sup>166</sup> CANBY, *supra* note 27 at 429.

<sup>167</sup> See *United States v. Edward*, 400 F.3d 591 (8th Cir. 2005).

<sup>168</sup> CANBY, *supra* note 27 at 430.

the Secretary of the Interior must approve the transfer but it cannot order the transfer to occur.<sup>169</sup>

Even with the United States holding the bare or naked title of the land, this does not create the duty to manage the resources of the land. However, the land cannot be condemned by the state or utility without consent of the United States government and it cannot be disposed of by will without the approval of the by Secretary of the Interior.<sup>170</sup> If there is no will, then state intestate procedures set in. This process has caused the creation of a significant portion of the fractionated land interests. The beneficial interests become so widely disbursed that it is impossible to use the land without consent of all allottees and nothing can be accomplished.

This process also results in non-Indians gaining land rights, removing it from trust status. To combat fractionation the Indian Land Consolidation Act was introduced, where less than “2% of an allotted tract yielding less than \$100 annual income could not be passed intestacy but escheated to the tribe” the Supreme Court found unconstitutional as a taking.<sup>171</sup> This was later amended to be less than \$100 over five years.<sup>172</sup> Purchase of these interests at fair market value allows tribes to adopt probate code for allotted lands.<sup>173</sup>

## VI. MISMANAGEMENT

During the 1980s, the Bureau of Indian Affairs’ management of Indian trust funds came under serious scrutiny by Congress. Accusations of trust fund mismanagement by the Bureau of Indian Affairs were noted as early as the 1960s.<sup>174</sup> By the mid-1980s,

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<sup>169</sup> Division of Real Estate Services, *Acquisition of Title to Land Held in Fee or Restricted Fee*, UNITED STATES DEPT. OF INTERIOR, OFFICE, BUREAU OF INDIAN AFFAIRS (2008), <http://ailc-inc.org/PDF%20files/FeeToTrustHandbook1.0.pdf> (last visited February 9, 2015).

<sup>170</sup> *Id.*

<sup>171</sup> The Indian Land Consolidation Act of 1983, 96 Stat. 2517 (1983); CANBY, *supra* note 27 at 433.

<sup>172</sup> *Id.*

<sup>173</sup> CANBY, *supra* note 27 at 429-34.

<sup>174</sup> John Echohawk, *Individual Indian Money (IIM) Accounts Cobell v. Kempthorne: Fact Sheet for IIM Account Holders and Other Individual Indian*

Congress started drafting initiatives to combat mismanagement by requiring more accountability and changes to the management of Individual Indian Money accounts.<sup>175</sup> Despite Congressional attention, the mismanagement of the funds continued to occur under the BIA's oversight. In 1991, "the BIA admitted that it had not distributed royalty income to account holders in six years."<sup>176</sup>

Finally in 1994, Congress passed the American Indian Trust Fund Management Reform Act (AITFMR).<sup>177</sup> The purpose of the AITFMR was to strengthen the trust commitment of the government to the tribes to protect the trust lands and assets.<sup>178</sup> In order to better serve this need, the AITFMR established the Office of the Special Trustee (OST) within the Department of the Interior in order to oversee the entire trust process.<sup>179</sup> The pervasive mismanagement of tribal trust assets went on for decades under the care of the Bureau of Indian Affairs oversight. One of the trust programs that face particular trouble is the Individual Indian Money (IIM) trusts.

The BIA, under the authority of the DOI, is responsible for managing the trust lands, approving leases and transfers of land, and income collection. The Treasury holds and invests the individual Native American accounts, or —IIM accounts and is responsible for accounting and financial management of the funds.<sup>180</sup>

IIM trusts are individual accounts that are typically comprised of profits that come from land, mineral, or economic land leases.<sup>181</sup>

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*Trust Beneficiaries*, NATIVE AMERICAN RIGHTS FUND, <http://www.narf.org/cases/iimgeninfo.htm> (last visited, Feb. 8, 2015).

<sup>175</sup> ROSLAIND KIDD, TRUSTEES ON TRIAL: RECOVERING THE STOLEN WAGES, 659 (2006).

<sup>176</sup> *Id.*

<sup>177</sup> The American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239.

<sup>178</sup> These trusts include: land, IIM, and resources. *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Merjian, *supra* note 57 at 619 (citing Christopher Barrett Bowman, *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, 550-51 (2004)).

<sup>181</sup> Office of the Special Trustee for American Indians, *Individual Indian Money Account Information*, UNITED STATES DEPT. OF INTERIOR, <http://www.bia.gov/cs/groups/mywesp/documents/collection/idc010124.pdf> (last visited, Feb. 8, 2015).

