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Tribal Land Corporations: Using Incorporation to Combat Fractionation

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I. INTRODUCTION

Until 1887, almost all reservation lands were held in common for the benefit of all tribal members. The Dawes Act of 1887 inaugurated a process of privatizing the reservations by distributing the land to individual Indians. Between 1887 and the end of allotment in 1934, 118 reservations were allotted.1 While many parcels were sold,

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* O'Connor Fellow, Arizona State University, Sandra Day O'Connor College of Law; J.D., Harvard; A.B., Duke. I would like to thank Prof. Gerald Torres for encouraging this project.
1. AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 309 (Comm. Print 1977). This number represents more than half of all reservations.
roughly ten million acres remain in allotted trust status today. For most Indians, alienation was prohibited, first for twenty-five years and then indefinitely.

Few Indians made wills (many were not permitted to do so) and therefore ownership interests descended under state law. In 1984, three-quarters of allotted land had more than one undivided interest, i.e. at least two Indians owned the parcel as tenants in common. The extent of fractionation is rapidly increasing: 350,000 interests in 1984 grew to 1.5 million in 1994. By July 2001, the number had increased to 3.15 million. Fractionation is skewed: a majority of the interests reflects ownership in a minority of the land. Indians own 1.4 million interests of less than 2% of a parcel, affecting 58,000 tracts. "Economically and administratively, allotment is unworkable." The administrative burden of maintaining over three million records is significant; the cost was estimated to be at least $17 million per year in 1999. The paperwork required to use allotted lands deters leasing and other economic uses, depressing returns for individual Indian owners.

Although the allotment of Indian-owned land is the apotheosis of fractionation, fractionation undermines land tenure elsewhere. Forty-one percent of black-owned land in the Southeast United States is fractionated to some degree. The willingness of courts to partition land in the Southeast has limited the degree of fractionation (federal law discourages partition). Partition is frequently combined with sale, contributing to the loss of black-owned land. Heirship property on the island of St. Lucia is called "family land" and partition requires consent from all the owners, which encourages fractionation of heirship

5. Id. (citing BIA Notice to Indian Landowners).
6. Presidential Comm’n, supra note 3, at 5.
property like in Indian country. Similarly, family land is underutil-
ized because ownership is split between so many individuals.\textsuperscript{10}

While fractionation is a significant problem affecting allotted land,
the burden is very unequal. One-third of all allotted parcels have a
single owner, i.e. no fractionation. Even within fractionated parcels,
the extent of fractionation is skewed. One-quarter of parcels re-
present 81\% of interests. Relatively few parcels are extremely frac-
tionated since only 1300 parcels have more than 200 owners.\textsuperscript{11} Even
where fractionation is limited, it imposes economic costs. Where frac-
tionation is extreme, the administrative costs sometimes mean that
land remains unused. While fractionation is a significant obstacle to
Indian prosperity, it is not the only impediment to economic de-
velopment. For example, the Presidential Commission on Indian Reserva-
tion Economies identified 2320 individual obstacles in forty major
categories.\textsuperscript{12} Among the most frequently cited impediments to eco-
nomic development are the remoteness of most reservations, few re-
sources/poor land, burdensome federal regulations, and tribal politics.

This Article proposes using the corporate form to solve the problem
of fractionation. Part II provides a short summary of allotment and
its effect on Indian land tenure. Part III describes attempts by Con-
gress to reduce fractionation, despite resistance from the courts. Part
IV discusses proposals from the literature on fractionation. Part V de-
scribes the role for tribal land corporations ("TLC") in responding to
fractionation. Part VI analyzes the implications of using eminent do-
main by TLCs. Part VII advances economic arguments in favor of the
TLC. Part VIII concludes.

\section*{II. INDIAN LAND AND THE HISTORY OF ALLOTMENT}

As early as 1633, non-Indians proposed granting or imposing indi-
vidual ownership of land on Indians.\textsuperscript{13} Jefferson saw a role for private
property in civilizing and assimilating Indians.\textsuperscript{14} Between 1830 and
1880, sixty-seven different tribes were given the opportunity to receive
allotted lands, yet fewer than 5\% chose to accept allotment of their
reservations.\textsuperscript{15} In addition, Indians were offered individual land ten-

\begin{thebibliography}{16}
\bibitem{10} Id. at 522–23.
\bibitem{11} National Congress of American Indians, Options for Improving Consolida-
tion of Fractional Interests as a Part of the Cobell Settlement Legisla-
See id. at 5.
\bibitem{12} Presidential Comm'n, supra note 3, at 25.
\bibitem{13} Jay Kinney, A Continent Lost—A Civilization Won 6, 82 (1937).
thesis, Harvard University) (citing statistics presented by Senator Morgan of Ala-
bama, Cong. Record, 46th Cong. 3d Sess. 1060–61). Allotment was part of treaty
negotiations with the Potawatomi, Cherokee, and Chickasaw from 1816 to 1818

ure off-reservation. In 1875, the Indian Homestead Act offered all the benefits of the 1862 Act without forfeiting any share of tribal funds.¹⁶ Few Indians took advantage of homesteading.¹⁷ Although cultural norms certainly played a role, much of the land set aside as reservations was inappropriate for small-scale agriculture or ranching. Ninety percent of the Sioux were reported to oppose allotment because their land was useless for agriculture and running livestock over a large range was the only economic use.¹⁸ Many Sioux reservations are concentrated in western South Dakota—a dry region with poor soils, where even subsistence gardens fail in many years.¹⁹

A. Allotment

The General Allotment Act of 1887, also called the Dawes Act,²⁰ authorized the President to distribute tribal land held in common to tribal members individually.²¹ Each tribal member received between 40 and 160 acres (later expanded to 320 acres), depending on age and sex. (No accommodation was made for future population growth.) Any land not allotted was declared surplus, removed from trust status and opened to non-Indian settlement.²² To encourage assimilation, allotted land was often checkerboarded with surplus land.²³ Although tribes ceding surplus land were supposed to benefit from its sale, often the land was sold on the cheap.²⁴ Most surplus land was sold for


¹⁷. HENRIKSSON, supra note 15, at 135.


²¹. Although the majority of reservations were allotted with Indian approval, the Act did not require tribal or individual permission.

²². MARION CLAWSON, UNCLE SAM’S ACRES 69 (1970) (arguing that homesteading privatized enforcement of United States’ land claims against the Indian tribes).

²³. Providing Indians with non-Indian examples as neighbors was a key benefit. Senator Henry Teller (of Colorado) argued that blacks had progressed more than Indians because of more frequent contact with whites. HENRIKSSON, supra note 15, at 170.

²⁴. For strong evidence of below-market sales of surplus land in Gregory County, see S. Doc. No. 58-158 (1904).
$1.25 per acre.\textsuperscript{25} Even when the federal government paid more, Indians still received a fraction of the value. In 1901, surplus land on the Devils Lake Sioux Reservation was ceded to the United States for $3.32 per acre, but resold for $4.50 per acre. At the time, prairie farm-land averaged over $7 per acre.\textsuperscript{26} While some of the proceeds were distributed pro rata among tribal members, some were retained by the Office of Indian Affairs ("OIA") to offset agency appropriations.\textsuperscript{27} The direct administration cost of allotment was $900 million, roughly $10 for each acre transferred to non-Indians.\textsuperscript{28}

Fearing that non-Indians could quickly come to possess much of the allotted land,\textsuperscript{29} the Act prohibited any conveyance for twenty-five years, including by devise.\textsuperscript{30} The trust period was judged sufficient time for the Indians to "acquire more provident habits . . . and to learn how to take care of themselves."\textsuperscript{31} Under Section 5 of the Act,\textsuperscript{32} ownership of allotment lands descended according to the laws of the state (or territory) in which reservation was located. Although state and territorial laws varied in their details, the heirs of intestate estates were tenants in common of an undivided parcel everywhere reservations were allotted.\textsuperscript{33}

Scholars have identified six goals for allotment: weakening the tribe as a social unit, promoting individual Indian initiative, encouraging Indian agriculture, retaining a portion of the reservation as Indian land, opening the remainder to non-Indian settlement, and

\textsuperscript{25} Fractionated Estate, supra note 15, at 8–9.


\textsuperscript{27} Fractionated Estate, supra note 15, at 8–9. The Office of Indian Affairs was established in 1824 as part of the War Department. Secretary of War John C. Calhoun had initially called the Office of Indian Affairs the Bureau of Indian Affairs, but the Bureau consistently worked under the name Office of Indian Affairs until 1947, when it was officially named the Bureau of Indian Affairs. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1227–28 (1984).

\textsuperscript{28} In contrast, the cost of purchasing 240 million acres between 1800 and 1840 was only 7.4¢ per acre. Barsh, supra note 26, at 819.


\textsuperscript{30} In 1905, the Burke Act authorized the Secretary to issue a fee patent to any "competent" Indian, which removed any restriction on alienation, but also the immunity from state taxation.


\textsuperscript{32} General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887).

\textsuperscript{33} In Jones v. Meehan, 175 U.S. 1 (1899), the Supreme Court ratified primogeniture under tribal law for property held in fee simple in a reservation unaffected by the Dawes Act.
reducing the cost of Indian administration. The legislative success of allotment depended on a coalition of Western agricultural interests eager for more land and well-meaning Easterners, who thought that assimilation would civilize Indians and improve their social and economic condition. In this view, Indians were held back by both the continued vitality of tribal social structures and the absence of private land ownership on reservations.

Both opponents and proponents of allotment believed that Indians had no private rights in property and thus Indians had no incentive to improve the land. The common prohibition on alienation outside the tribe or group is often characterized as evidence against private ownership. Yet, most countries do not permit non-citizens to own land. The United States is the exception rather than the rule. Note that federal law did prohibit the opposite (individuals buying land from Indians), but this restriction is not viewed as evidence that Americans do not recognize private property. Private land tenure combined with citizenship would encourage assimilation, believed to be the only route for improving the condition of Indians. Although the majority of Indians opposed allotment, some Indians were eager for


37. Stacy L. Leeds, By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land, 41 Tulsa L. Rev. 51, 64 (2005) [hereinafter Eminent Domain].

38. The original Dawes Act left the timing of citizenship uncertain. The OIA operated on the assumption that Indians would receive citizenship upon fee patenting, not upon allotment. In In re Heff, 197 U.S. 488 (1905), the Supreme Court voided the conviction of a Kickapoo allottee for drinking on the grounds that allotment conferred citizenship when the land was allotted. In response, Congress passed the Burke Act of 1906, restricting citizenship to fee patented Indians. Fractionated Estate, supra note 15, at 14.
individual land tenure. Proponents of allotment relied heavily on the few Indians who had voiced a desire for private property in land. Weakening tribal structures was an explicit goal of allotment, in fact, "this law [was] a mighty pulverizing engine for breaking up the tribal mass." Tribalism was identified with a variety of attitudes and practices considered undesirable. An Indian agent on the Yankton Sioux reservation argued that allotment would curb traditional religious practices, food sharing, and even "constant visiting." Senator Dawes asserted that private property would even encourage Indians to "keep the peace." In addition, private property would encourage agriculture, investment, and capital accumulation. Without private property in land, there would be no "selfishness, which is at the bottom of civilization." Allotment was an "experiment in social engineering," "hop[ing] to indoctrinate Native Americans to the European concept of private ownership."

Further impetus for allotment was provided by the OIA as a bureaucracy. Allotment increased funding for the OIA since allotment itself was time-consuming. After allotment, keeping records, probate, leasing, sales, fee patenting, etc. all created work for OIA agents. As fee patenting reduced the acreage under trust, the OIA could see that continued allotment would reduce the size and budget of the agency. In the 1920s, the OIA began to devote more energy to managing its resources; management requires more budget and personnel than disposal.

While the end of allotment may have served Indian interests, it also served OIA interests. Following the passage of the Dawes Act and the IRA, the OIA budget increased by 20%. Interestingly, simi-
lar results were found for the opening of the public domain, a simultaneous process with allotment. Before 1920, bureaucrats found that land sales increased their budgets and staffing. After 1920, "management of land [became] a source of greater appropriations than disposal." Perhaps not coincidentally, lands sales came to a close in 1934 with the Taylor Grazing Act.

Congress voted in 1891 to authorize limited leasing of allotted lands by non-Indians, and then in 1910 to permit widespread leasing. Leasing was further liberalized in 1921. Combined with restraints on alienation, the ability to lease made it easier for Indians to transfer land to non-Indians, harder to transfer land to other Indians, and nearly impossible to reschedule Indian land holdings to increase efficiency. Indian agencies controlled every aspect of leasing and its proceeds and often strongly discouraged the practice, since it conflicted with the goals of allotment. And yet, when Indian ranching proved successful, the OIA encouraged Indians to sell their herds and lease the land to non-Indians.

