A Slow-Motion Train Wreck: The Continuing Problem of Fractionation in Indian Country and the Mixed Results of the Cobell Settlement

By Daniel Hartman-Strawn

The United States' policies pertaining to the allotment and ownership status of reservation lands, policies rooted in colonial ideologies, have given rise to a pervasive problem in Indian Country: fractionation. The fractionation of reservation lands contributes to the economic stagnation faced by many reservation communities, and limits the ability of tribes to consolidate land for agricultural use or development. Despite efforts by Congress to resolve the issue and a class-action lawsuit, there is still no comprehensive plan to end the continually compounding fractionation of reservation lands. Any plan will require a long-term financial commitment to consolidation efforts, and a reformation of the law governing the transmission of tribal lands. In the meantime, stopgap measures such as the Cobell Settlement can provide an influx of capital to tribal communities as lands are consolidated, in addition to providing an example of an effective solution.

As with many issues in Indian Country, the root of the fractionation problem can be traced to United States' policies and precedents from deep in the past of U.S.-tribal relations. Perhaps few other policies have continued to generate as much enmity from critics as the General Allotment Act, also known as the Dawes Severalty Act, of 1887. This law forced the allotment of tribally-held lands into individual land plots to tribal members in an effort to assimilate Native people into a yeoman farmer society. However, its deleterious effects were hardly confined to the nineteenth century. Due to the manner in which allotment was imposed, without any consideration for how land would be passed on to future generations of tribal members, many plots now have hundreds or even thousands of fractional interests, or shares, tied to them. To understand how allotment came about, it is also important to understand the foundations of Native law and policy. Consequently, this article will examine the legal underpinnings of European conquest dating back to the eleventh century, and all the way through the early rulings regarding Native sovereignty and land rights by the U.S. Supreme Court.

Since 1887, there have been efforts to address the snowballing fractionation problem, including legislation and legal action. A class-action lawsuit now known as *Cobell v. Salazar* was brought against the U.S. federal government in 1996, led by Eloise Cobell, who sought to rectify many of the issues tied to allotment, such as the mismanagement of individual and tribal funds by the federal government.[1] Although the case would not be resolved for nearly fourteen years, the Cobell Settlement was reached in December 2010 in favor of the plaintiffs. This article will examine the history of various strategies aimed at mitigating the effects of fractionation up through the Cobell Settlement. A particular focus will be given to fractionation on the Pine Ridge Reservation in South Dakota, which has experienced some of the most severe impacts of allotment, as well as the potential benefits and pitfalls of the Cobell Settlement. This article will argue that the results of the settlement were mixed, and will examine what could have been done to increase the efficacy of the settlement's benefits.

In 1095, Pope Urban II issued the *Papal Bull Terra Nullius*, which endowed Christian European monarchies with the justification (if not duty) to conquer, or "discover," the homelands of those who did not believe in Christianity.[2] This document became the underpinning of countless expeditions that set out from Europe in order to claim lands and citizens in the name of their respective nations. Upon returning to Spain from his first voyage to the Americas in 1493, Columbus and his country were granted the right to conquer the New World that Columbus had "discovered" by Pope Alexander VI in the bull *Inter Cetera*.[3] This "right" became a foundation for Native law and policy in the U.S., from the expulsion of tribes as settlers pushed west to the Supreme Court cases known as the Marshall Trilogy, a series of cases which established a number of precedents regarding tribal sovereignty and property rights. In 1823, the U.S. Supreme Court justices, led by Chief Justice John Marshall, decided in the case of *Johnson v. McIntosh* that the "discovery" of the Americas by European explorers and the following colonization had given countries such

1. *Cobell v Salazar*, 573 F. 3d 808 (2009).
2. The Anti-Defamation League, "Lewis and Clark: The Unheard Voices," The Anti-Defamation League, 2005, http://archive.adl.org/education/curriculum_connections/doctrine_of_discovery.html.
3. Ibid.

as England "dominion" over the land and its people.[4,5] This was a "dominion" that the fledgling U.S. inherited upon achieving independence.[6] Just as the crusaders had drawn their authority from the Pope, and therefore God, the justices were now giving the U.S. the right to the lands of North America, "notwithstanding the occupancy of the natives, who were heathens."[7] With this ruling, the Supreme Court became "the architect and custodian" of the Doctrine of Discovery, which became the moral and philosophical justification for the westward expansion of the United States.[8] What began as a papal bull was now a precedent in the U.S. legal system.