However, some of the funds in these accounts can also come from other places. There are three types of IIM accounts: restricted, unrestricted, and estate accounts.<sup>182</sup> Restricted accounts tend to be supervised accounts for minors or others who prove unable to care for their own finances because of a mental or physical debility.<sup>183</sup> Minors' funds are left in this account status until they reach eighteen or the age of majority in their tribe.<sup>184</sup> Another reason a restricted IIM will be created is if your address is not verified or you are on the "Whereabouts Unknown" list.<sup>185</sup> Funds are still maintained and invested to earn income, but no disbursements occur.<sup>186</sup> Finally, child support claims or other pending claims can cause an IIM account to be restricted.<sup>187</sup>

Unrestricted IIM accounts are the most common.<sup>188</sup> Unrestricted accounts automatically disburse funds via mail when the balance is \$15.00 or more.<sup>189</sup> However, if the holder of the account has direct deposit set up, then the money should be automatically deposited.<sup>190</sup> Any funds awaiting disbursement are invested in government securities and are income earning until they are disbursed.<sup>191</sup>

The other kind of IIM account is the estate account.<sup>192</sup> Estate accounts are created for the deceased person with OST holding these funds, earning income until the probate process is complete.<sup>193</sup> These

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Office of the Special Trustee for American Indians, *Individual Indian Money Account Information*, UNITED STATES DEPT. OF INTERIOR, <http://www.bia.gov/cs/groups/mywcsp/documents/collection/idc010124.pdf> (last visited, Feb. 8, 2015).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Office of the Special Trustee for American Indians, *Individual Indian Money Account Information*, UNITED STATES DEPT. OF INTERIOR, <http://www.bia.gov/cs/groups/mywcsp/documents/collection/idc010124.pdf> (last visited, Feb. 8, 2015).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

accounts can get really tricky because of the inconsistency of clarity in the application of state probate law. This leaves many questions, for example: do these accounts have to go through state probate? Precedent would require it to pass through tribal probate, if there is a well-established process, but there is a lack of consistency regarding how this is handled.

A recent example of a mismanaged trust funds resulted in the Navajo Nation settlement of \$554 million dollars.<sup>194</sup> This agreement ended litigation for the historical mismanagement and prevents future litigation as a result of pending issues, such as the health effects of uranium mining and water resource rights.<sup>195</sup> The Navajo Nation is the largest of the managed trust lands, amounting to fourteen million acres that are leased for grazing, mineral resources, businesses, easements, and housing.<sup>196</sup>

## VII. THE COBELL SETTLEMENT

Several other internal challenges within the Bureau of Indian Affairs contributed to the mismanagement of IIM accounts.<sup>197</sup> The 2009 Cobell Settlement marked the end of a thirteen-year court battle by individuals attempting to reclaim what they had lost through this mismanagement and to hold the Department of Interior accountable for further trust account management.<sup>198</sup>

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<sup>194</sup> Press Release, Office of Public Affairs, *Attorney General Holder Secretary Jewell Announce \$554 Million Settlement of Tribal Trust Accounting and Management Lawsuit Filed by Navajo Nation*, DEPT. OF JUSTICE (Sept. 26, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-secretary-jewell-announce-554-million-settlement-tribal-trust>; see also Sari Horwitz, *U.S. To Pay Navajo Nation \$554 Million In Largest Settlement With Single Indian Tribe*, WASH. POST (Sept. 24, 2014), [http://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153527\\_story.html](http://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153527_story.html).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Merjian, *supra* note 57 at 619.

<sup>198</sup> *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009). Merjian, *supra* note 57 at 620; see also *Indian Trust Settlement* (warning individuals being contacted by people asking them to provide their bank account numbers. No one associated with the official Cobell Settlement process will ever ask for anyone's bank account number).

At its heart, *Cobell* is a case of equity; where the original relief sought was an accounting of the IIM accounts.<sup>199</sup> The *Cobell* lawsuit is the largest class action lawsuit against the United States in the country's history, with an estimated 500,000 beneficiaries represented by the action.<sup>200</sup> The 1996, Eloise Cobell, treasurer and member of the Blackfoot Indian tribe from Montana, discovered the many discrepancies and initiated the *Cobell* lawsuit.<sup>201</sup> During Cobell's service as treasurer, she discovered serious discrepancies in the management of funds for lands held for the benefit of the tribes by the United States government.<sup>202</sup> A large part of the trust relationship's failure resulted from the mismanagement of funds derived from lands held in trust.<sup>203</sup>

*Cobell's* cause of action alleged, two major trust violations: first "breach of trust, and [second,] interference with the duties of the Special Trustee."<sup>204</sup> Commonly, lands are held in trust for the benefit of an individuals or for the benefit of a tribe; and often times the land will be leased to non-native individuals, or organizations, for businesses for the extraction of resources.<sup>205</sup> The agency's responsibility to the trust relationship is similar to that of any fiduciary relationship and was charged with the following duties: keeping an accurate accounting of land lease the revenue; proper trust fund investment; proper reporting to the account holders; refraining from any self-dealing; and ultimately, to distributing this revenue to the Native Americans.<sup>206</sup>

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<sup>199</sup> *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 29 (D.D.C. 1998). *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

<sup>200</sup> Merjian, *supra* note 57 at 620. The number of 500,000 beneficiary representatives was amended from the original number, assumed to include around 300,000 individuals.