OIA control of lease proceeds was near absolute. The proceeds of leasing were deposited in Individual Indian Money ("IIM") accounts, but withdrawing any money required a purchase order. The OIA had nearly unlimited authority to approve or reject purchase orders, giving the OIA veto power over the purchase of clothing, seed, supplies, and even baby clothes. Yet the practice of leasing at the expense of Indian farming or ranching increased sharply through the period of allotment. The small size of parcels combined with capital shortages

49. Act of February 28, 1891, ch. 383, § 3, 26 Stat. 794, 795 (authorizing leasing for the infirm) (repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007). In addition, the amendments authorized allotments of eighty acres to each adult, thus protecting divorced wives. CARLSON, supra note 34, at 12. If the reservation was insufficient to allow each Indian eighty acres, then the parcels would be reduced, but the ratio maintained. HENRIKSSON, supra note 15, at 173.
52. CARLSON, supra note 34, at 90.
53. MUYER, supra note 50, at 196.
55. BOLSIS, supra note 19, at 16–17.
meant that many Indians could receive more by leasing the land than by working it themselves.\textsuperscript{56}

In addition, allotted land was converted to fee in certain cases, leading to non-Indian settlement within reservations.\textsuperscript{57} Congress authorized sale—upon request of a single competent heir—with the proceeds divided between heirs in 1902.\textsuperscript{58} Only 20\% of fee-patented lands remain in Indian ownership, shrinking the Indian land base by roughly twenty-three million acres.\textsuperscript{59} On most reservations, Indians lost more than three-quarters of all their fee-patented land by 1934.\textsuperscript{60} As lands were leased, the OIA often encouraged allottees to apply for fee patenting and sell their land.\textsuperscript{61} Fee-patented land sold to non-Indians and surplus land reduces tribal sovereignty and introduces jurisdictional complexity.\textsuperscript{62} Jurisdictional complexity deters economic use because of the risk of double or triple taxation, zoning uncertainty, and increased transaction costs such as complicated title searches.

**B. The Effects of Allotment**

Allotment did not provide Indians with individual economic opportunity. Where on-reservation agriculture had been viable, allotment disrupted production; Indians were more successful as farmers before allotment than afterwards.\textsuperscript{63} Not surprisingly, agriculture was strongest among tribes with agricultural traditions. Erroneously, the Pueblos of the Southwestern United States and the Five Civilized Tribes\textsuperscript{64} have been identified as the only successful farmers west of

\begin{footnotes}
\item[56.] The unpredictable climate of the high plains made small-scale ranching particularly difficult. \textit{Meyer, supra} note 50, at 196.
\item[57.] \textit{Presidential Comm'n, supra} note 3, at 29.
\item[58.] Roughly 3.7 million acres were lost through supervised sales. In 1913, there was a backlog of 40,000 requests, affecting $60 million worth of land. \textit{Fractionated Estate, supra} note 15, at 13–14. The pace of fee patenting reflected the demand for land, which fluctuated with crop and livestock prices. \textit{Carlson, supra} note 34, at 51.
\item[59.] \textit{Heirship, supra} note 44, at 4; \textit{Fractionated Estate, supra} note 15, at 15.
\item[60.] \textit{McDonnell, supra} note 54, at 106–07, 112–13.
\item[61.] \textit{Id.} at 55. For example, the Rosebud BIA encouraged the sale of well-watered land that produced high lease income in order to consolidate Indian ownership in drier land, ostensibly to permit more Indians to ranch. Carl K. Eicher, Constraints on Economic Progress on the Rosebud Sioux Indian Reservation 222–23 (Dec., 1960) (unpublished Ph.D. thesis, Harvard University) (on file with Harvard University Archives).
\item[63.] \textit{Carlson, supra} note 34.
\item[64.] The Cherokee, Chickasaw, Creek (Muskogee), Choctaw, and Seminole were termed the Five Civilized Tribes because many in those tribes had adopted Euro-
\end{footnotes}
the Mississippi. However, the Santee Sioux, Yankton Sioux, and the Coeur d'Alene adopted individual plot agriculture before allotment. Indian farming before allotment was growing quickly, albeit from a very small base on many reservations.65

Carlson argues that allotment itself increased leasing to non-Indians, decreased capital accumulation, and reduced the rate at which Indians learned to farm. Before allotment, individual Indians could not transfer land to non-Indians. Undercapitalization depressed returns, but Indians had no alternative to farming. After allotment, farming declined on many reservations, including the Santee, Sisseton, and Coeur d'Alene.66 By 1900, Sisseton-Wahpeton tribal members cultivated 52% less acreage than before allotment in 1887. From 4000 acres in 1900, cultivation shrunk further to 3100 acres in 1927.67 Irrigated farming by Indians was particularly unsuccessful, largely because irrigated farming was capital-intensive and Indians had limited access to capital.68 In 1937, 68% of irrigated land was leased to non-Indians.69

Allotment also disrupted Indian ranching, largely because allotments were much smaller than the size of an efficient ranch. In contrast to the expectations of many non-Indians about allotment, Indian fears were prescient: allotment ultimately permitted "white settlers . . . [to] monopolize the grazing."70 Stocking densities common near the Rosebud Reservation in the 1930s indicate that an allottee could run seven or eight cattle on a single 160-acre parcel, much too small a herd to compete with non-Indian ranchers. Even the poorest off-reservation ranches ran fifty or more cattle on at least 1000 acres.71 In addition, checkerboarding further discouraged productive use of the land since each family's parcels were not contiguous.72

When allotment came to a close, non-Indians leased a total of 13.9 million acres of Indian land.73 Almost all of the Pine Ridge reservation was leased to non-Indian ranchers in 1918.74 In 1935, non-Indi-
ans farmed over one million acres on Pine Ridge, while Indians cultivated only 12,109 acres. Although the disparity was not as great on the Rosebud reservations, non-Indians still farmed or ranched over four times as much land as tribal members. In the 1930s, a departmental report characterized Indians as a "race of petty landlords" depending on unearned, but limited, income. Over half of the Sisseton-Wahpeton lived entirely on lease income in 1900, and leasing was the single largest source of income on the Pine Ridge Reservation in 1921.

Eventually, the OIA did attempt to improve the returns on leasing. Before 1930, non-Indians could lease individual parcels of allotted land. Ranchers could opt to lease only those parcels with water, even though free-roaming cattle would certainly graze on adjacent parcels. Instead of leasing adjacent pastureland, the rancher would pay only a small trespass fee when his cattle were discovered. In the 1930s, the OIA shifted to unit leasing: trust land (whether tribal or allotted) was divided so that each unit had water, pasture, and shelter. Ranchers would bid for permits that specified the number of animals. The OIA hoped to reduce overgrazing while maximizing the return of all owners of a unit. In addition, Indian ranchers with small herds were given preference and paid less in grazing fees, although larger Indian ranchers faced competitive bidding.

While allotment failed to provide Indians with economic opportunity, one of its other goals was achieved. In 1887, Indians owned 138 million acres, but retained only fifty-two million acres by 1934 when further allotment came to an end. For example, only 12% of the 1887 area of the Lake Traverse (Sisseton-Wahpeton Sioux) Reservation remains in trust status today. Allotment began where the agricultural values were highest: in areas with more rain, proximity to non-Indian settlement, and more land appropriate for commercial farming. To accommodate non-Indian buyers of surplus land, the

75. Id. at 116.
77. HEIRSHIP, supra note 44, at 7.
78. BIELSKI, supra note 19, at 13.
79. Id. at 117–118; MEYER, supra note 50, at 196.
81. The Indian land base before allotment was roughly equal to the area of Oklahoma, Kansas, and Nebraska, while the land base in 1934 was roughly equal to Kansas. Since 1934, lands held in trust have increased by eight million acres. Mitchell, supra note 9, at 576.
82. HEIRSHIP, supra note 44, at 6.
83. In fact, these factors explain two-thirds of the variation in the timing of allotment. In addition, the rank order of allotment was significantly correlated with
best agricultural land and timber were not allotted to Indians. The Commissioner of Indian Affairs described the land set aside for the Sioux as "largely unfitted" for agriculture.

Allotment, leasing, and fee patenting were largely driven by non-Indian demand for land. Additional demand by non-Indians for allotted land led to Congressional action in 1902 to authorize heirs to sell land and then in 1906 to permit original allottees to sell—both sales subject to Secretarial approval. The leased acreage increased from eight to eighteen million between 1910 and 1918. At the peak of wartime demand for additional land, the OIA adopted a policy of removing restrictions on alienation, even in the face of Indian opposition. When agricultural prices collapsed in peacetime, the OIA abandoned "forced fee" patenting in 1921. Tribes with an ability to resist pressure for allotment have better maintained a tribal land base—which may provide greater income and security today.

The effects of allotment were not limited to the loss of a tribal land base. Productive use of allotment lands was seriously disrupted by Section 5 of the Dawes Act, which governed inheritance of allotted lands. The common law favors partition or sale when multiple parties inherit interests in the same parcel intestate. Neither was consistent with the goals of allotment, so heirs received undivided interests. By 1892, Indian agents noticed that the effects of descent governed by state law were undermining the ability of Indians to benefit from allotment. The agent at the Puyallup reservation (near Tacoma, Washington) reported that:

> upon the death of the original grantees the right to the land gets so divided and subdivided that no one has sufficient preponderance of property in the land to make it to his interest to improve it. After a few subsequent deaths of the heirs the title becomes so interminably mixed that it is next to impossible to clear it up. Not being alienable there can nothing be done.

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85. L. W. Colby, The Sioux Indian War of 1890–91, in Transactions and Reports of the Nebraska State Historical Society 174 (1892) (citing Letter from Commissioner of Indian Affairs, to Secretary of the Interior (Dec. 26, 1890)).


87. Heirship, supra note 34, at 4.

88. Barsh, supra note 26, at 810–12.

89. The Menominee of Wisconsin successfully resisted allotment and today the volume of sawtimber is greater than when the reservation was created, despite intensive management. Paula Rogers Huff & Marshall Pecore, Institute for Environmental Studies, Case Study: Menominee Tribal Enterprises (1995).


Testamentary disposition was first permitted in 1910, subject to approval by the Secretary of the Interior. Even today, wills disposing of trust property require Bureau of Indian Affairs ("BIA") approval. While some BIA offices approve wills posthumously, other offices invalidate wills lacking formal approval during life. The BIA also has latitude to disapprove wills, particularly those disinheriting a spouse or children.

As early as 1928, the federal government recognized the increasing problem of fractionation. Congress ended further allotment in 1934 with the Indian Reorganization Act, but did nothing to reverse (or prevent further) fractionation in lands already allotted. The OIA began exploring strategies to reverse fractionation as early as 1938. By the 1930s, the OIA estimated that the administrative cost of leasing was greater than the revenue generated.

The burden of fractionation is not merely administrative. Small parcel size (without the ability to combine parcels in a free market) distorted economic choices facing Indian ranchers. On the Santee Sioux reservation, wheat displaced cattle production even though "[t]he land was better suited to the range cattle industry, but allotment in severalty had so broken up the Indians' holdings that cattle could not be run over large expanses of territory." Intensive wheat cultivation led to crop failures and soil exhaustion. In 1935, 25,000 acres on the Lake Traverse Reservation lay unused because of transaction costs caused by fractionation.

In 1959, the GAO reported to Congress that fractionation increased the BIA cost of management by $1 million. In response, the House requested more information about fractionation and the Indian Heirship Land Survey was completed in 1961, finding that fractionation increased federal costs while decreasing heir income. Half of affected land was being used by non-Indians, while 3% was not used at
A majority of heirs did not live on the reservation, and only one-third lived on trust land. Only one-fifth of heirs farmed or ranched their own land. The average heir had between three and four interests, generating between $50 and $100 in annual income. By 1960, there were three million acres of allotted lands that had at least six owners per parcel. In roughly half of the allotted trust lands, ownership was split between at least two owners. In a study of twelve of the eighteen reservations affected by allotment, the GAO found that 20% of parcels had at least one owner with less than a 2% interest. Interests of 2% or less constitute two-thirds of the interests recorded and increased from 305,000 to 620,000 between 1984 and 1992.

Pine Ridge was allotted relatively late, yet the average parcel had thirteen owners by 1992. In 1987, the average parcel on the Lake Traverse Reservation was only forty acres, but had 196 owners. The average owner had undivided interests in fourteen different parcels. Parcel 1305 is rather famous with 439 owners sharing 40 acres by 1982. The largest owner receives $82.85 annually, and two-thirds receive less than $1 per year. Half of those receive less than five cents annually, while the smallest interest receives one cent every 177 years. If partitioned, the smallest heir would receive thirteen square inches. The BIA spends $17,560 annually administering this parcel alone.Reservation-wide, the BIA estimated that it spends $50 per heir to process a lease. In fact, the BIA spends 50% to 75% of its realty budget on administering allotted trust lands.