The case of *Johnson v. McIntosh* was set into motion by a land ownership dispute between Thomas Johnson and William McIntosh. In 1775, in a sale made possible by a 1763 royal proclamation, Johnson had purchased land in the Northwest Territory from members of the Piankeshaw tribe and later left this land to his heirs. Unwittingly, McIntosh in 1818 purchased from Congress 11,000 acres of the same land that had been bought by Johnson in 1775. When Johnson's heirs realized this, they sued McIntosh in District Court in December of 1820.[9] The District Court ruled in favor of McIntosh, as they saw the authority of Congress as superseding that of the King of England.

The Johnson heirs appealed this ruling to the Supreme Court, and using the reasoning stated previously, the Marshall court found that the federal government had the "sole right" to negotiate land purchases with Native nations. The Johnson heirs, the court said, had dealt with tribes that had no right to sell their own land.[10] This case provided the United States government with a monopsony over tribal lands, giving them the ability to dictate the value of Native people's property, and then to turn around and sell or lease the land at a chosen price. This monopsony remains in effect today.

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4. *Johnson v. McIntosh*, 21 U.S. 543 (1823).
5. David E. Wilkins, *American Indian Politics and the American Political System* (Maryland: Rowman & Littlefield Publishers, Inc., 2002), 106.
6. Ibid.
7. The Anti-Defamation League, "Lewis and Clark: The Unheard Voices."
8. Lindsay G. Robertson, "Native Americans and the Law: Native Americans Under Current United States Law" (University of Oklahoma, 2001).
9. Kades, Eric. "History and Interpretation of the Great Case of Johnson v. M'Intosh" (*Faculty Publications* 50, 2001), 100.
10. Chicago-Kent College of Law at Illinois Tech, "*Johnson and Graham's Lessee v. McIntosh*" (Oyez).

After Native tribes were moved onto reservations, many returned to the traditional lifestyles that had been practiced by their ancestors for millennia. This did not sit well with the U.S. government, since it was not only concerned about its ability to track and control the tribes, but also wanted to assimilate Native people into the yeoman farmer society of the settlers who were pushing their way west.[11] This led to the adoption of the General Allotment Act of 1887, also known as the Dawes Severalty Act. This act created a formula by which tribal members were given plots of land that were once a part of the larger reservation: 160 acres for the head of a household, eighty acres for single persons over the age of eighteen, and forty acres for those under eighteen.[12] The U.S. government sold the remaining "leftover" plots of reservation lands to non-Natives, leading to a checkerboard pattern of ownership among tribal members and non-Natives. That money was to be managed by the U.S. Treasury for the benefit of Native nations and their citizens (the mismanagement of these funds is another component of the Cobell settlement that this paper does not address). Between the time that the Dawes Act was adopted and the Indian Reorganization Act of 1934 put an end to the allotment process, 118 of the then 213 reservations had been broken up and allotted.[13] This resulted in Native peoples' loss of approximately ninety million acres, or two-thirds, of the land that had originally been promised to tribes through various treaties and agreements.[14]

In addition to the fractionation of reservations through the sale of "surplus" plots, the way in which tribal members passed along their land rights further confused the situation. Prior to European arrival, the vast majority of Native peoples practiced communal ownership of property and land, and therefore required no framework for the hereditary passage of property.[15] When the Dawes Act was put into place, it stipulated that for twenty-five years the land would be held in trust by the U.S. government. During this period, roughly the timespan of a single generation, Native landowners were not allowed to use the system of wills put forth