<sup>201</sup> *Id.* at 619.

<sup>202</sup> *Id.*

<sup>203</sup> *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 29 (D.D.C. 1998). *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

<sup>204</sup> *Id.* at 30.

<sup>205</sup> Merjian, *supra* note 57 at 616.

<sup>206</sup> *Cobell, v. Babbitt*, F. Supp. 2d 24 at 28. These duties of the federal government regarding IIM accounts were affirmed when Congress passed section 101 of the Indian Trust Fund Management Reform Act, 25 U.S.C. §162a(d) (2015).

The Special Trustee for American Indians was created in order to oversee the administration processes of the trust obligations.<sup>207</sup> In this position, the Special Trustee reports directly to the Secretary of the Department of Interior and is considered a sub-cabinet level position to the President.<sup>208</sup> The statutory requirements of the role of the Special Trustee are as follows:

(1) to provide for more effective management of, and accountability for the proper discharge of the Secretary of the Interior's trust responsibilities to the Indian people; (2) to ensure that these reforms are carried out in a unified manner; and, (3) to ensure the implementation of all reforms necessary for the proper discharge of the [Secretary of the Interior's] trust responsibilities to the Indian people.<sup>209</sup>

The Special Trustee is also responsible for submitting annual reports to Congress recommending improvements that can be made in carrying out the trust obligations.<sup>210</sup>

When Cobell first filed her claim in 1996, the estimated amount of money in question in the IIM accounts was “\$450,000,000, with more than \$ 250,000,000 dollars passing through the IIM accounts each year.”<sup>211</sup> Based on these numbers, the court determined that the balances of the IIM accounts should be nearly one billion dollars.<sup>212</sup>

The IIM accounts hold money that originates from various sources, but a majority of the funds are derived from income earned off of individual land allotments.<sup>213</sup> These allotments date back to 1934, pursuant to a United States government policy of breaking up Indian tribes and tribal lands.<sup>214</sup> In implementing this policy, the bulk of the tribal lands were divided into tracts, generally of eighty or one

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* See also 25 U.S.C. § 4042 (2015).

<sup>209</sup> *Cobell, v. Babbitt*, 30 F. Supp. 2d at 28. See 25 U.S.C. § 4041 (2015).

<sup>210</sup> *Id.* See 25 U.S.C. § 4043 (2015).

<sup>211</sup> *Cobell v. Babbitt*, 30 F. Supp. 2d at 48.

<sup>212</sup> *Id.*

<sup>213</sup> Office of the Special Trustee for American Indians, *Individual Indian Money Account Information*, UNITED STATES DEPT. OF INTERIOR, <http://www.bia.gov/cs/groups/mywvsp/documents/collection/idc010124.pdf> (last visited, Feb. 8, 2015).

<sup>214</sup> See *supra* Part V and accompanying notes.

hundred and sixty acres.<sup>215</sup> These tracts were patented to individual Indians, with legal title held by the United States as trustee.<sup>216</sup> These land allotments held in trust by the government generated income by the lease of their grazing, farming, timber, and mineral rights.<sup>217</sup>

Federal Statute required that the Department of Interior provide a full accounting of the source of funds, gains, losses, to each individual account holder in a quarterly report.<sup>218</sup> In 1999, the DOI stipulated that it could not perform this necessary accounting because it did not have the resources.<sup>219</sup>

There were no policies or procedures in place regarding the trust funds management or accounting.<sup>220</sup> In June 2001, Secretary of Interior Gale Norton issued a directive creating the Office of Historical Trust Accounting (OHTA), “to plan, organize, direct, and execute the historical accounting of Individual Indian Money Trust (IIM) accounts,” as mandated by both the Court and the 1994 Act.<sup>221</sup> Finally, a settlement was reached on December 7, 2009.<sup>222</sup> This settlement, is known as the Cobell Settlement, signed by Obama in 2010, that agreed to \$1.9 billion dollars to be set aside for the purchase of fractionated land interests so that areas of land could be united and returned to tribal management and ownership.<sup>223</sup>

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<sup>215</sup> General Allotment Act, *supra* note 120.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* See also CANBY, *supra* note 27 at 430.

<sup>218</sup> 25 U.S.C. § 4011 (2015).

