Divided Interests: Growing Complexity of Fractionated Property Rights in Indian Country and Possible Resolutions

Patrice H. Kunesh

[Note: Much of this material is derived from the Tribal Leaders Handbook on Homeownership, *published by the Center for Indian Country Development, July 2018.]*

Indian Country connotes an enduring interconnection between land and people.[1] It also is a complex web of historical, legal, and social forces that make it unnecessarily difficult or impossible for American Indian[2] people to use their lands efficiently. One area of increasing complexity is the fractionation of their property interests, where ownership of land continually descends from one generation to another into smaller and smaller individual shares. Also known as "the Indian heirship problem," Federal assimilationist policies initiated in the late 19th century made fractionation of allotted Indian land the default succession plan and wreaked havoc for generations. As recent as 2017, the U.S. Department of the Interior Bureau of Indian Affairs (BIA) estimated that 2.9 million acres across 150 reservations are owned by approximately 243,000 unique owners managed jointly by tribal governments and the BIA. Fractionation and bureaucratic oversight result in significant barriers to efficient land use and capital access for land development.

Because of the centrality of land to economic and community development, as well as the unique status of trust land, the Center for Indian Country Development (CICD) at the Federal Reserve Bank of Minneapolis has made land a primary area of focus, with the aim of supporting its optimal and productive use. Established in 2015 with the mission of helping self-governing Native communities attain *their* economic goals, the CICD conducts economic research and engages with Native communities at a national level around issues related to social and financial capital, such as housing and homeownership, education, and business development. Governance is the foundation of the CICD's strategic framework for economic development. The CICD believes that tribes can make better policy decisions and build stronger economies for their citizens when they have relevant and current data and helpful resources. The Center has created several such resources: Reservation Business Profiles (https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles), Map of Native American Financial Institutions (https://www.minneapolisfed.org/indiancountry/resources/mapping-native-banks), and the *Tribal Leaders Handbook on Homeownership* (https://www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-homeownership).

[1] As used in this paper, the term "Indian Country" refers to lands held by American Indian tribes and individuals, mainly reservations. Between 1887 and 1934, the Federal government took nearly two-thirds of reservation lands from the tribes for non-Indian settlement. Appalling community destabilization and abject poverty ensued. The Federal government subsequently deemed the remaining lands to be held in trust indefinitely and subject to restrictions on sale and encumbrance, commonly referred to as "trust land." Today, the vast majority of land on American Indian reservations, approximately 60 million acres, is trust land. Urban Indian communities, representing a significant percentage of the Native population, often with strong ties to the reservations, are not trust lands.

[2] The term "American Indian" is synonymous with Native American and includes Alaskan Native people. As used in the paper, the terms "Indian" and "Native" also are used interchangeably.

Author information: Patrice H. Kunesh, Director, Center for Indian Country Development, Federal Reserve Bank of Minneapolis, Minneapolis, MN 55401.

Citation for proceedings: Gaither, Cassandra J.; Carpenter, Ann; Lloyd McCurty, Tracy; Toering, Sara, eds. 2019. Heirs' property and land fractionation: fostering stable ownership to prevent land loss and abandonment. June 15, 2017, Atlanta, GA. e-Gen. Tech. Rep. SRS-244. Asheville, NC: U.S. Department of Agriculture Forest Service, Southern Research Station. 105 p.

HOW DID INDIAN LAND TENURE GET SO COMPLICATED?

In short, poorly constructed Federal policies and overly zealous bureaucracy have resulted in the current state of Indian land tenure. The American Indian reservation system was created for two general purposes: to separate Native people from their lands for White settlement and to regulate Indian affairs. The BIA supervised every aspect of life on the reservation—from government and religious practices to housing, jobs, and education. The reservation system created a deep and desperate culture of dependency and persistent poverty. That policy quickly morphed into an overt objective of eliminating reservations altogether and forcing American Indians to assimilate into mainstream society.[3]

The genesis of most of these lands issues is the General Allotment Act of 1887 (commonly called the Dawes Act), 24 Stat. 388 (25 U.S.C. § 331), which authorized the President to allot every Indian reservation into 80- or 160-acre parcels. The purpose of the legislation was to reduce and eliminate the reservation system established by historic treaties. To do this, the Dawes Act attempted to force American Indian people to assimilate into White culture. Among the many assimilation experiments (see discussion of boarding schools in note 3) was the allotment program, which was designed to transform communal, tribal living into private farms on individually owned parcels of land called allotments. The expectation was that the land would be farmed or ranched. Reservation lands remaining after allotment, the so-called "surplus" lands, were taken by the Federal government and opened to White settlement.

As originally envisioned, allotted parcels were to be held in trust by the United States for no more than 25 years. During this period, allotments would be inalienable and exempt from State taxation and jurisdiction. The Dawes Act anticipated that after 25 years of Federal trusteeship, Indian owners would be sufficiently assimilated and capable of managing their land, after which the United States would patent (deed) the land to the allottee in fee.