11. Emily Greenwald, *Reconfiguring the Reservation: The Nez Percés, Jicarrila Apaches, and the Dawes Act* (Albuquerque: University of New Mexico Press, 2002), 1.
12. David E. Wilkins, *Hollow Justice: A History of Indigenous Claims in the United States* (New Haven: Yale University Press, 2013), 155.
13. Ibid.
14. IBID.
15. Katja Göcke, "The US Class Action Settlement Agreement in Cobell v. Salazar - An Adequate Redress for 120 Years of Mismanagement of Indian Lands and Funds?" (*International Journal on Minority and Group Rights* 19, 2012), 268.

by the laws of descent and partition for the state or territory in which they resided. Instead, Native landowners were forced to abide by the laws of intestate succession, which is a process that is typically used when someone passes away without having created a will. In this case, the deceased's possessions and property are considered a single entity, and all heirs receive equal interests in that entity. An interest, or share, is different from outright ownership in that a share gives the holder a say in the use of the property but not outright ownership. No process was ever set up to intervene in this old practice, therefore over the multiple generations since allotments, as many as several thousand people sometimes accumulated interests in a single plot. For the 143,663 individual allotments left today, there are over four million fractional interests.[16] This means that there is an average of nearly twenty-eight shareholders for every single plot. Without any effort to reform the system, it is estimated that by the year 2030, the number of shareholders will have increased to eleven million individuals, or more than seventy-five fractional interests per plot on average. Some of the ownership interests are currently worth only .0000001 percent of the total interest, in some cases, generating for that shareholder only a single penny every 177 years.[17] According to lawyer Jered T. Davidson, this legal tangle has created "a massive web of fractionation that has now rendered the allotted lands virtually worthless."[18]

The Pine Ridge Reservation, located in the southwest corner of South Dakota, is home to the Oglala Lakota tribe.[19] It is a place that is as plagued by poverty, violence, and strife as it is blessed with natural beauty and filled with relentlessly optimistic people who have courageously defended and preserved their culture and heritage. The average life expectancy on Pine Ridge is forty-eight, lower than those of Afghanistan and Somalia.[20,21] The unemployment rate on Pine Ridge ranges between eighty-five and ninety percent, and the median per capita income

16. Ibid., 271.
17. Ibid. 18. Jered T. Davidson, "This land is your land, this land is my land? Why the Cobell Settlement will not resolve Indian land fractionation" (*American Indian Law Review* 35, 2011), 577.
19. The Oglala Lakota people are officially recognized by the federal government as the Oglala Sioux Tribe. The word 'Sioux' is supposedly derived from an Ojibwe exonym for the Lakota people meaning "little snakes," which English settlers learned from French settlers. Members of the tribe generally identify as Oglala Lakota, however.
20. "The World Factbook: Afghanistan," Central Intelligence Agency, August 11, 2016, https://www.cia.gov/library/publications/the-world-factbook/geos/af.html.
21. "The World Factbook: Somalia," Central Intelligence Agency, July 19, 2016, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html.

is between $2,600 and $3,500.[22] These are statistics typical of a developing nation, not a county ninety miles away from the pantheon to U.S. democracy and patriotism, Mount Rushmore. Much of the economic stagnation found on the reservation is due to the problems surrounding land ownership as a result of allotment that began over 100 years ago. Before developing or leasing reservation land with twenty or more shareholders, the Bureau of Indian Affairs requires owners to obtain consent from fifty percent of those with interests in the land, which can be next to impossible given the number of shareholders and the diaspora of those individuals.[23] This prevents many people from using their land for anything beyond residing on it. Much of the Pine Ridge Reservation is arable, and even more is suitable for grazing cattle. However, between the checkerboard pattern of ownership mentioned earlier that prevents large tracts from being accessible, and the lack of complete ownership, agricultural activities and leasing are made much less profitable if not outright impossible. Landowners are unable to get a loan using land as collateral, because the land cannot actually be sold outright due to the legacy, noted earlier, of *Johnson v. McIntosh*. Additionally, investment in business and infrastructure is discouraged because outside groups and even members of the tribe are not able to permanently secure ownership to the land upon which they are trying to build or operate.[24]