<sup>219</sup> *See Id.*

<sup>220</sup> *See Id.* § 162(d)(7).

<sup>221</sup> Gale A. Norton, Secretary of the Interior, *Order No. 3231*, UNITED STATES DEPT. OF INTERIOR (July 10, 2001), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/T-2265.pdf>.

<sup>222</sup> Cobell Settlement Agreement, *supra* note 1.

<sup>223</sup> *Id.*

## VIII. THE LAND BUY-BACK PROGRAM

By gaining development control over the land, the tribe – as well as private individuals working with the tribe – should have a greater opportunity to create and build businesses or homes at many of these locations.<sup>224</sup>

The Land Buy-Back funding came directly from the Cobell Settlement where the United States government was held responsible for \$3.4 billion in mismanaged trust assets.<sup>225</sup> Over time, land allotments were passed down to the various heirs of the original landowners and now some land allotments have hundreds or thousands of owners.<sup>226</sup> Each of the owners of a land allotment possesses what is known as fractionated interests.<sup>227</sup> Fractionated ownership creates serious economic issues in the land value because it is difficult to for the numerous owners of interest in a parcel of the land to agree on a single use or designation for the land.<sup>228</sup> Department of Interior statistics noted that there are “approximately 150 reservations with 2.9 million purchasable fractional interests owned by approximately 245,000 individuals.”<sup>229</sup> Furthermore, the DOI released information that approximately 64% of these fractionated interests earn \$25.00 or less in annual income.<sup>230</sup>

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<sup>224</sup> Jacob Wascaus, *Maximizing the Tribal Land Buy-Back Program: How Priority Lists can Help Tribes Influence What’s Purchased*, Federal Reserve Bank of Minneapolis, COMMUNITY DIVIDEND (July 1, 2014), <https://www.minneapolisfed.org/publications/community-dividend/maximizing-the-tribal-land-buyback-program-how-priority-lists-can-help-tribes-influence-whats-purchased> (quoting Denise Mesteth, Director, Oglala Sioux Tribe Land Office) (Federal Reserve Bank of Minneapolis, June 1, 2014).

<sup>225</sup> See *supra* Part VI and accompanying notes.

<sup>226</sup> Bureau of Indian Affairs, *Land Buy-Back Program Frequently Asked Questions for Tribal Nations*, UNITED STATES DEPT. OF INTERIOR, 2 (Nov. 2015), <https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/landowners/upload/Frequently-Asked-Questions.pdf>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Status Report: Land Buy-Back Program Tribal Nations*, UNITED STATES DEPT. OF INTERIOR, 4 (November 20, 2014), <http://www.doi.gov/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf>.

The Department of Interior created the following table that reflects the estimates of fractioned lands mentioned:

*Table 1. Fractionation by Region*

BIA Region	Fractionated Tracts	Fractional Interests	Associated Acres
Great Plains	29,054	958,915	4,214,078
Rocky Mountain	20,789	701,291	3,410,879
Western	9,521	325,274	301,106
Northwest	13,359	278,193	1,025,730
Navajo	4,160	256,229	658,761
Southern Plains	7,332	196,368	567,758
Midwest	2,452	132,775	136,635
Eastern Oklahoma	6,591	49,437	395,010
Pacific	1,505	31,076	26,364
Southwest	440	11,361	55,262
<b>Total</b>	<b>95,203</b>	<b>2,940,919</b>	<b>10,791,584</b>

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Instituting the Land Buy-Back program allows the owners of fractionated interests to have their interests bought out at the fair market value assessment of their portion of the land ownership.<sup>232</sup> These purchase offers are good for forty-five days and the individuals who receive offers are under no obligation to accept.<sup>233</sup> However, once the offer is passed up on, it is unlikely that the DOI will return to that tract of land to make additional offers, as the anticipated length of time the Department will spend with each tribe is one year.<sup>234</sup>