101. Today, 21% of trust land is unused. It is unclear, however, how much can be attributed to fractionation since there is no economic use for some land. CONTEXT, supra note 2, at 2-1.

102. Further complicating the picture, a majority of heirs had interests on more than one reservation.


106. Shoemaker, supra note 4, at 753.

107. The Lake Traverse Reservation was the first to be allotted. One-third of the reservation was allotted to individual Indians, while the remaining two-thirds were sold for $2.50 per acre to non-Indian settlers. See Heirship, supra note 44, at 5-6.


109. Since the BIA will not issue a check for less than $5, it will take 88,652 years before this heir will receive payment.


112. Joint Hearings, supra note 8; NCAI, supra note 11, at 1.
In 2002, the BIA managed fifty-six million acres of trust land. Ten million acres belonged to individual Indians and the BIA managed 100,000 leases. Leasing (and sales) of individual land generated $300 million. In 2002, nearly half of IIM accounts for income-generating allotted lands held less than $15 and 18,605 had a balance of less than $1. In addition, there were 62,000 accounts where the owner's whereabouts were unknown. Mismanagement by the BIA of IIM accounts is the subject of the long-running Cobell litigation. Management of allotted trust land remains a "bureaucratic nightmare without parallel."

III. CONGRESSIONAL LEGISLATION

Since 1983, Congress has sought to reduce fractionation by altering the laws governing inheritance of allotted land. The Supreme Court curtailed the first two attempts. As noted before, the number of undivided interests has expanded from roughly 300,000 to more than three million since 1983.

A. Indian Land Consolidation Act

In 1983, Congress passed the Indian Land Consolidation Act ("ILCA") to reduce the fractionation of allotted lands. The BIA had long argued for replacing state inheritance law with primogeniture, combined with some form of escheat. As originally enacted, Section 207 of the ILCA provided that undivided interests consisting of less than 2% of the total acreage and producing less than $100 in income in the preceding year would escheat to the tribe without compensation.

113. CONTEXT, supra note 2, at 2-1.
114. OFFICE OF HISTORICAL TRUST ACCOUNTING, DEPARTMENT OF THE INTERIOR, REPORT TO CONGRESS ON THE HISTORICAL ACCOUNTING OF INDIVIDUAL INDIAN MONEY ACCOUNTS 13 (2002). The Office of the Special Trustee estimates there were 68,000 unclaimed IIM accounts in 2004. NCAI, supra note 11, at 4.
115. HEIRSHIP, supra note 44, at 1.
116. Shoemaker, supra note 4, at 747.
117. In contrast, Norway attempted to reduce fractionation through a specialized court. Enclosure combined with subdivision created excessive fragmentation of agricultural and pastoral land. In 1821, Norway created a Land Consolidation Service as an ongoing process to adjust to changing land use. See Mitchell, supra note 9, at 563-64, 573-74.
118. HEIRSHIP, supra note 44, at 17-18.
119. "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descendent [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, § 207, 96 Stat 2515, 2519 (current version at 25 U.S.C. § 2206(a) (2006)).
In response to escheat under Section 207, members of the Oglala Sioux tribe sued, asserting a violation of the Fifth Amendment. Justice O'Connor wrote the majority opinion in *Hodel v. Irving*, which held that Section 207 was unconstitutional. The Court did not overturn *Jefferson v. Fink*, which recognizes that Congress has broad authority to regulate the devise and descent of Indian trust lands. Nor did it rely on the long series of cases recognizing that the government has ample latitude in regulated property, even when the owners are adversely affected. In addition, the Court conceded that "the whole benefit gained [from Section 207] is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." The overlap between tribal membership and ownership of escheatable interests was not perfect, but the Court recognized something akin to the "average reciprocity of advantage" developed in *Pennsylvania Coal Co. v. Mahon*. The Court still found Section 207 unconstitutional, however, on the grounds that abolishing devise and descent for affected Indians was an uncompensated taking.

Escheat upon death has been described as economically-attractive. While reducing fractionation should increase the economic returns from allotted land, probate is an inefficient mechanism. Increasing consolidation to the point of economic viability through probate would take decades. Additionally, each interest in probate must be calculated, verified, and recorded. If Congress has deter-

120. 247 U.S. 288 (1918).
121. The definition of property is circular because property is an interest that a court will recognize and protect. See Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 Iowa L. Rev. 595, 614 (2000). Since the definition of property is unmoored from logic, the Court has considerable latitude to pick and choose which interests it will protect and which it will not.
123. 260 U.S. 393, 415 (1922).
124. *Cf. Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.").
125. Guzman, *supra* note 121, at 640. Guzman argues that escheat provisions would create "economic harm" because owners might spend more than the value of the parcel to avoid escheat and maintain the parcel in family ownership. *Id.* at 654–55. If the value of the parcel is less than the transactional costs of conveyance, then recognizing and protecting the interest is in itself economically harmful. Interests worth less than the cost of conveyance should not be recognized as property interests.
126. Generally, undivided interests less than 10% or 20% have no market value. See Widdoss Report 2 (Letter from John Widdoss and Jerry Hulm, May 5, 2006). In contrast, Guzman asserts that the "transfer value ... tracked the economic value of the interest itself." Guzman, *supra* note 121, at 632. No citation or source is given so it is difficult to evaluate this surprising claim.
mined that interests smaller than 2% are too small to be worth protecting, immediate escheat would be many times more efficient.

B. Amendments to the ILCA

Before Irving was decided, Congress amended Section 207 in three important ways. First, the requirement that interests liable to escheat produce less than $100 in the previous year was changed to interests “incapable of earning $100 in any one of the five years [following the] decedent’s death.”127 Failing to earn $100 in any of the five years preceding the decedent’s death created a rebuttable presumption of future poverty.128 Second, interests that would otherwise escheat to the tribe could be devised to any other owner of the parcel.129 Last, tribes were permitted to adopt codes regulating the descent or devise of fractionated lands, subject to Secretarial approval.130

Members of the Sioux and Assiniboine Tribes of the Fort Peck Reservation sued over fractionated interests in the Fort Peck, Standing Rock, and Devils Lake Sioux reservations. Relying heavily on Irving, the Court found in Babbitt v. Youpee131 that the amendments to Section 207 did not cure its unconstitutionality. These decisions have been described as “inconsistent analysis,”132 “strain[ed],”133 “strange and [defiant],”134 and “particularly pernicious.”135 Note the absurdity in permitting the federal government to restrict alienation severely during life, but not after death. The irony is especially rich where the inter vivos restrictions have destroyed most of the value for many heirs and the escheat provision would create value (perhaps even for heirs with interests in several parcels).

128. Even a rebuttable presumption may not adequately protect owners of parcels with intermittent income potential. While ranching, agriculture and some mining produce annual lease income, forestry does not. See Guzman, supra note 121, at 633–34 n.151. Perhaps the appraised value would be a better measure than income.
130. 25 U.S.C. § 2206(c).
In 2000, Congress amended the ILCA again.\textsuperscript{136} Again, tribes were authorized to adopt probate codes governing the descent and devise of trust and allotted lands, subject to Secretarial approval.\textsuperscript{137} Where tribes had not done so, descent and distribution were governed by uniform federal rules. (In contrast, the Dawes Act applied the inheritance law of the state or territory in which the reservation was located.) To preserve the trust status of allotted lands, non-Indian heirs may only receive a life interest. The remainder interest descends to first- and second-degree Indian heirs. If no Indian heirs exist, another owner of an undivided interest may purchase the remainder. If no offer is forthcoming, the remainder interests pass to the tribe.

In addition, the law creates a presumption that interests devised to more than one person are joint tenancies with a right of survivorship. Absent a will,\textsuperscript{138} interests of less than 5\% descend with a right of survivorship, leaving the entire interest to one person. Interests greater than 5\%, however, descend as tenancies in common. Although the stated policy of the Act is to reduce fractionation,\textsuperscript{139} this provision will encourage fractionation until every interest is less than 5\%. This provision does nothing to reduce fractionation, except by happenstance. In addition, conveyance of fractionated interests is liberalized by this amendment, but the procedure is still burdensome.\textsuperscript{140}

C. Federal Purchase of Fractionated Interests

In 1994 as part of a revision of ILCA, the BIA proposed buying heavily fractionated interests and transferring the interests to the relevant tribe. However, the federal government would retain the lease income until the purchase price was paid.\textsuperscript{141} The main beneficiary of this proposal is the BIA since it saves significant amounts of money currently spent on recordkeeping. Yet, the BIA would divert income until the purchase price is paid, essentially double-dipping. The federal government should not insist on double compensation for ameliorating a problem of its own creation. Yet, this proposal was incorporated in the 2000 amendments of the ILCA.\textsuperscript{142} A three-year pilot program was established with three tribes in Wisconsin and


\textsuperscript{137} Id. at § 103(3) (codified as amended at 25 U.S.C. § 2205 (2006)).

\textsuperscript{138} The majority of Indians die intestate, although those with greater assets are more likely to prepare a will. CONTEXT, supra note 2, at 2-10.

\textsuperscript{139} Indian Land Consolidation Act Amendments of 2000 § 102 (codified as amended at 25 U.S.C. § 2201, Historical and Statutory Notes, Declaration of Policy (2006)).

\textsuperscript{140} Shoemaker, supra note 4, at 770-71.

\textsuperscript{141} Hakansson, supra note 84, at 254-55.

36,000 interests were acquired.\textsuperscript{143} The BIA estimates that this pilot program will eventually save the federal government $2.5 million in administration.\textsuperscript{144} The program was expanded and had spent $97 million on land consolidation before 2006. Interests in 243,000 parcels were acquired, preventing the creation of roughly 600,000 new interests. Unfortunately, the number of interests is increasing so rapidly that it would cost $135 million each year just to maintain the current level of fractionation. With funding from Congress, there is the potential to expand this program. Seventy percent of heirs contacted by the test program volunteered to sell their interests, indicating that fractionation could be significantly reduced through voluntary purchase.\textsuperscript{145}

Since the 1930s, the BIA has spent more money administering allotted lands than those lands have generated in income.\textsuperscript{146} No private party would continue to use a resource where the costs were greater than the benefit received. Federal resources are limited and allotment administration makes America poorer; those resources could have been used to build roads, clinics, etc. (Alternately, the federal government could reduce taxes.) As detrimental as most BIA mismanagement is, the effects are mostly distributional: losses to Indians are gains to non-Indians. Stealing from Indians is wrong, but the wrong is more egregious when the theft does not benefit anyone. Rather than continue to waste limited federal resources, the BIA should purchase all interests worth less than the cost of administration.\textsuperscript{147}

For example, “famous” Parcel 1305 is appraised at $8000,\textsuperscript{148} which is only slightly more than half the annual cost of administering the parcel. Clearly, the BIA should purchase Parcel 1305 from the 439 heirs. The BIA could even pay twice the appraised value of Parcel 1305 and still break even within the first year.\textsuperscript{149} Since one of the goals of reversing fractionation is the expansion of the tribal land base, the BIA should donate the parcel to the Sisseton-Wahpeton tribe. Even though the BIA donates the parcel to the tribe, the BIA (and hence the taxpayer) still comes out ahead in the first year.

\textsuperscript{143} Shoemaker, supra note 4, at 769.
\textsuperscript{144} Indian Land Plan Could Save Millions, OK. DAILY, Nov. 5, 1999, at 4.
\textsuperscript{145} NCAI, supra note 11, at 3.
\textsuperscript{146} Fractionated Estate, supra note 15, at 11.
\textsuperscript{147} OIA staff in South Dakota proposed this in 1941. See Clow, supra note 71, at 149-50.
\textsuperscript{148} Heirship, supra note 44, at 10. The appraised value is close to the estimated value using the annual income of $1080 and the 1982 OMB discounting rate. The present value of an asset producing a perpetual income stream is $\text{PV} = \frac{C}{i}$. See Office of Mgmt. & Budget, Executive Office of the President, OMB Circular No. 1-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs app. C (1992) (Table of Past Years Discount Rates).
\textsuperscript{149} Using the same methodology as note 150, the net present value to the BIA of saving $17,560 in annual administrative costs is at least $135,000.
Unfortunately, Congress has not authorized the BIA to acquire heavily fractionated parcels more generally, even where acquisition would be cost-effective in the short-term (even within the year in the case of parcels like Parcel 1305). Unilateral action by the executive branch has been viewed with suspicion, but Congress and the courts should not attempt to prevent the BIA from purchasing parcels where purchase improves the returns for Indian heirs and saves the taxpayer money.

The pilot program suggests that a majority of owners will voluntarily sell their land to the BIA. However unpopular, forced purchase is justified where the costs of administration are greater than the revenue generated. Critics will argue that forced purchase of interests amounts to a second appropriation, stealing Indian land all over again. While emotionally resonant, the argument is largely specious. BIA management combined with the trivial value of many interests has already severed whatever connections heirs might have to a tangible piece of land.\textsuperscript{150} Shoemaker asserts that Indians have already suffered a “constructive dispossession” since the “factual reality” of allotment is such that Indians retain “few, if any, of the beneficial aspects of property.”\textsuperscript{151}

Of course, there are many parcels where the administrative costs are less than lease income. The problem of fractionation will not be solved merely by eliminating the most heavily fractionated parcels.