The first attempt to address the epidemic of fractionation found all across Indian Country came in the form of the Indian Land Consolidation Act of 1983. This law enabled tribal governments, with the approval of the U.S. Secretary of the Interior, to consolidate their land by offering to buy out those who held fractional interests in a tract of reservation land. Buy backs were contingent on the approval of over fifty percent of those with a fractional interest, or getting approval from shareholders constituting over fifty percent of the total interest in the plot.[25] This ability to consolidate lands was something that tribes had long sought, and was therefore greeted favorably. Yet one piece of the law, Section 207, quickly became controversial. Section 207 blocked the ability of those with a fractional interest of

22. American Indian Humanitarian Foundation, "Pine Ridge Statistics," Accessed May 6, 2016, http://www.4aihf.org/id40.html.
23. Brandon Ecoffey, "Oglala Sioux Tribe launches buyback program" (*Indian Life* 34.4, 2014), 8.
24. Ibid.
25. Indian Land Tenure Foundation, "Indian Land Consolidation Act of 1983," Accessed May 6, 2016, https://www.iltf.org/resources/land-tenure-history/recent-allotment-legislation/ilca-1983.

less than two percent of the total, or earning less than $100 from their share, to pass along their shares to their decedents.[26] The land instead went to the tribal government through escheat, which is generally a component of intestate succession.[27]

As was described previously, many shares are equal to infinitesimal portions of the whole share and earn tiny amounts of money. Therefore, many tribal members stood to be dispossessed of their land through this 1983 law. For example, Mary Irving, a member of the Oglala Lakota tribe, had a relative who passed away in 1983 after the law came into effect, as did several other members of the tribe. These descendants and heirs sued Donald Hodel, then U.S. Secretary of the Interior, in Federal District Court alleging that their Fifth Amendment rights were being violated due to their property being seized without just compensation.[28] The District Court found that the plaintiffs did not have a vested interest in the lands at stake as result of the small interest that they possessed. The plaintiffs appealed their case to the Supreme Court, and in 1987 the Court sided with the plaintiffs on the grounds that, though their interests were small, their Fifth Amendment rights were indeed being violated.[29,30] This prompted Congress to revise the 1983 law, though it still maintained the escheat provision with a few changes.[31]

In 1996 the Supreme Court heard the case of *Babbitt v. Youpee*, which like the previous litigation alleged that the Fifth Amendment rights of tribal members were being violated, this time by the revised Section 207.[32] The decision, delivered by Justice Ruth Bader Ginsburg, found that Section 207 had not been revised sufficiently, and therefore was invalid.[33] Though these decisions clearly favored tribal property rights, it is rather ironic how vigorously the Court defended the property rights of Native peoples given the long history of dispossessing Native peoples of their land in the U.S.

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26. Ibid.
27. Ibid.
28. Justia, "*Hodel v. Irving*," Accessed May 6, 2016, https://supreme.justia.com/cases/federal/us/481/704/.
29. Ibid.
30. *Hodel v. Irving*, 481 U.S. 704 (1987).
31. Ibid.
32. *Babbitt v. Youpee*, 519 U. S. 234 (1997).
33. Chicago-Kent College of Law at Illinois Tech, "*Babbitt v. Youpee*," *Oyez*, Accessed May 6, 2016, https://www.oyez.org/cases/1996/95-1595.