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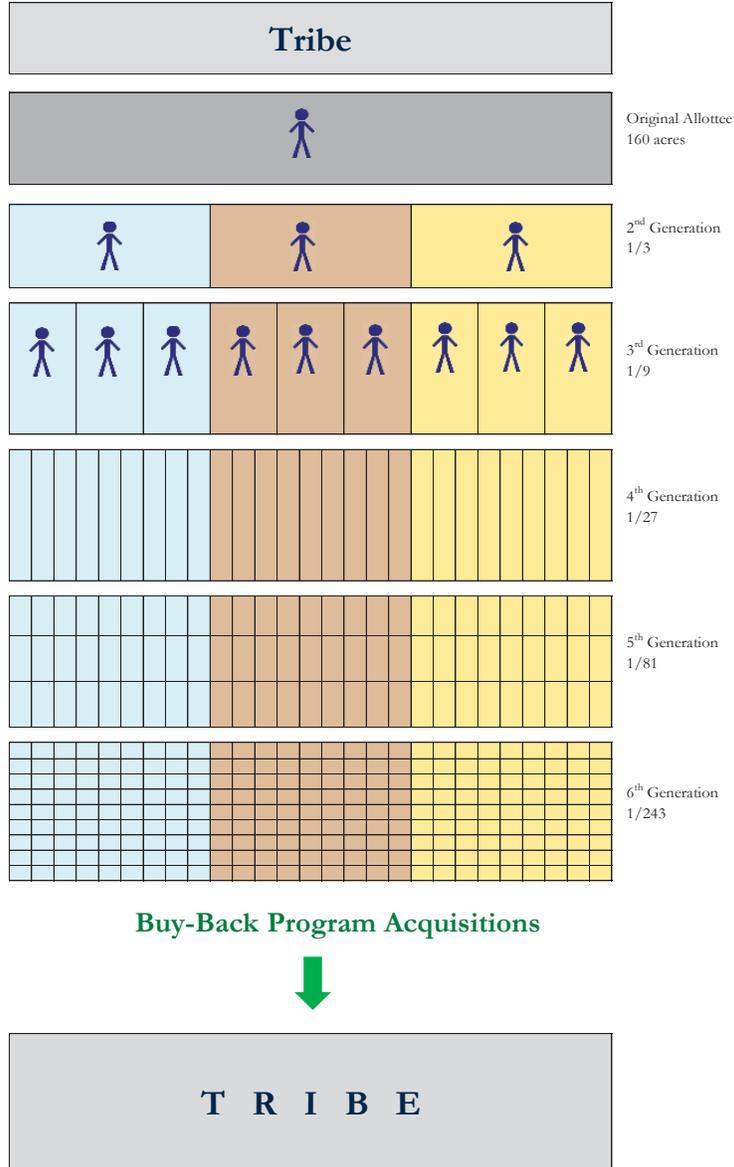
<sup>231</sup> *Id.* at 5.

<sup>232</sup> *Id.* at 23.

<sup>233</sup> *Id.* at 29.

<sup>234</sup> *Id.* at A-4, A-12.

The following figure offers a clear depiction of how fractionated land is passed down through the generations:



<sup>235</sup> Status Report: Land Buy-Back Program Tribal Nations, UNITED STATES DEPT. OF INTERIOR, 4 (November 20, 2014), <http://www.doi.gov/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf>.

With the Land Buy-Back program already under way, the Department of Interior published a 2014 report highlighting the goals and priorities of the program moving forward.<sup>236</sup> Specifically, the Department of Interior is aiming to:

“(1) Reduce fractionation by consolidating interests for tribes, ensuring that land stays in trust; (2) Effectively manage implementation costs; (3) Maximize tribal participation; and (4) Establish and maintain clear communications with tribes, landowners, and the public.”<sup>237</sup>

The 2014 report also does a nice job detailing the four phases of the land consolidation process. The four phases are:

(1) Outreach where the Department of Interior engages in a process of educating and informing tribes and individuals land owners of their option to sell their fractionated land interests. (2) Land research, which requires mapping, an assessment of fair market value of the fractionated interests and also an assessment of the land resources. (3) Valuation is the actual fair market value assessment of the land interests. And finally, (4) Acquisition takes place when the Department of Interior extends the purchase option to the individual landowners and acquires the land interest through sale.<sup>238</sup>

The Land Buy-Back program is much more expansive than any previous land consolidation effort by focusing on a large number of tracts and owners at once without requiring an application from owners.<sup>239</sup> It also allows for efficient and effective purchases that will reduce fractionation in the locations where it is most prevalent.<sup>240</sup>

The Land Buy-Back program, like any government program, has its strengths and weaknesses. In the area of strengths, from the vantage point of an administrative agency, allowing the consolidation of fractionated land interests decreases the administrative burden of

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<sup>236</sup> *See Id.*

<sup>237</sup> *Id.* at 2.

<sup>238</sup> *Id.*

<sup>239</sup> *See* Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2517 (allowing tribes to exchange or sell undivided fractionated interests of ownership of over fifty percent of the land or with consent of over fifty percent of the owners and final approval by the Secretary of Interior).