D. American Indian Probate Reform Act

In 2004, the American Indian Probate Reform Act (“AIPRA”) changed some of the rules governing intestate succession, but maintained the distinctions between Indian\textsuperscript{152} and non-Indian heirs and interests smaller and larger than 5%. Testamentary disposition is limited to lineal descendents, other co-owners of the same parcel, the tribe, or any other Indian. Alternately, the testator may devise to ineligible heirs a life interest or convert the interest to fee.\textsuperscript{153}

Without a valid will, trust property descends to lineal descendents and then to parents or siblings. Recipients must be Indians, lineal descendents within two generations of an Indian, or co-owners of the same parcel. If there are no eligible heirs, and no other co-owners buys the interest, the interest escheats to the tribe.\textsuperscript{154} Surviving spouses only inherit in the absence of other heirs, otherwise receiving

\textsuperscript{150} Shoemaker, \textit{supra} note 4, at 751. \textit{Cf.} Guzman, \textit{supra} note 123, at 633 (comparing land to a Van Gogh painting), 635 (“spiritual connection to the land”).

\textsuperscript{151} Shoemaker, \textit{supra} note 4, at 730 & n.5.

\textsuperscript{152} Note the definition of “Indian” is broadened. \textit{See} 25 U.S.C. § 479 (2006).


\textsuperscript{154} Note that AIPRA studiously avoided using this term. \textit{See} 25 U.S.C. § 2206(a)(2)(B)(v) (2006). Guzman asserts that it is consistent with \textit{Irving} and
one-third of any money in an IIM account and a life estate in the trust property.\textsuperscript{155} In contrast to the amendments enacted in 2000, small fractional interests do not descend to all the heirs as tenants in common, but instead to a single (oldest) heir.\textsuperscript{156}

Although the goal is to facilitate estate planning by owners of fractionated interests, even the BIA acknowledges that these probate rules are "complex."\textsuperscript{157} The BIA encourages Indians to write wills,\textsuperscript{158} yet it no longer provides assistance in drafting and storing wills.\textsuperscript{159} The BIA retains the power to disapprove wills for defects in formality or even the content of a will. Although AIPRA continues to authorize tribes to establish probate codes, only two tribes have done so and received Secretarial approval.\textsuperscript{160}

Perhaps it is too soon to judge AIPRA; but because the changes to inheritance laws are hardly radical it appears that fractionation will decline only slowly. No "changes in the laws of inheritance, no matter how far-reaching, would consolidate the number of interests in any reasonable period of time."\textsuperscript{161} The problems of fractionation have increased since 1887, but proposals to eliminate the problem should aim to do so in less than 122 years. Since AIPRA does nothing to consolidate interests larger than 5%, fractionation will not disappear even by 2131. If "[s]omeone once said that for every person attacking the roots of evil there will be at least a hundred who are only attacking its leaves,"\textsuperscript{162} then perhaps AIPRA is merely topiary.

IV. PROPOSALS FROM THE LITERATURE ON FRACTIONATION

The literature on fractionation includes several good proposals to limit or reverse fractionation, but these proposals share a certain modesty. Modesty should not be taken as a virtue in this context since the degree of fractionation has increased sharply in recent years. Since 1984, three million undivided interests have been created, a ten-fold

\textsuperscript{155} Youpee to make the tribe the sole heir, so long as testamentary freedom is maintained. \textit{See} Guzman, \textit{supra} note 121, at 622.

\textsuperscript{156} Primogeniture as an inheritance rule for Indian property is not entirely novel. \textit{See} Jones v. Meehan, 175 U.S. 1 (1899).

\textsuperscript{157} \textit{BUREAU OF INDIAN AFFAIRS & OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS, UNDERSTANDING THE AMERICAN INDIAN PROBATE REFORM ACT OF 2004}.

\textsuperscript{158} \textit{Id}.


\textsuperscript{160} The Lummi Nation (of Washington) and the Oglala Sioux.

\textsuperscript{161} Mitchell, \textit{supra} note 9, at 566.

increase from the total number of interests that existed in 1984.\textsuperscript{163}

Taking the various proposals together, it is possible to achieve real progress. The proposals fall into three categories: changing default rules, reducing the cost of land acquisition, and encouraging private consolidation.

Several commentators have suggested changing the default rules to discourage fractionation. Although Mitchell does argue that default rules like intestacy should be reformed, his main argument is that the default rules governing co-ownership should be written to model those governing a limited liability corporation. Mitchell’s core interest is the loss of black-owned farmland, where the problem of fractionation is less acute. Where the number of owners is smaller and the prospects for cooperative use better, Mitchell’s proposal is more appropriate.\textsuperscript{164} Shoemaker proposes eliminating intestacy as a default and replacing it with a “more flexible, case-by-case . . . equitable distribution.”\textsuperscript{165} Among a variety of proposed guidelines for these ad-hoc distributions, Shoemaker encourages distributing interests in their entirety. Since most Indians with at least one undivided interest have interests in several different parcels, it may be possible to freeze fractionation without depriving any heir of a more-or-less even share of the estate.

Like Mitchell and Leeds, Shoemaker proposes favoring local heirs. If the shares in consideration are large enough to permit some possible use, there is some justification for favoring on-reservation heirs over more (geographically) distant heirs. If the interests are too small to permit use, then the rationale for favorism is much weaker.\textsuperscript{166} Unfortunately, Shoemaker concedes a central role for the BIA with tribes restricted to recommending a particular distribution.\textsuperscript{167} The BIA has shown itself unable to protect Indian interests. As much as the BIA may assert that it would like to reduce or eliminate fractionation, the administrative nightmare is a gravy train for the BIA. Without fractionation, the workload of the BIA would shrink significantly, meaning decreased funding and almost certain job losses.

Leeds argues that tribes should acquire future interests.\textsuperscript{168} Alternatively, she proposes that tribes acquire a joint tenancy with a right of

\textsuperscript{163} Shoemaker, supra note 4, at 747.

\textsuperscript{164} See Mitchell, supra note 9, at 567–72.

\textsuperscript{165} Shoemaker, supra note 4, at 782–83.

\textsuperscript{166} See Mitchell, supra note 9, at 565.

\textsuperscript{167} Shoemaker, supra note 4, at 786.

\textsuperscript{168} In her own words, her proposal “borders on predatory lending” since she proposes that tribes acquire these interests in exchange for small payments to settle consumer debt. Stacy L. Leeds, Borrowing from Blackacre: Expand Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies, 80 N.D. L. Rev. 827, 838–42 (2004).
Both alternatives reduce the cost of land consolidation, but many tribes do not have the resources to acquire even future or joint interests.

An alternative to increased tribal control over fractionated lands would be improved control by individual Indians. For some Indians, economic returns are limited by the low value of the land interest owned. Many other Indians, however, see depressed returns because the interests are dispersed, even though the total value of those interests may be significant. Even without increasing the ownership concentration by value, ownership could be concentrated within individual parcels. The federal regulations permit owners of a fractional interest to acquire interests from other owners of the same parcel. Since fractionation persists, private action under current law is clearly insufficient.

Tribes could establish exchanges where members with interests in fractionated land could trade interests. Consolidating ownership in a parcel would allow owners either to use the lands themselves or to bargain more effectively with renters. The OIA attempted to organize exchanges on different reservations, but results were limited. In addition, the Pine Ridge Reservation has organized an exchange to allow allottees to consolidate their landholdings by trading with the Tribe or other allottees. Exchanging interests requires nine bureaucratic steps, involving both the Tribe and BIA. The majority of trading is not between individuals, but instead between individuals and the Tribe.

In addition, facilitating partition has been proposed. Partition may do little to facilitate farming or ranching, but it would allow homeowners to secure marketable title to their homes. Partition and liberalized exchange would ameliorate the problems associated with fractionation. The Rosebud tribal president has estimated that partition and exchange could add $50 million to the tribal economy.

169. Where the land is owned in fee, Leeds proposes that the tribe apply for trust status once the joint tenancy is created. She argues that the tribe could reduce costs by marketing immunity from state taxation as a benefit of a joint tenancy. Id. at 842–44. One can imagine that local resistance might cause the Secretary of the Interior to withhold trust status.


171. Clow, supra note 71, at 145.

172. Hakansson, supra note 84, at 251.

Shoemaker proposes federal decontrol of conveyances between tribal members.\textsuperscript{174} Originally, restraints on alienation were justified by the incompetence of individual Indians to manage their own affairs in the twenty-five years after allotment.\textsuperscript{175} Today, continued restraints on alienation may be appropriate because sale to non-Indians generally reduces tribal sovereignty, which conflicts with current federal policy.\textsuperscript{176} Federal decontrol will likely worsen inequality in Indian country, a region already plagued with poverty. In addition, there is some reason for concern since market abuses are likely in a new regulatory environment where valuation is uncertain at best. Shoemaker’s proposal has gained no political traction and it is doubtful there is much political appetite for federal decontrol.\textsuperscript{177}

Land exchanges and federal decontrol are not the only means to increase individual control and use of fractionated lands. The 1984 Presidential Commission proposed pooling of interests by individuals to facilitate cooperative farming or ranching.\textsuperscript{178} Under current law, there is nothing to prevent cooperative farming or ranching on allotted lands. The absence of cooperatives strongly suggests that individual action cannot overcome fractionation.

V. TRIBAL LAND CORPORATIONS

This Article proposes incorporation as a mechanism for increasing tribal control over allotted land without the expense of purchasing the underlying land. After a description of the proposal, this Article examines a similar corporation created on the Rosebud Reservation.

Since Federal action to limit or reduce fractionation is severely limited by \textit{Irving} and \textit{Youpee}, there is impetus for a tribal solution.\textsuperscript{179} Under Section 207, tribes may adopt codes regulating the disposition of fractionated interests, but the process of consolidation is likely to be slow. Since federal law imposes onerous consensus requirements,\textsuperscript{180}

\begin{itemize}
\item\textsuperscript{174} Shoemaker, \textit{supra} note 4, at 781–82. Hakansson reports that a “less burdensome process regarding consolidation” was proposed to him at Pine Ridge, but it appears the suggestion was not as radical as Shoemaker’s. \textit{See} Hakansson, \textit{supra} note 84, at 260.
\item\textsuperscript{175} Compare this rationale for the trust status of land with the rationale for the federal government’s trust relationship with Indian tribes, which springs from the political dependency doctrine first advanced in \textit{Johnson v. M’Intosh}, 21 U.S. (8 Wheat.) 543 (1823).
\item\textsuperscript{176} \textit{See} \textit{Montana v. United States}, 450 U.S. 544 (1981).
\item\textsuperscript{177} The NCAI did not include federal decontrol on its list of proposals to reduce fractionation. \textit{See} NCAI, \textit{supra} note 11.
\item\textsuperscript{178} \textit{Presidential Comm’n}, \textit{supra} note 3, at 51.
\item\textsuperscript{180} \textit{See} 25 U.S.C. § 2218 (2006) (90% if five or fewer owners, 80% if five to ten owners, 60% if ten to twenty owners, and majority of interests if twenty or more owners). Prior to 2005, unanimous consent was required when there were five or
effective control by Indian owners remains a distant prospect even with significant consolidation. More than a century of increasing fractionation is not likely to be reversed soon enough to satisfy the demands for increased income and opportunity in the near-term.

A. Incorporation

One possible mechanism for reversing fractionation while preserving the underlying economic interests is for tribes to create a tribal land corporation ("TLC").\(^{181}\) The Indian Reorganization Act\(^ {182}\) authorizes tribes to incorporate. TLCs would acquire fractionated interests in exchange for shares in the corporation.\(^ {183}\) Because the value of each parcel is different, shares should not represent a given area, but instead a specific value. Once the TLC controls all the fractionated interests in a given parcel, it could then make leasing and use decisions. The prospect of increased returns and tribal control should encourage many, if not most, owners to tender their interests in allotted land, although hold-outs are likely. In addition to the expense involved, purchasing hold-out interests will only encourage more owners to hold-out since many owners may prefer cash now to dividends later.

Using the power of eminent domain may be more appropriate. Tribal funds are limited and would quickly be depleted by acquiring fractionated interests. Instead, this Article proposes paying compensation in-kind rather than in money. Owners whose interests are condemned would receive interests in other parcels of equivalent value. Using eminent domain, the TLC would take more land than it intended to control. Interest owners who wanted to participate in the TLC would receive shares while those that did not would receive interests in parcels outside the TLC zone. The goal would be to segregate non-cooperative owners into parcels with no TLC ownership. While the administrative costs are non-trivial, tribal or TLC funds are not depleted through direct outlays. Eminent domain as a mechanism to segregate owners who do not want to participate in the TLC would increase the number of parcels for which the TLC could make leasing and use decisions.