In 1994 Congress enacted the American Indian Trust Fund Management Reform Act to attempt to make good on the U.S. government's promise to properly manage the trust funds of tribes and individuals.[34] Part of this legislation involved creating a plan to better manage accounts. Although this plan was mandated in the law, funding to implement it was never appropriated by the U.S. As a result, an account holder from the Blackfeet tribe of Montana named Elouise Cobell, along with four other plaintiffs, filed a lawsuit in 1996 against the U.S. Secretary of the Interior for mismanagement of their funds.[35] The lawsuit eventually included over 500,000 plaintiffs, and the proceedings continued for thirteen years until 2009. In his 2008 presidential campaign, Barack Obama proposed to resolve the Cobell case, and this, combined with several rulings that made the government realize and acknowledge that it would eventually have to pay the plaintiffs, brought both parties to the negotiating table. On December 7, 2009, the parties reached a settlement agreement, and Congress authorized that agreement on December 8, 2010 with the Claims Resolution Act, which President Obama immediately signed.[36] The final amount of the settlement was over $3.4 billion, with $1.9 billion allocated for a Trust Land Consolidation Fund, which is what is used to fund tribal buy-back programs.[37]

The highest amount of fractionalized lands, eight percent of the total, can be found on the Pine Ridge Reservation.[38] Georgine Broken Nose, the director of the tribe's buy-back program, provides an example of the extreme fractionation wherein there is "a 1 acre tract of land with 2,500 people owning it."[39] As a result of the Cobell settlement, the Oglala Sioux Tribe government has received $126 million, the largest amount given thus far to any tribe that has participated in the buy-back program.[40] The rate of acceptance of buy-back offers that the tribe made to individuals was 45 percent, and as of April 15, 2016 the tribe had paid out

34. Brooke Campbell, "Cobell Settlement Finalized After Years of Litigation: Victory at Last?" (*American Indian Law Review* 37, 2012), 633.
35. IBID.
36. Wilkins, *Hollow Justice*, 177.
37. Department of the Interior, "Cobell / Land Buy-back," Accessed March 24, 2016, https://www.doi.gov/cobell.
38. Ecoffey, "Oglala Sioux Tribe launches buyback program," 8.
39. Ibid.
40. As noted earlier, the Oglala Lakota people are officially recognized by the federal govern ment as the Oglala Sioux Tribe. Members of the tribe generally identify as Oglala Lakota, however.

$110,395,928 to 9,319 individuals for 292,774 acres of land.[41] The landowners who chose to accept the offers made by the tribe received fair market rates for their land.[42] The ability of the tribal government to consolidate so much land is significant. The chairman of the tribe in 2012, Brian Brewer, said that the program could double the amount of money that the tribe collected at the time from tribal trust lands from $5 million to $10 million annually.[43] These funds, he contended, were (and continue to be) sorely needed for investing in infrastructure, social programs, and economic development on the Pine Ridge Reservation.[44]

The critiques of the Cobell Settlement are wide-ranging in their opinion of its efficacy and fairness. Many detractors take umbrage with the portion of the settlement that is supposed to compensate tribes and individuals who had their money managed in trust funds by the U.S. Treasury. However, there are two broad criticisms of the buy-back program that both point to an overarching issue left unresolved by the settlement. One such argument is that although $1.9 billion is certainly a large sum of money, it would take $135 million annually in spending on consolidation efforts simply to prevent the current level of fractionation from increasing.[45] Over the ten-year period that the buy-back program is authorized, this estimated expenditure would amount to close to half of the $1.9 billion total after just the first seven years. An issue with the structure of the buy-back program is the time constraint stipulated in the settlement, which requires that after ten years any unspent money from the fund must be returned to the U.S. Treasury. This is problematic, especially given that many of the fractionalized lands have shareholders who are classified as "whereabouts unknown."[46] The ten-year time frame makes action by the tribe to consolidate within the first five years preferable. The resulting time crunch makes it difficult for the U.S. Department of the Interior and the tribe to do their due diligence with regards to attempting to locate these missing individuals, and even when all of the shareholders are present, it forces