<sup>240</sup> *Id.* at 6.

accounting for a high volume of individuals who have low earnings on these fractionated lands. Another benefit would be the potential for eliminating the Whereabouts Unknown category from IIM accounts. According to the 2014 Department of Interior Report, individuals who are Whereabouts Unknown are those “without current address information on file with the Office of the Special Trustee for American Indians.”<sup>241</sup> Statistics for the number of individuals that fall into the Whereabouts Unknown category with fractionated interests is approximately thirteen percent.<sup>242</sup>

The Cobell Settlement specifically included procedures for locating individuals who are Whereabouts Unknown. Those procedures are as follows: (1) “Additional Service. . . the Interior Defendants shall use due diligence to provide all owners whose whereabouts are unknown with actual notice of the opportunity to convey their fractionated interests through the best means available.”<sup>243</sup> (2) Notice, information regarding the Land Consolidation Program must be included and provide the individual with a mailing address and contact information and the process to be followed to respond to an offer for purchase.<sup>244</sup> (3) Returned Notice, the Department of Interior must conduct a reasonable search using any state, federal, or tribal database to locate an address for an individual and must then send written notice.<sup>245</sup> (4) Notice by Publication, if the Department of Interior cannot contact a party based on the above methods they must publish public notices of the right to participate in the program either by newspaper or by conspicuous public posting and provide notice in any other place deemed appropriate.<sup>246</sup>

In the event that the Department of Interior is unsuccessful in locating the owners that are whereabouts unknown, after five years

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<sup>241</sup> *Status Report: Land Buy-Back Program Tribal Nations*, UNITED STATES DEPT. OF INTERIOR, E-1 (November 20, 2014), <http://www.doi.gov/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Status Report: Land Buy-Back Program Tribal Nations*, UNITED STATES DEPT. OF INTERIOR, E-1 (November 20, 2014), <http://www.doi.gov/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf>.

these individuals interests will be considered a “consented conveyance” to the tribe.<sup>247</sup>

Some areas of criticisms surrounding the Land Buy-Back program include the fact that the DOI is hiring more workers for jobs that should be completed by the tribes, such as conducting fair market valuations and land assessments. Another criticism concerns money from the settlement going back into the hands of the government for purchase of fractionated interest—an already distrustful relationship because of the mismanagement that led to the settlement. Furthermore, some tribes have already started a process of land consolidation by purchasing fractionated interests. Many wonder if their expenditures will be refunded with the funds that rightfully belong to the tribes. Others are concerned that they are buying back land that they must submit proposals to the United States government for use and are getting no response, rendering the land useless, as before.<sup>248</sup>

Some criticisms surrounding the implementation of the Land Buy-Back program are strongly heard from the tribal governments who have already implemented Land Buy-Back programs within their communities and would like to maintain control of the buy-back process for their tribes. However, the BIA has already sent a clear message that this will not be the case. The BIA is maintaining strict control over who is hired to assess the fair market value of each allotments and who is receiving offers on their property.<sup>249</sup>

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<sup>247</sup> *Id.* at E-2.

<sup>248</sup> Adrian Jawort, *\$1.9 Billion Dispute: Tribal Leaders Fuming Over Cobell Land Buy-Back Program*, INDIAN COUNTRY TODAY (July 29, 2013), <http://indiancountrytodaymedianetwork.com/2013/07/29/19-billion-dispute-tribal-leaders-fuming-over-cobell-land-buy-back-program-150623>.

<sup>249</sup> *Id.*

## IX. TRANSFORMATION OF THE TRUST RELATIONSHIP

In recent years, the Obama Administration has played a positive and active role signing significant legislative changes for Indian Country. In 2009, Congress offered an apology to the American Indians, recognizing a limited number of general violations that the American Indian culture endured. Granted, the apology was tacked onto the end of a Department of Defense appropriations bill and “implored” the president to recognize the apology and sign it as recognition for apology on behalf of all United States Citizens.<sup>250</sup> Regardless, actions such as these can be seen as a step in the right direction.

The importance of keeping land in trust and not fee simple is to prevent states from condemning the lands and taxing.<sup>251</sup> Would it be beneficial to get the states involved and to the table on these issues? Clearly there is a struggle for power and questions regarding the expanse of federalism. However, the tribes are forced to make the choice of trying to acquire fee simple land and facing the taxation and condemnation of states or leaving land in trust where the federal government holds title and allows “benefit and use.” This hardly seems fair. Especially for a sovereign, note how the General Allotment Act allows state taxation after land is removed from trust<sup>252</sup> and after repurchasing tribal land on a reservation. Department of Interior may take land into trust, which is particularly important today when it comes to Gaming law.<sup>253</sup>

The 2009, *Carcieri v. Salazar* decision strictly interpreted the Indian Reorganization Act of 1934 (IRA) by limiting the scope of authority that the Secretary of the Interior has to take land-into-trust.<sup>254</sup> Post *Carcieri*, the Secretary may only approve land-into-trust applications for tribes that were already federally recognized pre

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<sup>250</sup> 111th Cong., 1st Sess., S. J. Res. 14 (April 30, 2009).

<sup>251</sup> CANBY, *supra* note 27 at 425.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 426.

<sup>254</sup> *Carcieri v. Salazar*, 555 U.S. 379 (2009).