There is an additional benefit to the TLC model. Except where parcels contain valuable mineral resources, the size of individual parcels is much smaller than the size of viable economic units. The value

\(^{181}\) Incorporation is not a new proposal. The Commissioner of Indian Affairs Charles Rhoad proposed this as early as 1929. See \textit{72 CONG. REC.} 1052 (1929).


\(^{183}\) \textit{See Ethel J. Williams, Too Little Land, Too Many Heirs—The Indian Heirship Land Problem}, 46 \textit{WASH. L. REV.} 709, 730 (1971).
of individual parcels depends on the ability to use nearby parcels. For example, because water is distributed very unevenly on the high plains, many parcels are useless as rangeland if access to a parcel with water is prevented. Even where resources are distributed evenly, the value of parcels would increase when many parcels are aggregated since larger tracts are generally more valuable. The ability to segregate non-participants in parcels outside the economic unit is important both to increase the value of TLC land and reduce conflict with non-participants. In fact, non-participants may prefer transfer to a peripheral parcel over the possibility of social pressure to cooperate with TLC plans.

Tribal land corporations should be independent of the tribal council. Political interference has been cited as a source of poor performance. There is no reason, however, for the TLC to take a narrow view of its fiduciary duty to its shareholders. Depressed returns to landowners are not the only economic problem in Indian country, nor is it likely to be the only concern of TLC shareholders. TLC shareholders are also workers, ranchers, farmers, and tribal members. The TLC may legitimately consider the interests of other stakeholders, including the unemployed and environmental interests. In fact, better stewardship of natural resources is likely to be a key contribution by TLC to long-term Indian prosperity. Additionally, a TLC that considers the interests of all stakeholders will have more legitimacy when it uses eminent domain to expand.

B. Two Caveats

Although the Indian Reorganization Act authorizes tribes to incorporate, only one tribe has created a tribal land corporation along the lines discussed above. Before discussing that experiment, there are two arguments about tribal enterprise to be addressed. Both arguments occur frequently but are rarely examined carefully.

Much has been made of the divisions within Indian country. Some have argued that internal divisions make tribal solutions to fractionation difficult or unworkable. The divisions between Red Cloud and Crazyhorse, 'hand around the fort' and 'hostiles,' 'old dealers' and 'New Dealers,' American Indian Movement and the Guardians of the Oglala Nation are real, of course. Yet, there is a real danger of overemphasizing these differences. Indians have a long history as the


185. Hakansson, supra note 84, at 253; Biolisi, supra note 19, at 151–78.
‘Other,’ and have long been romanticized by non-Indians. When discussing the ‘Other,’ there is a real danger of fetishizing or exoticizing the ordinary since the act of perceiving the ‘Other’ frames how they are perceived. All human groups, from the halls of the United Nations to the playground, have disputes, divisions, and differences. The claim that Indian tribes cannot work through their differences while not extending the same argument to Republicans and Democrats (or the tall and the short) is highly suspect.

While arguments about division and corruption are generally used to undermine the case for increased tribal control, there is a second common argument that overstates the case. Proponents of tribal control point to the collective or cooperative property and economic arrangements that predate allotment. Ironically, proponents make the same factual error that supporters of allotment made: simplifying the wide variety of economic arrangements that existed in the territory of the United States into a single model of Indian cooperation. Since

186. Part of romanticizing Indians is in perceiving them as a blank canvas on which to project European notions and desires. When the Enlightenment needed a metaphor for life without rigid social and political control, Europeans identified Indians as the ‘noble savage.’ When concerns about the cost of industrialization developed in the 19th century, Indians were reframed as a ‘dying race.’ Contemporary concerns about environmental degradation produce today’s image of an environmentally-sensitive Indian who is good steward of the land, living in harmony with nature. These are only a few of the images, but the point is not to delineate these notions, but to recognize how they might frame our understanding of Indians.

187. See Eileen Stillwagon, Racial Metaphors: Interpreting Sex and AIDS in Africa, 34 DEVELOPMENT AND CHANGE 809 (2003). The tendency to fetishize the native is pervasive, even among very sympathetic observers. For example, resistance to using the plow instead of the hoe by the Santee Sioux is described as an “actual religious objection, based on the notion that plowing would injure their fields.” MEYER, supra note 50, at 63. Note how legitimate concerns about erosion in an area with limited soil fertility is exoticized by describing the belief as religious, even though non-Indians often express stewardship in religious language. Meyer also describes how Indian agents found “sinister” and tribal overtones in the customs like the sewing bee, even though the practice was common among non-Indians also. Id. at 193.


189. Breezy generalizations are common in the literature. “All Indians, whether hunter or planter, considered the concept of individual land ownership a religious sacrilege. The [E]arth belonged to the Great One.” Vaznelis, supra note 93, at 287. Unfortunately, the condescension of the assertion is not atypical, only its recent publication. In contrast, Carlson reports land sales by the Yuman and orchard sales by the Hopis before allotment. Leonard A. Carlson, Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act, in PROPERTY RIGHTS AND INDIAN ECONOMIES 67, 70–71 (Terry L. Anderson ed., 1991). In addition, private ownership (which could be inherited, rented, and sold) was recognized by California Indians over food-producing trees and by Indians in the Pacific Northwest over fishing grounds. Id. at 72–73; Miller, supra note 184, at
traditional property regimes have been so disrupted, it is unclear if those regimes have any relevance to the modern problem of fractionation.\textsuperscript{190} In addition, economic and property relations were flexible (as those relations are and were in European societies), so the form of economic organization pre-contact may not be relevant.\textsuperscript{191} For most tribes, the information on property regimes and economic organization is very limited. The metaphor of communism has been used, but its application to pre-industrial production is limited. It is difficult now to establish whether economic cooperation (e.g. hunting or fishing in groups) was tribally-organized or the result of individual initiative.\textsuperscript{192} There is almost no evidence of common field farming (e.g. plantation farming), which generally depends on centralized control.\textsuperscript{193} In contrast, there is much stronger evidence of post-production sharing.\textsuperscript{194} (Note that the welfare state does not require state enterprises.) Given the disruption of traditional tribal life, the absence or presence of pre-contact ‘tribal enterprises’ is hardly dispositive of whether tribal enterprises make sense today.\textsuperscript{195}

Rather than starting from the assumption of Indian difference, a more fruitful inquiry would consider the concentration of economic

\begin{itemize}
  \item [190] To cite one example among many, the allotting agent refused to recognize prior individual claims on timber on the Yankton reservation. Before allotment, the Yankton recognized private property in woodlands where an individual had expended some effort. The Yankton had asked the allotting agent to include privately-owned timber in allotments, but the agent did not include timber in any of the allotments. Only when the agent had declared the timber a common resource without protection was the timber cut and sold. \textit{Carlson, supra} note 34, at 88. Note that Indians had no rights in timber (for sale) since theirs was a mere right of occupancy. United States v. Cook, 86 U.S. 591, 592 (1873).
  \item [191] When the fur trade increased the value of trapping grounds, Indians in Labrador developed private property regimes. \textit{Miller, supra} note 184, at 771.
  \item [192] Guzman, \textit{supra} note 121, at 650, asserts, “Common toil was efficient and produced common gain.” But, without specification or evidence, the claim is hard to evaluate. In contrast, Anderson provides several examples of individual production. \textit{See Conservation, supra} note 35. “Most evidence is consistent with the view that Indian farming was carried out on individual plots . . . .” \textit{Carlson, supra} note 34, at 86. In contrast, \textit{Miller, supra} note 184, at 774, argues that even communal activities were organized for individual benefit since the spoils were divided based on individual effort or success.
  \item [193] \textit{Carlson, supra} note 34, at 85. In fact, the OIA encountered significant resistance on the Blackfeet Reservation when it tried to create a tribal herd. Opposition was strongest from fullblood tribal members, “who had always considered livestock in terms of individual possessions.” \textit{John C. Ewers, The Blackfeet: Raiders on the Northwestern Plains} 318 (1988).
  \item [194] Sharing is common worldwide and reflects informal insurance against deprivation. \textit{Carlson, supra} note 34, at 106. Harvest sharing is described as a tax to support public needs. \textit{Miller, supra} note 184, at 783.

\item [195] Note that no one has suggested that non-Indians return to traditional economic forms (e.g. European feudalism) as a way to deal with current economic problems.
\end{itemize}
and political power in the tribal council and generally pliant juri-
dcians. Note that both these structures are non-Indian impositions,
rather than indigenous governance structures. While there are legiti-
mate fears about "capture and corruption," those fears are also jus-
tified off the reservation.197

C. The Rosebud Tribal Land Enterprise

Home of the Sicangu Oyate (one of the Lakota Sioux), the Rosebud
Reservation is located in south central South Dakota. Rosebud was
created in 1889 from the remnants of the Great Sioux Reservation es-
established by the Fort Laramie Treaty of 1868.198 The original reser-
vation was more than 3.2 million acres in five counties,199 of which
only one-third remained in Indian hands by 1934.200 Today, the reser-
vation has roughly 900,000 acres of trust land. There are 25,000
tribal members, of which 21,000 live on the reservations.201 The res-
ervation was allotted: each head of household was eligible to receive
320 acres, each unmarried Indian over eighteen years old was eligible
for 160 acres, and each Indian under eighteen was eligible for eighty
acres.202 The OIA allotted the majority of tribal members land in the
western part of the reservation, where rainfall averaged sixteen in-
ches per year, too dry for anything but grazing.203 Todd County was
entirely allotted, while neighboring Mellette and Tripp counties were
88% and 72% allotted, respectively. In contrast, the overwhelming ma-
jority of land in Gregory (9% allotted) and Lyman (4% allotted) coun-
ties was sold as surplus.204 In those easternmost counties (Gregory

196. Shoemaker, supra note 4, at 750.
198. Had the Great Sioux Reservation been divided equally, each of the 25,000 Sioux
would have received 880 acres. Even after the reservation was reduced in 1889,
each tribal member would have received 500 acres, which is close to the size of a
199. Eicher, supra note 61, at 11.
201. Hearing on Indian Trust Reform, supra note 173, at 99 (statement of Hon.
Charles C. Colombe, President, Rosebud Sioux Tribe of South Dakota).
203. Id. at 12–14.
204. Id. at 88. The tribe had negotiated over $1 million in compensation for ceding
unallotted land, but Congress opted to sell the land on the tribe's behalf instead.
HENRIKSSON, supra note 15, at 184. Before 1904, the Federal government had
acquired surplus land directly. The opening of the Rosebud reservation set a pre-
cedent for sales to settlers on behalf of Indians. In testimony before the House
committee, Commissioner Jones argued that Lone Wolf v. Hitchcock, 187 U.S. 553
(1903), authorized Congress to act as if it were the "guardian or ward of a child 8
or 10 years of age" and ignore provisions in the 1868 and 1889 treaties requiring
and Lyman), rainfall averages eighteen to twenty inches per year and agriculture is possible, in addition to grazing.\textsuperscript{205} The tribal land base suffers from checkerboarding and roughly one-third of allotments were excessively fractionated by 1960.\textsuperscript{206} The heirship status of allotments is a "tremendous problem," causing some land to be "practically worthless."\textsuperscript{207}

Commissioner Collier intended Rosebud to be a test case for the Indian New Deal. The Rosebud Sioux accepted the IRA in 1934, approved its IRA constitution in 1935 and received a corporate charter in 1937.\textsuperscript{208} The Tribal Land Enterprise (TLE) was created in 1943, at which time 60% of the allotted lands were already fractionated to some degree.\textsuperscript{209}

The TLE had two goals: reducing fractionation and helping Indians acquire economically-sized units of land.\textsuperscript{210} Interests tendered to the TLE would be conveyed to the tribe, but managed by the TLE.\textsuperscript{211} The TLE was largely the product of Superintendent Whitlock, who struggled against resistance from both the Sicangu Lakota and Washington. Whitlock experienced resistance from BIA officials at the Glacier Park conference where he first presented the idea to his superiors, and that resistance continued until January 1943.\textsuperscript{212} In addition, a significant portion of the tribe opposed the TLE, either because of dissatisfaction with tribal leadership or fear of losing the little land they still owned.\textsuperscript{213}

In keeping with the inalienability of trust land, Whitlock believed that TLE shares should be not transferrable. Tribal leaders wanted three-quarters consent. \textit{Prucha, supra} note 27, at 867-68. The reservation was diminished by those land cessations. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1997) (diminishing the reservations from five counties to one, Todd). The tribe and its members retain land in the four counties no longer part of the reservation. \textit{Indian Land Consolidation Act Amendments; and to Permit the Leasing of Oil and Gas Rights on Navajo Allotted Lands: Hearing on S. 1586, S. 1315, and H.R. 3181 Before the S. Comm. On Indian Affairs, 106th Cong. 162 (1999) [hereinafter Hearing on I.L.C.A. Amendments]} (written testimony of Ben Black Bear, Executive Director, Tribal Land Enterprise, Rosebud Sioux Tribe of South Dakota).