When an allottee died during this trust period, the United States would determine the heirs and distribute the property in accordance with State law of descent and distribution, bypassing completely tribal customs and the individual property owner's intent. It was not until a 1910 amendment that allottees were allowed to use a will to direct their property interests to specified heirs, but still only with Federal approval and probate in a Federal administrative forum. Even then, many Indian allottees did not prepare wills, leaving their ownership interests to be divided according to State law. In addition, because the United States holds land in trust only for Indians then and now, interests passing to non-Indian spouses and heirs must come out of trust status and become subject to State taxation and other State law. This situation results in land coming out of trust status, and it becomes taxable. Observers note that many acres of land have been lost through non-payment of taxes, compounding boundary and jurisdiction issues.

The Dawes Act and the subsequent probate system demonstrate the often contradictory and incongruent policy prerogatives of the United States. On the one hand, the Federal government is eager to decrease its financial responsibilities to tribes and Native people, yet on the other hand, it vehemently asserts its paternalistic oversight over Indian affairs. Congress halted the devastation of allotment in 1934 with the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.*, which banned further allotment of reservation lands, extended the trust period indefinitely for remaining allotments, authorized the acquisition of new land in trust for tribes, and strengthened support for tribal self-governance.

Interesting parallels can be made between the Federal government's role as trustee over the property and natural resources of American Indian tribes and the historical role that courts (also as functionaries of the Federal government) inadvertently played in usurping land for other marginalized peoples—for instance, African Americans in the Black Belt South, poor Whites in Appalachia, and Hispanics in the Southwest. (See Mitchell et al. in these proceedings for how court-ordered partition sales of heirs' property likely resulted in significant land loss for African Americans; also, see Johnson Gaither in these proceedings for court appropriation of land in Appalachia.)

FRACTIONATION: DIVIDED OWNERSHIP

Under Federal Indian probate laws, when an Indian allottee died, his or her property descended to heirs as undivided "fractional" interests in the allotment (tenancy-in-common). The land however, remained physically intact.

[3] One of the most damaging policies was the Federal government's Indian Residential Schools program, commonly known as boarding schools. During the late 19th and mid-20th centuries, thousands of Indian children were removed from their families and sent to residential schools far away from reservations. The infamous Carlisle Indian Industrial School, founded by Richard Henry Pratt in 1879 on a former military installation in Pennsylvania, became a model for the 25 other schools established by the BIA. Pratt's proclaimed assimilationist policy was "Kill the Indian and save the man." This was accomplished by removing anything from the child that could be identified as "Indian"—braids were cut off, clothes were burned, and Native languages and cultural practices were prohibited. In their place, students were forced to speak English and received vocational training with strict military protocols. After years of separation, Native students were sent back to the reservation only to face the shock of another cultural dissonance with their own families. The legacy of the boarding school program, an experiment in legalized discrimination, is pervasive intergenerational trauma.

As a result, heirs of an original allottee own common and undivided interests in the same allotted parcel. Due to a variety of issues, primarily the now federalized probate system for Indian lands and dismissal of cultural property rights, many Native people are unfamiliar with the concept of using a will to pass their property to the next generation. As a result, original allotments now have hundreds and even thousands of distinct individual owners, oftentimes sharing a common interest in a minute fraction of land. In addition, an allottee's descendant could own multiple fractionated interests in several different parcels through inheritance from different family branches. As the number of owners grows exponentially (fig. 1), the cost of land administration increases, and the value of the land and income derived therefrom become *de minimus*—much less than what it costs the Federal government to process the payment.

Furthermore, no single owner can use of any part of the land without consent of the other owners, nor can the land be leased, logged, grazed, or mined without Federal approval and consent of at least a majority of ownership. This heirship pattern makes it nearly impossible for any one owner to actively and efficiently manage the land for agriculture, business development, or a home site, all uses that would improve quality of life for Indian people living on reservations.

RESOLVING INDIAN LAND FRACTIONATION

Resolving the Indian Country fractionation issue should be one of most pressing administrative priorities for the Federal government. Over the years, Congress has attempted to fix this fragmented system through four prominent strategies:

- Encourage land consolidation through the Land Buy-Back Program for Tribal Nations.
- Promote gift deed conveyances, wills, and estate planning through the American Indian Probate Reform Act of 2004.
- Relieve Federal bureaucratic burdens on land use while returning control to tribes through the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012.
- Promote tribal community response and revive tribal customs.