41. Department of the Interior, "Land Buy-Back Program for Tribal Nations Cumulative Sales through April 15, 2016," Accessed April 19, 2016, https://www.doi.gov/buybackprogram.
42. Andrea J. Cook, "Newest part of Cobell settlement could pump $430 million into South Dakota tribes" (*Rapid City Journal*, December 23, 2012).
43. Ibid.
44. Ibid.
45. Davidson, "This land is your land," 599.
46. Subcommittee on Indian and Alaska Native Affairs, "Implementing the Cobell Settlement: Missed Opportunities and Lessons Learned" (Washington: U.S. Government Publishing Office, 2014).

them to make a decision under the pressure of a ticking clock. Some critics argue that in light of these facts, and the continual fractionation that occurs because of intestate succession, an open ended buy-back program would make more sense so that landowners can take advantage of the program as new heirs come into their shares.[47] These are valid assessments of the shortcomings of the Cobell Settlement, and they draw attention to the problem that the settlement did not resolve: the continuing fractionation of reservation lands.

Also worth briefly examining is a completely unintended, though debatably positive, result of the inability of tribal members to sell their land to groups or individuals outside of the tribe. If tribal members were able to sell their land to anyone, or more easily lease their land due to consolidation, it is quite likely that many reservations would have since disappeared as residents decided that they wanted to live in an urban area, or heirs simply dispersed and no longer desired to hold a particular plot. On the Pine Ridge Reservation, summer nights are a time to go out and interact with the community at powwows, and at graduation ceremonies children receive eagle feathers in the tradition of Lakota warriors.[48] If the community was no longer constituted primarily of Lakota residents, it is arguable that the sense of identity that has become so inseparable from that corner of South Dakota would be lost, along with the cultural vitality that has been preserved. This concern has to be weighed against the economic cost of fractionation and property rights, but it is certainly a risk of changing the current status quo.

It is impossible to rewrite history to correct the mistakes made by the U.S. government and legal system that resulted in the fractionation of reservation lands. However, it is possible to enact reforms that can attempt to correct the negative effects of some U.S. policies pertaining to Indian Country and Native citizens, many of which continue to plague tribal communities and Native individuals to this day. While it is too early to say what broad effects the influx of funding will have on communities such as the Pine Ridge Reservation, it is evident that the Cobell Settlement takes real, concrete steps to reduce the current state of fractionation and render that land functional and profitable to the tribe and its members.

47. Ibid.
48. Personal observations from time living on the Pine Ridge Reservation.

Furthermore, the ability to accept buyouts gives an option to some tribal members to sell their land, a choice that most Americans take for granted. Just as the tribe can invest the money garnered from the newly consolidated lands, buyout recipients can empower themselves through education, improve their living situation, or do whatever else they deem to be an appropriate use of their money.

Yet regardless of its merits, the Cobell Settlement does not resolve a huge unanswered question: What should be done about continuing fractionation of reservation lands? Addressing this question will likely require additional legislation on the part of the U.S. Congress, a daunting proposition, but far more effective and efficient than another decade of litigation. Therefore, though not perfect by any means, the Cobell Settlement can be considered a boon for Indian Country. The settlement offers an opportunity to turn the resolution of a bad situation into a means of ushering in a new economic future for Indian Country as a whole.

Author's Biography

Daniel Hartman-Strawn is an undergraduate student in the College of Social and Behavioral Sciences at the University of Arizona, where he is pursuing a major in American Indian studies and law. He grew up in Denver, Colorado, but spent the past two years primarily living on the Pine Ridge Indian Reservation in South Dakota. While living there, he worked with non-profit organizations focusing on community outreach and development, quality of life projects, and efforts to bring renewable energy technology and sustainable building techniques to the reservation to help alleviate poverty. After completing his degrees, he would like to pursue legislation and policy solutions that address the economic and political paralysis that is found on many reservations in the United States.