\textsuperscript{205} Eicher, \textit{supra} note 61, at 14.
\textsuperscript{206} Id. at 11-12.
\textsuperscript{207} Id. at 19 (quoting Superintendent Holmes of the Rosebud Sioux Reservation).
\textsuperscript{208} Clow, \textit{supra} note 71, at 147. Although increasing tribal autonomy was a goal of the IRA, the OIA maintained a paternalistic role. As late as 1952, the Rosebud superintendent believed the tribe was incompetent to manage its own affairs because of a lack of competent leaders (motivated instead by personal gain) and excessive factionalism. Eicher, \textit{supra} note 61, at 21.
\textsuperscript{209} Biolsi, \textit{supra} note 19, at 117.
\textsuperscript{210} Clow, \textit{supra} note 71, at 151.
\textsuperscript{211} Id. at 152.
\textsuperscript{212} Id. at 148-51.
\textsuperscript{213} Id. at 154.
transferrable shares (which give shareholders an asset in addition to TLE dividends) and eventually prevailed.\textsuperscript{214} To reduce further fractionation, the TLE required that shareholders devise their section to a single heir. Where none had been identified, the heirs as a group would decide. In addition, the shares themselves could be devised.\textsuperscript{215} As a condition of Secretarial approval, shareholders were given voting rights to ensure that their interests would be protected. Tribal members would receive Class A shares with voting rights in exchange for land, while non-members would receive non-voting Class B shares. Both classes of shares entitled the holder to receive dividends.\textsuperscript{216} Tribal members could sell their shares to non-members, but non-members could not exercise their share's voting rights.\textsuperscript{217} In addition, shares would pay dividends; any profits beyond that would be used to acquire more fractionated land.\textsuperscript{218}

In addition, the value of shares was fixed, based on the appraised value of local land. The face value of each share was $1, so shareholders would receive one share for each dollar of appraised value. Tendering an undivided interest worth $10 would entitle the shareholder to ten shares.\textsuperscript{219} Share values based on appraised land values was a key defect in the TLE. Shares in most corporations have two benefits: dividends and appreciation of the shares. Shares in the TLE, however, could not appreciate in value as the value of the TLE assets increased. Share undervaluation was greater because the appraised value was too low. The first shares were issued based on land prices in the 1943 Bureau of Agricultural Economics Real Estate Market index for South Dakota. Land values in 1943 were still depressed (reflecting low beef prices during the Great Depression), but would appreciate by 140\% by 1952. Rising land values combined with fixed share values meant that shareholders received shares worth less than the value of the land.\textsuperscript{220} In 1953, the value of each share was revised upward from $1 to $2.43 and then again in 1959 to $2.98.\textsuperscript{221} Today, the value of shares is determined annually.\textsuperscript{222}

\textsuperscript{214} Id. at 148.
\textsuperscript{215} Fractionated Estate, supra note 15, at 21–22.
\textsuperscript{216} Clow, supra note 71, at 153.
\textsuperscript{217} Fractionated Estate, supra note 15, at 21.
\textsuperscript{218} Hearing on Indian Trust Reform, supra note 173 (statement of Hon. Charles C. Colombe, President, Rosebud Sioux Tribe of South Dakota). The TLE's goal was to pay a 4\% dividend. Clow, supra note 71, at 155.
\textsuperscript{219} Clow, supra note 71, at 153.
\textsuperscript{220} Id. at 153, 154, 157–58. Grazing leases could be had for three or four cents an acre in 1943. Cash & Hoover, supra note 200, at 114–15.
\textsuperscript{221} Eicher, supra note 61, at 94.
\textsuperscript{222} Hearing on I.L.C.A. Amendments, supra note 204, at 160–67 (written testimony of Ben Black Bear, Executive Director, Tribal Land Enterprise, Rosebud Sioux Tribe of South Dakota). In contrast, Tribal President and TLE Board Member Colombe testified that the TLE has "systematically failed to perform the annual
In addition to allotted trust lands, the Department of the Interior assigned 28,000 acres of "submarginal lands" to the TLE for ten years beginning in 1944. Submarginal lands were originally part of the reservation, but had been abandoned by non-Indians and acquired by the Federal government under the Emergency Relief Appropriation Act, the National Industrial Recovery Act, and the Bankhead-Jones Farm Tenant Act. Since many of the tracts were isolated, roughly half of the submarginal lands remained unused and the Bureau of Land Management ("BLM") took control of leasing those lands in 1954.223

Within the first six years of operation, the TLE increased tribal income from $40,000 to $220,000 simply by charging the same rent as that on off-reservation grazing. In contrast, the OIA had leased allotted lands to non-Indian ranchers at fixed minimum prices.224 Yet, the overall success of the TLE in its early years was limited and it had difficulty reaching the goal of a 4% dividend. The tribe did not receive a dividend on the TLE shares it owned.225 The costs of administration were higher than anticipated because incomplete tender meant that the TLE could not replace OIA or tribal administration. Rather than simplifying the management of allotted lands, the TLE created another level of bureaucratic involvement. The complexity of TLE transaction required the on-going involvement of the OIA.226 Between 1952 and 1959, the BIA spent $329,213 on realty administration on Rosebud.227 Even today, the BIA retains "signatory authority" over all accounts and transactions (including leasing), adding cost and constraining TLE autonomy.228

In addition, substantial acreage remained vacant and unused. Like the submarginal lands, many of the tendered interests were either partial or scattered. In addition, land restoration—necessary after the drought and soil loss of the 1930s—required falling the land, reducing lease income.229

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225. There is some dispute whether the TLE decided to favor individuals over the tribe or whether the tribe opted to forgo dividends to protect the interests of individual Indians. See Clow, supra note 71, at 155.
226. Id. at 158.
227. Eicher, supra note 61, at 18.
228. Hearing on Indian Trust Reform, supra note 173, at 100 (statement of Hon. Charles C. Colombe, President, Rosebud Sioux Tribe of South Dakota).
229. Clow, supra note 71, at 155.
Although transferrable shares had been a key tribal demand, share trading led to resentment. Ideally, transferability would permit shareholders to liquidate trivial interests and consolidate ownership in larger parcels.\textsuperscript{230} Consolidating interests was considered “particularly appealing.”\textsuperscript{231} But share certificates quickly became as negotiable as cash, sometimes selling for as little as ten cents on the dollar.\textsuperscript{232} Some shareholders sold shares to finance capital investments, others to avert economic hardship. Some of the transactions were “shady” and the Secretary of the Interior revised the TLE by-laws in 1947 to discourage sale.\textsuperscript{233} Despite this, 841 of the original 1821 shareholders had liquidated all their shares by 1952. In particular, the Rosebud elderly protested that a “few highly aggressive mixed bloods . . . [were] acquiring control of the reservation . . . [and] assignments of land.”\textsuperscript{234}

Some consolidation was achieved, however. The tribe, for example, was able to acquire undivided interests in 800 allotments by 1955.\textsuperscript{235} In addition, the TLE increased the availability of land for tribal members; some leases were as large as 5000 acres, although most tribal ranches were small, averaging seventy-two head of cattle. Despite preference for intra-tribal leasing, insufficient interest meant that land was frequently leased to non-Indian ranchers.\textsuperscript{236} Even as late as 1959, two-thirds of TLE land was being leased by non-Indians.\textsuperscript{237} Only thirty-four shareholders had received land assignments from the TLE through 1945.\textsuperscript{238} By 1959, the number had increased to 330; but ten of those individuals received 20% of the total acreage. Eight of those ten individual assignees controlled 23% of all the cattle on the reservation.\textsuperscript{239}

The collapse of agriculture in the 1930s prompted non-Indian out-migration. This trend continued in the 1940s and 1950s as the structure of ranching changed and ranches grew much larger.\textsuperscript{240} On the

\textsuperscript{230} Id. at 156.
\textsuperscript{231} Bio\textls, supra note 19. For example, interests equivalent to 160 acres would permit the shareholder to use 160 acres of TLE land. Cash & Hoover, supra note 200, at 115.
\textsuperscript{232} Clow, supra note 71, at 156–57. Cash & Hoover, supra note 200, at 115. Ben Black Bear testified that shares can be redeemed for cash at any time. Hearing on I.L.C.A. Amendments, supra note 204, at 161 (written testimony of Ben Black Bear, Executive Director, Tribal Land Enterprise, Rosebud Sioux Tribe of South Dakota). Either he is mistaken or this was not true in the 1940s because it seems nonsensical to sell shares for less than face value if the TLE is obligated to redeem them without discount.
\textsuperscript{233} Id. at 156–57.
\textsuperscript{234} Id. at 156.
\textsuperscript{235} Id. at 158.
\textsuperscript{236} Id. at 158–60.
\textsuperscript{237} Eicher, supra note 61, at 95.
\textsuperscript{238} Bio\textls, supra note 19, at 119.
\textsuperscript{239} Eicher, supra note 61, at 94, 108.
\textsuperscript{240} Id. at 32–36, 115.
reservation, the pattern of consolidation was also present, largely because of the disappearance of full-blood ranchers between 1949 and 1959. The BIA value system strongly encouraged herds of thirty head of cattle, while the minimum efficient herd size was 100 to 200 in western South Dakota by 1947.

The limited success of the TLE was insufficient to defuse growing resentment. The tribal council voted in 1954 and 1955 to liquidate the TLE, but the Rosebud superintendent disapproved the resolutions. In addition, the off-reservation non-Indian community was strongly opposed to the TLE, calling it "communistic," and hence un-American." The TLE had grown to 312,000 acres in 1959, of which 63,000 remained fractionated and the TLE had a net equity of $1 million. On the other hand, the increase in fractionation between 1943 and 1959 was greater than the TLE's success in reducing fractionation and Indian land use hardly increased.

Between 1944 and 1959, 433,900 acres had been sold by individual Indians and the TLE was only able to acquire 318,770 acres, leaving 115,130 acres lost to fee patenting.

By 1979, the TLE had grown to 400,000 acres with 1.9 million shares outstanding. Between 1996 and 1999, the TLE acquired almost 10,000 acres of trust and restricted land, 58% of which had fractionated interests of less than 2%. By 2005, the TLE had acquired 570,000 acres of land for the tribe. Each year, the TLE generates $3 million in gross revenue, of which $2 million is profit. Between $40,000 and $70,000 is spent each month to acquire fractionated interests.

Yet critics argue that the TLE has been a "black hole for the financial interests of individual certificate holders." Although required by its bylaws, the TLE has not performed annual land valuations,
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which would allow it to accurately value its shares. Critics argue that land exchanged for shares in 1943 would produce a loss of $260 per acre, producing a loss to the tribe and its members that runs in the millions of dollars. In addition, the TLE is accused of leasing land to insiders, although the Code of Federal Regulations requires leasing to the highest, sealed bid.

D. Evaluating the Rosebud Tribal Land Enterprise

The Rosebud Sioux Reservation may be a flawed test case for the tribal land corporation concept since the reservation is so poor. With an 86% unemployment rate and few natural resources, prospects are poor, whatever the form of land tenure. Despite a "large population [and] grinding poverty," the tribal president noted that the tribe is rich in "traditions and trust lands." The majority of tribal land is limited to grazing because of low rainfall. In addition, Rosebud is hardly the most fractionated reservation and allotments were twice as large as the Dawes Act norm. Only 26% of Indian land was allotted, leaving a large majority in tribal control. The corporate form is only necessary when land is not already under tribal control.

Writing in 1960, Carl Eicher found that land consolidation on Rosebud did not stimulate economic growth. The range management system (also called unit leasing) introduced in the 1930s ensured that land was used in appropriately large economic units. Of course, administration remained a headache for BIA and tribal workers, but fractionation was not a major constraint on use. In contrast, he found that lack of credit was the major constraint on Indian ranchers. Eicher identified two structural factors: the lack of collateral and credit rating or history. In addition, he identified two social factors:

252. In addition, the BIA has "done very little to ensure that correct annual valuations" were completed. Id.
253. Id.
255. DIAMANT, supra note 184, at 1, 17, app. 2. In general, natural resources are distributed very unevenly in Indian country. Over half of the income from mineral leases flow to only 10% of tribes. PRESIDENTIAL COMM'N, supra note 3, at 29.
257. Eicher, supra note 61, at 14.
258. Id. at 11–12.
259. Id. at 90.
260. Id. at 185.
261. Id. at 99, 184.
discrimination (two local banks were known for refusing Indian business) and the perception that Indians received significant government financing and hence did not need private credit.262 Although land was available in large units, credit policies and the BIA value system limited most Indian ranchers to subsistence scale.263 Eicher's findings are consistent with Trosper's findings on ranching on the Northern Cheyenne Reservation.264 Trosper found that Indian and non-Indian ranchers were equally efficient, but Indian ranchers were undercapitalized which he attributed to land tenure. The lack of education and agricultural extension is often identified as an impediment to economic progress.265 Yet the economic literature does not support the claim that improved agricultural extension is desirable or even beneficial since undercapitalization is the main impediment to Indian ranching.