The Land Buy-Back Program for Tribal Nations—Established in 2014, this ambitious program implements the land consolidation component of the *Cobell* Settlement, which provided $1.9 billion to purchase fractional interests in trust or restricted land from willing

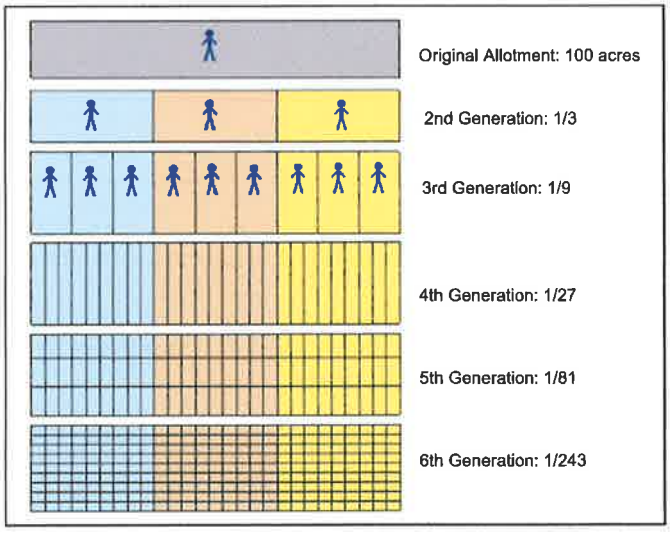

Figure 1—A simple example of a 100-acre parcel owned initially by an original allottee succeeded by three offspring in each generation. Each of the three children in each new family inherits a one-third interest in their parents' interest, resulting in 243 heirs by the sixth generation.

sellers at fair market value. Consolidated interests are immediately restored to tribal trust ownership for uses that benefit the reservation community and tribal members. According to the BIA, as of September 2017, the program had purchased more than 2 million acres from more than 700,000 fractional interests on almost 40,000 tracts across 45 reservations.

The American Indian Probate Reform Act of 2004—This Act created a nationwide Indian probate code and changed the way trust estates are distributed to heirs. In effect, it replaced State law with a Federal probate code. The Act applies to all individually owned trust lands unless a tribe has its own probate code. Its primary purposes are to: limit and reduce fractionation; encourage estate planning and drafting wills; and maintain land in trust status.

Writing a will or using a gift deed to convey land is very important for several reasons. For one, the owner has more control over property and assets. For another, the trust land retains trust or restricted status if it passes to eligible heirs. Overall, fractionated ownership is reduced or eliminated, and land with consolidated ownership interests becomes more usable and economically productive.

The HEARTH Act of 2012—Leases of trust lands play an important role in tribal housing and business development since trust lands cannot be readily sold or encumbered. In Indian Country, mortgage financing typically is secured by a leasehold interest. Delays in approving individual leases cause a great deal of frustration to homebuyers and lenders alike.

In 2012, in a major shift of authority over tribal lands, Congress amended the Long-Term Leasing Act through the HEARTH Act. The HEARTH Act amendments establish an alternative land leasing process for tribes to negotiate and enter into leases with minimal involvement from the BIA. Through the HEARTH Act, Indian tribes lease tribal trust lands directly pursuant to tribal law, without further Secretarial approval. This enables tribes to exercise more decision-making authority over land-use decisions and engage more efficiently in larger scale home ownership and business development.

The passage of the HEARTH Act amendments was nationally lauded by tribal leaders and tribal organizations as a valuable tool that would, among other things, empower tribes to realize their potential for economic growth and job creation on tribal lands; increase community development; and strengthen tribal self-determination.

Tribal community response—The most important work will be, as ever, in tribal communities. There is a tremendous need to impart basic information about trust lands to new generations of Native landholders. A special emphasis in this communication should be that land is a valuable asset, in economic as well and socio-cultural and historical terms. In addition, trust property estate planning assistance needs to be readily available for Native people. Support for drafting wills and creating gift conveyances can come from diverse parts: the Department of the Interior and the BIA's tribal realty and probate offices; tribal and private, non-profit legal services programs; law school clinical programs and the private estate planning bar; and community development practitioners across the country.

Equally important is addressing the central issue of who is Indian. The political and economic stakes in such discussions are obvious and compelling—who is eligible to share in government services and economic development programs; who is subject to tribal jurisdiction; and, ultimately, who has the right to hold land in trust. It is up to the tribes, as self-governing, self-determining nations, to determine their future.

Finally, a word of caution. Most solutions to fractionation are framed around tribal ownership, essentially the consolidation of land back to communal ownership. Such emphasis on total tribal ownership may overshadow the benefits of individual landowners and private development to enhance a more diverse and vibrant reservation economy. Where concentrations of collective land ownership occur, economic and political development could be stymied. To fully realize self-determination, Indian property rights and land reform thus should be transformed by the people themselves. Community values that promote family relationships and support individual interests can concurrently advance the betterment of the tribe as a whole.

These are not modest challenges, and undertaking these different paths requires extensive resources and uncompromising commitment. Fortunately, Native people have been adept in the art of survival. They may do so again in securing their lands.