IRA.<sup>255</sup> More specifically, the Secretary of Interior's approval for land-into-trust applications from tribes that received federal recognition status post IRA is now exceeding the Secretary's authority.<sup>256</sup> The narrow interpretation of the Indian Reorganization Act in *Carcieri* created a lot of issues for tribes; particularly those who were once federally recognized with trust land. Now they are no longer listed in the federal registry and their land status is in limbo.<sup>257</sup>

The National Congress of American Indians state of the union address made in January 2015 reiterated the interest of Native American tribes to lobby Congress for a *Carcieri* fix.<sup>258</sup> Some of the effects of *Carcieri* have included the following: lack of economic development because of unclear state regulatory status of tribal lands; trouble with civil and criminal jurisdictional interpretations; and, trouble asserting federal benefits and exemption status based on the ambiguous interpretation of "Indian" in the court's decision.<sup>259</sup> In

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<sup>255</sup> In *Carcieri*, there is a dispute between the state of Rhode Island and the Narragansett tribe over the tribe's noncompliance to state laws regarding a housing development being constructed on thirty-one acres of land outside of the tribe's settlement lands. The Narragansett tribe petitioned the Secretary of Interior to take the thirty-one acres of land-into-trust, which it ultimately approved. As a result of this decision, the state of Rhode Island challenged the decision based on the plain language of the Indian Reorganization Act of 1934, arguing a narrow interpretation of the word "now" in reference to the statute 25 U.S.C. section 479. In the statute, Indian was defined as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* The Court in *Carcieri* determined that "now" was limited to those tribes that were federally recognized at the time the IRA was enacted. 25 U.S.C. § 479; *Carcieri v. Salazar*, 555 U.S. 379 (2009).

<sup>256</sup> *Id.*

<sup>257</sup> Another effect of the *Carcieri* decision has been the emergence of landless tribes. Status as a landless tribe has raised many legal questions in the area of tribal rights and self-determination. In fact, the current number of federally recognized landless tribes is not fully known by the BIA. This is due in part to the delay in processing applications for land into trust status, communication challenges within the Department of Interior and inaccuracies in recording and entering tribal recognition codes and the computer system. *Id.*

<sup>258</sup> The NCAI state of the union address (January 2015), <http://www.ncai.org/resources/testimony/2015-state-of-indian-nations>

<sup>259</sup> Heidi McNeil Staudenmaier & Celene Sheppard, *Impact of the Carcieri Decision*, A.B.A., ABA SECTION OF BUSINESS LAW COMMITTEE ON GAMING LAW,

order for the trust relationship to improve all branches of government must work together in development, implementation, and interpretation of new laws.

#### A. *What To Expect Moving Forward*

Congress must change the laws defining the trust relationship to better reflect the capabilities of the tribes and to implement the federal policies empowering tribal governments to meet their responsibilities as permanent components of the American federalist system. Tribes should be able to manage their lands without federal supervision, while at the same time, maintaining their immunities and authorities regarding trust land. Congress should create both financial and policy incentives for tribal governments to assume these responsibilities. Rather than insisting that the Department of the Interior improve its execution of a system that is flawed at its foundation, Congress should clear a path for tribes that wish to use their primary capital asset—land—to create the financial resources needed to build viable tribal economies. By doing so, Congress will bring the trust relationship into the twenty-first century.<sup>260</sup>

What to expect in 2015:<sup>261</sup> one of the major hurdles in government-to-government relations with tribal sovereignty comes from the states feeling boxed out regarding land acquisition and land use.<sup>262</sup> Trust lands are being abused for uses that do not conform to tribal interest and sacred lands are being desecrated. This is currently happening in San Carlos Apache, where Arizona legislatures are

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(Spring 2009)  
<http://apps.americanbar.org/buslaw/committees/CL430000pub/newsletter/200905/s-taudenmaier.pdf>.

<sup>260</sup> Gover, *supra* note 5.

<sup>261</sup> Gale Courey Toensing, *Right Out the False, Ring in the True: Five Takes on 2015*, INDIAN COUNTRY TODAY (Jan. 1, 2015), <http://indiancountrytodaymedianetwork.com/2015/01/01/ring-out-false-ring-true-five-takes-2015-158518>.