Economic benefits, however, are not the exclusive criterion for evaluating the TLE. The TLE has acquired land in Tripp, Gregory, and Lyman counties. Under the Isolated Tracts Act,266 Todd and Mellette counties have been approved as a consolidation area.267 When the TLE acquires title to fee land, the Secretary must take the land into trust.268

The experience of the Rosebud TLE is discouraging, but it provides several lessons for tribes organizing a TLC. First and foremost, the Rosebud TLE shows the costs of uneven tender. Returns were depressed because the TLE was unable to assemble 100% interests in enough parcels. Since hold-outs are likely, the TLC should use eminent domain to assemble large blocks while relocating uncooperative landowners. In addition, a TLC that controlled most of the land on a reservation could replace the BIA in land administration, rather than adding another layer of cost.

Superintendent Whitlock was wrong to insist that shares in the TLE have a fixed value. In fact, the value of TLE shares was not truly fixed since prices in the secondary market fluctuated, sometimes trading at a steep discount to face value.269 The value of TLE shares was

262. Id. at 125-26.
263. Id. at 185.
265. See, e.g., CARLSON, supra note 34, at 81.
268. Id. When the BIA has attempted to slow trust land expansion through administration rule-making, the tribe has resisted those efforts. See Acquisition of Title to Land in Trust, 64 Fed. Reg. 17574 (proposed Apr. 12 1999) (codified at 25 C.F.R. 151).
only fixed at the moment of tender. Ten dollars of land traded for ten shares. Fixed value shares greatly simplified the on-going tender of shares after the TLE was organized. If a landowner decided to tender shares after the initial tender, how many shares should be awarded in exchange for land appraised at $10 if the value of shares fluctuated freely? Should the shareholder receive ten shares, to ensure that every shareholder received the same consideration for their land? Or should the shareholder receive the same number of shares for the same consideration? Whatever the merits, either decision is likely to create resentment. But, a new TLC should not expand gradually like the Rosebud TLE, because uneven tender reduced returns. If the TLC uses eminent domain to include all or most of the reservation, then the problems of valuation are reduced.

Allowing shares to fluctuate in value is important for several reasons. Fluctuating share prices provide information to shareholders, management, employees, and other interested parties. If share prices are fixed, monitoring is more expensive and likely to be less effective. Well-monitored management contributes to shareholder value. Shareholders in the TLE only receive a dividend. Fluctuating share prices would permit asset appreciation greater than the increase in appraised land values. Asset appreciation is a key benefit of share ownership.

The Rosebud Sioux were right to demand share transferability. In addition to general concerns about autonomy and voluntary association, non-transferability depresses returns. Thirteen regional corporations were created by the Alaska Native Claims Settlement Act; those shares are inalienable. Karpoff and Davis found clear evidence of depressed returns. In addition, non-transferrable shares remove the opportunity for exit, which encourages shareholders to increase costly monitoring. Lastly, non-transferrable shares create no price signals, also increasing monitoring costs.

VI. EMINENT DOMAIN

While tribal land corporations could certainly elect to expand on a purely voluntary basis, there are some very good reasons for including some interest-holders against their will. While many interest-holders will opt to tender, some may not. From an ex ante perspective, it is very difficult to identify which interest-holders will make land planning more difficult. It is very likely that some interest-holders in an


271. Hakansson, supra note 84, at 257–58, proposes eminent domain as a tool to combat fractionation, albeit with cash compensation.
individual allotment will tender, while others will not. In that situation, the tribal land corporation would actually worsen the position of interest-holders because income would pass through another layer of bureaucracy, inevitably reducing net income.

Uneven tender would create economic losses. Although less pronounced in mining, most allotments are significantly smaller than the prevailing size of economic units. Perhaps most evident on ranching lands on the high plains, even 320 acres is a fraction of the size of the smallest viable ranches. In the Dakotas in the late 1950s, 2500 to 3000 acres were required for an efficient, profitable ranch. One of the chief benefits of TLC management would be that the TLC could assemble parcels of land in the most economically-productive manner possible. Inholdings created by pockets of non-tendered shares would disrupt one of the main mechanisms for creating value out of allotted lands.

The Rosebud TLE found that uneven tender reduced the value created by a novel land tenure structure. Tendered interests were spread across many parcels and where the TLE controlled an entire parcel, the parcels were non-contiguous. Many shareholders no longer received IIM payments, so the tribal government elected not to receive dividends on its shares to permit the TLE to pay individual shareholders a dividend. In addition, the tribal government authorized income from other tribal lands to be used to pay a dividend to individual shareholders. Over time, more interests have been tendered and the problems of uneven tender have decreased. Although problems of uneven tender may decrease over time, any TLC would benefit from the power of eminent domain. With the power of condemnation, the TLC could assemble parcels in such a way as to maximize the economic return.

But, the Supreme Court has found in Irving and Youpee that Congress may not escheat interests in allotted lands, even where the interest is inchoate. Whether tribal probate codes that include escheat provisions similar to Section 207 are also takings is not certain. When Youpee was decided, no tribe had adopted a code regulating the dispo-

272. Other proposals do not restrict uneven tender. See id. at 259–60.
274. Clow, supra note 71, at 155.
275. Id.
276. Of course, there is also the danger that the TLC could use the power of eminent domain for empire-building or other goals unrelated to increasing returns for shareholders. So long as the TLC does not reduce returns to interest holders, there is some tribal sovereignty benefit in removing management from the BIA and returning it to tribal bodies.
sition of fractionated land.\textsuperscript{277} Thus, the Court did not address whether tribal action would be immune from the reasoning in \textit{Irving}. By its terms, the Constitution does not apply to Indian tribes.\textsuperscript{278} As sovereign entities, tribes are not restricted by constitutional protections in the same way as states. Tribes are subject, however, to the Indian Civil Rights Act;\textsuperscript{279} Section 1302(5)(8) mirrors the language of the Fifth Amendment. Tribes have not used the power of eminent domain in any significant way to consolidate land tenure.\textsuperscript{280}

Would taking private property interests to resolve the problem of fractionated heirship constitute a public purpose? Under \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{281} one would have to conclude that it would. Fractionated heirship presents similar problems as concentrated land tenure since it leads to environmental degradation, poverty, and unemployment.\textsuperscript{282}

Takings require just compensation,\textsuperscript{283} generally defined as fair market value.\textsuperscript{284} Fair market value implies a willing, informed buyer and a willing, informed seller.\textsuperscript{285} But, fractionated heirship interests may not be sold freely. The comparable sales approach produces better results than the cost or capitalization of income approach.

The more difficult part of the comparable sales approach is not finding similar parcels in the local area; instead, the challenge is deciding whether and how to adjust the value for the large number of owners. Even with majority voting,\textsuperscript{286} more owners impose real costs and depress the value of the land. Simply to divide the total value of the allotment by the shares held by individual interest holders would actually over-compensate them since the analysis ignores a significant

\begin{itemize}
\item \textsuperscript{277} Babbitt v. Youpee, 519 U.S. 234, 245 (1997).
\item \textsuperscript{278} However, the Fourteenth Amendment does protect Indians. See United States ex \textit{rel. Standing Bear v. Crook}, 25 F. Cas. 695, 697 (D. Neb. 1879) (No. 14,891) (the definition of "person" is "comprehensive enough . . . to include even an Indian").
\item \textsuperscript{280} \textit{Eminent Domain}, supra note 37, at 74. Although some commentators have questioned whether tribes retain the power of eminent domain in light of recent opinions that limited tribal sovereignty, the BIA asserts that tribes have the power of eminent domain. \textit{Id.} at 75–76.
\item \textsuperscript{281} 467 U.S. 229 (1984). The \textit{Midkiff} holding was recently recognized in \textit{Kelo v. City of New London}, 545 U.S. 469 (2005).
\item \textsuperscript{282} Shoemaker, supra note 4, at 752.
\item \textsuperscript{283} United States v. Miller, 317 U.S. 369, 374–75 (1943).
\item \textsuperscript{286} Majority voting is permitted when there are twenty or more owners. 25 U.S.C. § 2218(b) (2006).
\end{itemize}
determinant of value. Interest-holders would receive significantly more than the economic value of their interest. Adequate compensation should reflect the diminution in value caused by the large number of owners.

Yet it is unclear how to adjust the value of the allotment for the large number of interest-holders. Outside of Indian country, there are very few parcels with as many owners as an average allotted parcel. So appraisers have relatively few data with which to calculate the adjustment. Most interests worth less than 20% have no marketable value. Even if a methodology could be developed off the reservation, it would not account for the special restrictions of Indian land. While the legal standard requires taking into account current government regulation, interest-holders may feel the tribe has affirmatively endorsed allotment and mismanagement by relying on those depressed values when paying compensation. Consider someone who broke a bicycle and then stole it, yet insisted on paying only the scrap value of the bicycle in restitution. Although dividing the total value of the parcel by the interests without adjusting for the large number of owners will consistently over-compensate interest-holders, it appears to the only politically-palatable option for tribes.

Tribes, however, do not have significant sources of capital. The federal government has shown itself unwilling to devote more than trivial resources to land consolidation. Section 5 of the Indian Reorganization Act (1934) authorized the Secretary of the Interior to spend $2 million annually to purchase land, water, and surface rights on behalf of Indian tribes, except for the Navajo. Between 1934 and 1974, however, only $5,988,077 was spent to acquire 595,157 acres. Con-
gress has attempted to deal with the problem of fractionated heirship through legislation twice in the last twenty years, but has shown no interest in dealing with the progress through outright purchase except the pilot program, later expanded slightly.\textsuperscript{292} The cost of purchasing all lands affected by fractionated heirship is non-trivial. In fact, the lack of money has been identified as the major obstacle to reducing fractionation.\textsuperscript{293}

Thus, the most appropriate compensation is interests or parcels of equivalent value. Some commentators have asserted that exchanging parcels of equivalent value should be characterized as a mere "substitution of assets,"\textsuperscript{294} thus no taking would occur. But, land is special. Every parcel is considered unique. The Court applied a rigidly formalistic approach in \textit{Irving} and \textit{Youpee}, so exchanging minute interests of almost no value might be considered a taking. Even if a taking is found to have occurred, a parcel or interest of equivalent value should be adequate compensation, particularly if BIA leasing is the only beneficial use the owner receives.

The use of eminent domain is likely to produce at least some resistance from those affected. An early draft of the Indian Reorganization Act included a provision authorizing the Secretary of the Interior to compel transfers from individual Indians to tribal corporations. That provision was removed upon the request of delegates from eighteen tribes at a meeting in Rapid City, South Dakota.\textsuperscript{295} Recently, forced purchase has been proposed in connection with land consolidation.\textsuperscript{296} There are several ways for a TLC to mollify or attenuate opposition to the use of eminent domain. Those affected by eminent domain could be given priority in leasing, even over other tribal members. In addition, the TLC might grant tribal members usufructory rights, so that those who lost land might still be able to gather berries, for example, on "their" land. Lastly, the TLC should permit access for recreational or religious observance.\textsuperscript{297} Recreational, religious, and usufructory rights all contribute to the perception that TLC land is tribal land, managed for the benefit of the tribe as a whole.

\textsuperscript{292} As noted before, the total amount of money is less than what would be necessary each year to prevent increasing fractionation. NCAI, \textit{supra} note 11, at 2. Several commentators, including Hakansson, have proposed purchase of fractionated interests, perhaps using eminent domain. See Hakansson, \textit{supra} note 84, at 257–260.

\textsuperscript{293} \textit{Heirship}, \textit{supra} note 44, at 19.

\textsuperscript{294} NCAI, \textit{supra} note 11, at 4.

\textsuperscript{295} BioLSi, \textit{supra} note 19, at 68–70, 75.

\textsuperscript{296} NCAI, \textit{supra} note 19, at 3.

\textsuperscript{297} I would like to thank Joseph Singer for suggesting this.
ECONOMIC RATIONALES FOR THE TLC

Economic theory suggests that the TLC will manage Indian land better than the BIA. The BIA is a conduit of revenue rather than the recipient. Agents face different incentives from their principals, well-discussed in the literature on the principal-agent problem. Indians, however, are not the BIA’s principal. The BIA answers to the President and Congress. Individual BIA employees answer to their supervisors and ultimately to the agency director. While Indians can attempt to influence the BIA, the President, and Congress, non-Indians with adverse interests can do the same. Indians, however, face a structural disadvantage: Congress represents the states, not Indian tribes. The sad experience of the OIA and BIA is that non-Indians have been more successful.

The BIA does not receive any direct benefit from leasing allotted lands, so it has no incentive to minimize the cost of administration. In fact, the BIA has the perverse incentive to increase the cost of administration. Increased red tape provides job security, continued or increased funding, and even the possibility of graft. The BIA is not unique in this regard; bureaucrats tend to maximize staffing. The BIA’s ability to increase administration procedure, and hence cost, is limited by government practice and Executive and Congressional oversight. BIA employees have no incentive to exceed mandated efficiency targets, which are generally very lax in the federal government. Civil service protections undermine even the incentive of mandated efficiency targets.

Increased tribal self-determination can lead to job losses in the BIA. Public Law 638 (“P.L. 638”) authorizes tribes to contract with the BIA to perform work previously done by the agency. Although increased tribal sovereignty is a federal goal, it is not necessarily a goal of the BIA or its employees. Where tribes have replaced BIA management, management is often superior. BIA employees, however, have lost their jobs, which strongly discourages the BIA from facilitating P.L. 638 programs.

By 1992, forty-nine tribes had contracted with the BIA through the P.L. 638 program to manage tribal forests. In the process, four-thousand BIA forestry workers were replaced with tribal members, engendering no small resistance from the BIA. Not surprisingly, the performance of tribally-managed forestry operations is significantly


299. Matthew B. Krepps, Can Tribes Manage Their Own Resources? A Study of American Indian Forestry and the 638 Program, in WHAT CAN TRIBES DO? STRATEGIES
better since tribes will benefit from better management while the BIA does not. Tribal loggers were 75% more productive than BIA loggers. The effect is more pronounced for managers. The typical tribal high-skill worker adds 24,000 board feet per year. In contrast, the typical BIA high-skill worker reduces the timber harvest by 14,000 board feet per year. Replacing the remaining BIA forestry workers with tribal members using P.L. 638 should increase productivity by 40% and increase tribal revenue by $15 million nationwide.

BIA control does more than suppress productivity; the price received is also depressed. Tribes contracting under P.L. 638 do a much better job of marketing timber than the BIA. Hiring one more tribal high-skill worker adds 6% to timber sales prices, while the additional BIA worker adds only 1.4%. This effect is even more pronounced because tribes often sell timber to tribal lumbermills at below-market prices (to plump the profitability of the tribal enterprise and protect jobs). Although P.L. 638 contracting does improve the performance of tribal forestry, the success is somewhat uneven. Tribes with significant business experience are more successful. For example, the White Mountain Apache Tribe runs one of the most productive sawmills in the southwest and generates $30 million in annual revenue with a 90% tribal workforce. While the average lumbermill in the west takes 7.4 labor hours to produce one-thousand board feet, the tribal lumbermill takes only 5.7 labor hours. In addition, the milled lumber sells for a 15% to 20% premium over the regional average.

Even where BIA and Indian interests are not adverse, the involvement of another government agency increases costs (and thus depresses returns to Indians). This would be true even if the BIA were not notorious for its inefficiency and potential for delay. In addition to


300. Id. at 188.

301. Id. at 192.

302. Id. at 196–97. Note that the estimate for the effect of BIA high-skill workers is only significant at the 85% level.

303. Id. at 195–96.

304. The effect of previous tribal business experience is significant statistically. For every 10% increase in employment in tribal enterprises, the annual timber harvest increases by 306,000 board feet and stumpage prices increase 17%. Id. at 189, 196.

305. The tribal forest generates $7 million in net revenue per year. In addition, a tribally-owned ski resort generates $9 million, while trophy hunting brings in $1.5 million. Cornell & Kalt, supra note 254, at 224. The Fort Apache Timber Company is the largest tribal forestry enterprise and one of the hundred largest forestry enterprises nationwide. Frantz, supra note 84, at 271.

the potential for delay, surprise, and additional cost, even innocuous decisions or policies can discourage private enterprise. For example, the BIA may impose lease terms different from those common in the private sector. Even where the terms are neutral, their novelty imposes costs on private parties. But, the problem is broader than novel contract language. Administrative control permits the BIA to force development, as well as prevent use through changes in transaction rules or costs. Even the BIA has recognized that its power to set lease terms gives it the power to discourage use and development.\(^3\)

In a variety of ways, BIA involvement deters business activity, both Indian and non-Indian.\(^3\)

The BIA has little incentive to bargain hard with potential lessees, since neither the agency nor individual employees receive any more revenue. Hard-bargaining is time consuming, difficult, and potentially unpleasant, especially since non-Indian BIA employees would be defending Indian interests against the pecuniary interests of their non-Indian neighbors, generally in an atmosphere of racial identification. In small, isolated communities, concentrated economic power is likely to have more influence. In addition, the BIA's perceived mission for many years was to develop Indian-owned resources for the public benefit. Therefore, hard bargaining would likely lead to congressional pressure since lessees could complain to their representatives.

In addition, the regulations that apply to Indian land are more "flexible" than those that apply to the public lands, allowing the BIA more leeway to accommodate non-Indian interests at the expense of Indian income.\(^3\)

For example, the BIA sold timber for as little as $16 per one-thousand board feet, even though export prices were more than $1000 per one-thousand board feet.\(^3\)

There is strong evidence that the BIA has failed to demand sufficient rent for allotted agricultural lands. In addition, it is often far simpler for the BIA to lease to large non-Indian operators who have

\(^3\)Secretarial discretion is greater, allowing any requirement to be waived, for example. Barsh, *supra* note 26, at 821.
\(^3\)Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the Select Comm. on Indian Affairs, 101st Cong. 69 (1989) (statement of James Spitz, Forestry Consultant, Warm Spring and Yakima Tribes, Bend, Or.).
the resources to lease many parcels at once. The GAO investigation argued that the methodology in that study was flawed, but still found a $60 per acre disparity in net income for irrigated lands. The GAO argued that the disparity reflected increased costs, although it could only explain $20 per acre in tangible costs. Estimates of losses run as high as $330 million in the 1980s alone. Losses are not limited to insufficient rent. When beef prices collapsed in 1921, the OIA reduced the rent on allotted land in Pine Ridge. In addition, the OIA failed to pursue non-Indian ranchers who abandoned their leases leading to losses for Indian owners. In 1931, the OIA extended the payment term for non-Indian purchasers: debt relief to the detriment of the Indian sellers.

In addition, there is evidence that the BIA failed to require lessees to conserve the value of the land adequately, diminishing the value of allotted lands. Studies at Fort Hall found sharp disparities in land management and soil conservation practices on and off-reservation. By 1974, 16,000 acres of the Ross Fork watershed had been "virtually destroyed." Even where the BIA made nominal efforts to protect the long-term viability of agriculture, enforcement or contract design were lacking. Most leases at Fort Hall required the planting of alfalfa before the end of the lease term, but the penalty for failing to plant alfalfa was set too low and so it was cheaper for lessees to pay the penalty. Planting alfalfa protects the soil from erosion and regenerates soil nutrients, both of which protect the value of a grazing lease.

In 1898, the Curtis Act took the power to lease hydrocarbons from the tribes and gave it to the OIA. Indian resources were developed very quickly, peaking at a quarter of total production in 1908–1909. As prices declined, the OIA made a policy decision to reduce Indian

311. See Williams, supra note 183, at 712–13.
312. The GAO methodology itself may be flawed since it found slightly higher net income for dry land agriculture and pasture reservations lands compared with off-reservations lands. It is hard to imagine that the BIA could extract a premium for leasing Indian land since farmers have a choice of parcels to lease and no particular preference for Indian land.
315. McDonnell, supra note 54, at 68.
317. Id.
318. Barsh, supra note 26, at 813.
production to support prices. Barsh finds that Indian oil was sold at a discount even when compared with oil from the public domain, which paid only a nominal one-eighth royalty. Even after competitive bidding was introduced in 1925, undervaluation and lax monitoring further reduced Indian revenue. Long-term coal leases where royalties were fixed (in cents per ton) led to Indian losses when prices rose in the 1910s and 1960s. While most coal was bid competitively, OIA/BIA involvement discouraged private interest, so fewer bids were received than when public domain coal was auctioned. Underpricing of government resources has been used to stimulate private industry, albeit at a cost to taxpayers. When Indian resources have been sold on the cheap, the cost is not a broadly shared "tax," but instead government-run theft.

The losses from BIA mismanagement are hard to estimate accurately because the BIA has yet to complete a soil classification or timber, water, or mineral inventories. Without knowing the extent of Indian resources, it is hard to evaluate the magnitude of the losses. However, overpayment is unlikely since non-Indians have no special affinity for Indian resources. Overpriced resources will find no buyers, so pricing mistakes will be biased only in one direction. In addition, overuse and degradation are more likely when the extent of the resource is unknown. In the absence of an inventory, grazing and timber permits are based on historical use, likely representing overuse and degradation. Historical use patterns throughout the United States lead to overuse, e.g. the Dust Bowl. In addition, the BIA spends little to preserve and maintain Indian resources. While the U.S. Forest Services spends $2.30 per acre (and private landowners $5.50 per acre), the BIA spends just $1.60 per acre.

Like any organization, the TLC and its employees present a principal-agent problem. In contrast to the BIA, the TLC's principals are its shareholders. The TLC and its employees do not answer to any non-Indian. Of course, the incentives facing the TLC and its employees are not the same as one of its shareholders. TLC employees can benefit from increased compensation at the expense of dividends. Empire-
building can lead to inefficient spending. Increased social standing and the ability to arrange jobs for friends and family at a profitable enterprise are clear benefits in small, isolated communities. The TLC and its employees can benefit in many ways at the expense of shareholders, which is unfortunately true any time that ownership and control are split.

In contrast to the BIA, the TLC and its employees do not benefit from charging low rents. The TLC and its employees have every incentive to bargain hard and insist on every contract provision that will increase revenue or protect the resources. Even if the TLC and its employees divert some of the increased revenue, shareholders are still better off. Good corporate governance, however, should provide shareholders with the ability to monitor and influence management. Since most reservations are small, isolated communities, monitoring may be cheaper and more effective because of social pressure.

Although economic theory would suggest that returns to individual Indians would improve if land management were transferred from the BIA to a TLC, there is little empirical foundation. No thorough economic analysis of the TLE has been attempted. Moreover, the TLE had several defects (e.g. fixed value shares, uneven tender, etc.) that limit its usefulness when evaluating the TLC model.

VIII. CONCLUSION

Allotment has not provided individual Indians with economic opportunity; instead, it has weakened tribal structures and shrunk the tribal land base. The administrative burden is significant, absorbing federal monies that could be used elsewhere in Indian Country. In addition, transaction costs inhibit economic development and depress the returns to individual Indians. Congress has attempted to reduce fractionation through regulating devise and descent. Unfortunately, the Supreme Court has limited the quickest mechanism for consolidating land ownership. However, any consolidation program that relies solely on inheritance will take decades to reduce fractionation.

The literature on fractionation has produced several interesting suggestions. Unfortunately, changing the default rules, partition, or increasing individual autonomy requires federal action. So far, Congress has shown little interest in addressing fractionation except through inheritance law (and purchase on a very small scale). Tribal purchase of future interests does not require federal action, but it is too expensive for most tribes affected by fractionation. Together, these proposals might reduce fractionation, albeit not on a grand scale.

Instead, tribes should rely on incorporation and eminent domain to consolidate ownership and control of allotted lands in a tribal enterprise. Interests in allotted lands can be exchanged for shares in the
TLC, limiting the cost of formation. Eminent domain should be used to prevent uneven tender and quickly expand to an efficient scale. Since funds are limited, compensation for the taking of allotted interests should be an interest of equivalent value in other parcels. The Rosebud TLC is just such a TLC, although with several structural defects imposed by the OIA. Even with weak shareholder control, the incentives facing the TLC are closer to the individual Indians than the BIA. Economic theory suggests that the TLC should provide better management of trust land.

Incorporation is not a panacea. This model is most appropriate for tribes where both the resource and culture are appropriate for centralized management. The BIA should continue to purchase heavily-fractionated parcels, particularly where the value of individual interests is de minimis. At the very least, the BIA should purchase all interests worth less than the cost of processing a lease, currently estimated to be $50. The administrative costs of heavily-fractionated parcels would burden the TLC, depressing returns. Improved management of allotted lands will improve economic opportunities for Indian enterprise and increase returns to landowners. However, the economic development in Indian Country still faces significant obstacles.

Any proposal that expands the tribal land base will face non-Indian resistance. However, tribes do not and should not represent non-Indian interests. Resistance and enmity, unfortunately, may be the price of restoring tribal sovereignty and control over Indian resources. In addition, the federal government has a responsibility to encourage, rather than prevent, economic development in Indian Country. If the federal government is to live up to its rhetoric, Congress and the BIA should assist tribes in eliminating fractionation of allotted lands.

327. Hakansson, supra note 84, at 259.