<sup>262</sup> Gale Courey Toensing, *Feinstein Insists Carcieri Fix Address Her Opposition to Tribal Gaming*, INDIAN COUNTRY TODAY (Dec. 2, 2013), <http://indiancountrytodaymedianetwork.com/2013/12/02/feinstein-carcieri-fix-must-address-concerns-about-tribal-gaming-152514>.

continuing a pattern of discriminatory practices by state legislatures' Senate using a closed rule to pass detrimental laws.<sup>263</sup>

How can government agencies like the BIA and Office of Tribal Justice ensure involvement in tribal affairs under future administrations? There really is nothing that the BIA can do other than perform its trust duties fairly and responsibly. The BIA is an executive regulatory body and must follow the directives of the president and congressional statutes. The Department of Justice, on the other hand, is situated in a position where under proper Attorney General Leadership; a close eye can be kept on the interactions between the BIA, DOI, and the tribal governments.<sup>264</sup> This is accomplished through the commitment and advocacy of the attorneys in the Office of Tribal Justice, amicus briefs, and Attorney General intervention on matters that affect the United States Government.

Perhaps alternative dispute resolution practices could play a role in reshaping the future government-to-government relationships by encouraging a collaborative process? The law has gone as far as it can in "maintaining" the relationships between the United States government and the Native American tribes. Turning to more personal and tailored resolution processes allows for broader solutions.

Several tribal courts chose to utilize different forms of conflict resolution and mediation efforts in their court systems; these tribal governments are committed to the rehabilitation and cultural protection of their people. The government is doing a better job, through key leadership positions, at reaching out to tribes before passing and enforcing statutes that directly impact native tribes. However, this process rests too heavily on a distrustful and inconsistent enforcement process. Maintaining a consistent dialogue and consultation process with tribal government leadership is

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<sup>263</sup> Gale Courey Toensing, *San Carlos Apache Leader Seeks Senate Defeat of Copper Mine on Sacred Land*, INDIAN COUNTRY TODAY (Dec. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/08/san-carlos-apache-leader-seeks-senate-defeat-copper-mine-sacred-land-158181>.

<sup>264</sup> *Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes*, 79 FED. REG. 239, 73905, 239,73906 (2014) <http://www.gpo.gov/fdsys/pkg/FR-2014-12-12/pdf/2014-28903.pdf>

challenging, especially when the leadership in some tribes is changing more frequently than one could possibly keep up with. However, if an agreement was made for a special advisor to be selected from each tribe to maintain a commitment of service, perhaps tribes could come to agree with how certain programs are enacted.

The tension from the mismanagement of the Native American trust funds over the years by the BIA has deeply damaged the government-to-government relationship. If the BIA properly empowers and works with tribes that have cooperative agreements, there is hope that the relationship can transform from one that has long been debated of as a balance between protection of real property and moral and political obligations.

While American Indians have the right of sovereignty and self-government on their reservations, they are still afforded the same civil rights protections that all United States citizens have. With tribal sovereignty “the relevant inquiry is whether any federal limitation exists to prevent the tribe from acting within the sphere of its sovereignty, not whether any authority exists to permit the tribe to act.”<sup>265</sup> The Land Buy-Back program is a unique opportunity for the United States government to give back some of the powers of self-determination to the tribes; particularly, tribal governments who already have land consolidation plans in place.

## X. CONCLUSION

The Land Buy-Back program is a positive vehicle for change and opportunity to improve government-to-government relations between the United States and tribes. However, this can only happen if the Department of Interior implements the suggestions and feedback that they receive from their Listening Sessions and customize their approaches to each tribe. Furthermore, tribes that have already been involved in their own land consolidation programs should be able exercise self-determination in how the program is implemented. The Land Buy-Back program is going on the road for their next Listening

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<sup>265</sup> CANBY, *supra* note 27 at 79.

Session soon.<sup>266</sup> The purpose of these Listening Sessions is gain feedback from tribal leadership and tribal members to assist the DOI in outreach for the program. The Listening Sessions are imperative to gaining successful implementation of the Land Buy-Back program. There is no “one-size-fits-all” solution for all tribal nations because all tribes are at different places in terms of infrastructure, capacity, and development.

The difficulty in the ten-year plan of the Land Buy-Back program is whether or not the changes in the executive administration leadership currently taking place, and the presidential election of 2016, will bring the same spirit of commitment and cooperation to continue building strong government-to-government relationships with the tribes.<sup>267</sup> With a changing administration currently underway and a new Attorney General soon to be confirmed, it is difficult to know what to expect moving forward. One can hope that the hard work of Attorney General Holder and his staff in strengthening and developing trust-based relationships with many tribal leaders will continue under the next appointee. Realistically, the trust relationship cannot be carried out by just one office or one leader; instead Congress must maintain its role of oversight while the Department of Interior, Bureau of Indian Affairs works diligently with tribes to make positive strides in implementing the Land Buy-Back program.

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<sup>266</sup> Scheduled for March 19, 2015 in Laveen, Arizona.

<sup>267</sup> A good example of a presidential commitment to maintaining positive tribal relationships that ended up having no teeth. Bush Administration, *Memorandum Committing to Further the Government-to-Government Relations Between the United States and Federally Recognized Tribes* (2004), <http://www.gsa.gov/portal/content/105007>.