CP 87 and CP100: Allotment and Fractionation Within the Citizen Potawatomi Nation

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INTRODUCTION

The letter came to my father's house sometime in the early 1990s. His cousin wrote seeking to obtain his consent to sell CP 87 and 100, the Citizen Potawatomi tracts originally allotted to their grandparents, Ellen Yott and Joseph Haas, following the Dawes Act of 1887. By now, ownership of tracts 87 and 100 had become fractionated into eighteen undivided interests through multiple successive heirship divisions. The only way his cousin could alienate his interest was to convince all the heirs to relinquish, by unanimous consent, the trust status of the land. My father discarded the letter, only to pull it out of the wastebasket later and file it away. Yet, the letter had awakened repressed memories and bitter emotions of growing up as an orphan in the Concho and Chilocco BIA schools in Oklahoma, of the death of his parents, of the severe conditions of the BIA boarding schools, and of the abandonment at age nine by his uncle, his legal guardian. CP tracts 87 and 100, he decided, would remain in trust. Besides, he still had not given up the idea of growing pecans on his family's land.

The legacy of CP 87 and 100 dates back, through written narratives, to well over 100 years prior to the General Allotment Act of 1887.[2] In the mid-1700s Mahteenose, the daughter of Menominee chief Ahkenepoweh, married a French and Indian fur trader named Joseph LeRoy at what is now Green Bay, Wisconsin. [3] Mahteenose (Madeline) and LeRoy are my six-times great grandparents. Their descendants followed the Potawatomi bloodline through successive generations, and continued the French and Indian marriage tradition until the early twentieth century when my grandmother, Ethel Haas, the daughter of Ellen and Joe Haas, married Arthur Welliver, an Englishman.

In 1906, Ethel Haas inherited one-fifth interest in both CP 87 and 100 when her parents died within days of each other. The four remaining one-fifth interests belonged to her siblings—Jess, Lucille, Ruben and Bernadine. Ethel and Arthur Welliver had one child, Jack Welliver, in 1914. Arthur died soon thereafter, and upon his mother's death in 1923, Jack inherited her interest in the two tracts.

By now, the reader is probably wondering why my father's family history is relevant in an article about the laws affecting allotment land. After considering Indian tribes' traditional relationship with the land (Mother Earth), and the centuries of tactics—disease, military force, political agreements—used by the dominant cultures to displace tribes from their traditional homelands and destroy their indigenous cultures, the relevancy will become clear. Today, because of the heirship problems emanating from the Dawes Allotment Act, Indian allotments are for the most part still held in trust by the federal government for the interest

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[2] *See generally* Andrew J. Vieau, Sr., *The Narrative of Andrew J. Vieau, Sr., in* 2 COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 219 (Reuban Gold Thwaites ed., 1888). Andrew Vieau, Sr., was the grandson of Mah-tee-nose (Madeline) and Joseph LeRoy. His mother, Angelique LeRoy married Jacques Vieau, a fur trader with the Northwest Fur Company. *Id.* at 218—221_._ The Vieau(x) family would become prominent in the history of the Citizen Band Potawatomi.

[3] *Id*. at 220, n3.

holders.[4] Some interests have become so diminished by fractionation that they have no significant economic value. Nevertheless, an owner of a diminutive interest may feel that the land itself connects him with his culture and family history and therefore makes it priceless, regardless of the size and actual economic value of the interest.

This paper will illustrate some of the typical issues faced today by interest owners of Indian allotment land by using my father's one-fifth interest in tracts 87 and 100 as a "hypothetical," in the context of the Citizen Band's history and removal to Oklahoma beginning in the early1800s.5 These issues encompass the use of the property, including leasing and partitioning; alienation rights (or lack thereof); disputes between interest owners; and the continuing trust status of many tracts of allotment land as a result of the inability to come to an amiable solution to the heirship problems. Also included in the discussion will be some of the solutions that are applicable either by the federal government, the tribes, or the individual interest holders.

I. The Beginning

Mahteenose,[6] daughter of the Menominee Chief Ahkenepowey and his Potawatomi wife, was born at the village of her father near what is now the town of Ashwaubenon, located near Green Bay, Wisconsin. Some time around the mid-1700s, Mahteenose married a Frenchman named Joseph LeRoy, who was engaged in fur trading with the village.[7] Mahteenose and LeRoy had a daughter named Angelique, who married Jacques Vieau(x) in 1786.[8] Within five years, Angelique gave birth to Madeline Jacques Vieau, the first of their eleven children.[9] In 1821, Madeline Vieau married Jacques Brisque Yott (sometimes spelled as Hyotte).[10] Yott was a clerk for John Lawe's store in 1820.[11] Madeline Vieau gave

[4] *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership,* 54 VAND. L. REV. 1559, 1618-19 (2001).

[5] CP 87 and 100, however, are rather "atypical" in that there are a small number (18) of interest holders. *Compare infra* text accompanying notes 115—123.

[6] Her baptismal name was Madeline, sometimes listed as Marguerite. It was common for the French to carry names forward throughout subsequent generations, often making research confusing. *See* e-mail from Susan Campbell, Citizen Potawatomi Genealogist, to author (Oct. 17, 2000, 18:15:00 PST) (on file with author) [hereinafter Campbell e-mail, Oct 17, 2000]; *see also* e-mail from Susan Campbell, Citizen Potawatomi Genealogist, to author (Oct. 19, 2000, 02:00:00 PST) (on file with author) [hereinafter Campbell e-mail, Oct 19, 2000].

[7] *See* Vieau, *supra* note 1, at 219.

[8] *Id*. Andrew Vieau states that his father, Jacques, was born May 5, 1757. *Id.* Presumably, Angelique was born around the same general time, so that Mahteenose could have married LeRoy within the same decade or before. *See* e-mail from Susan Campbell, Citizen Potawatomi Genealogist, to author (Nov. 04, 2000. 01:41:00 MST) (on file with author) [hereinafter Campbell e-mail, Nov 04, 2000]. The earliest spelling of the surname Vieau was Viau(d), the spelling that came over from France. *Id.* It has also been spelled Vieux, Vieaux, Veio, View, Jarveau and Jambo (a reference to Jacques Vieau). *Id*.

[9] Records indicate that Madeline Vieau was either born on April 1, 1801 in Milwaukee, or in 1800 in Green Bay. *See* Campbell e-mail, Oct. 17, 2000, *supra* note 5. She is the older sister of Andrew Vieau, Sr., born in 1818 at Green Bay. *See* Vieau, *supra* note 1, at 225.

[10] *See* Campbell e-mail, Oct. 17, 2000, *supra* note 5.

[11] *See id.* John Lawe ran a trading post in Green Bay, and later established a saw mill at Two Rivers, where he also owned a large tract of land on which the settlement was founded. *See* Vieau, *supra* note 1,

birth to six children, and her family was one of several Vieau families who were eventually removed to the Potawatomi reservation in Kansas.

During this period, federal Indian policy focused upon removal of the Indian tribes in the upper Mississippi River valley to the open frontier west of the river. In addition to pressure on the tribes of this area from advancing white settlement from the east, intertribal conflict threatened the peace on the western frontiers.[12] The United States sought to prevent such hostilities by having Indian tribes agree to specific boundary lines for the area each claimed.[13] To facilitate this, in the summer of 1825 the Treaty of Prairie du Chien[14] was signed to create a "firm and perpetual peace" among the Sioux, Sac and Fox, Chippewa, and other tribes including a portion of the Ottawa and Potawatomi tribes.[15]

The Prairie du Chien treaty had little lasting effect. For instance, two years after the Indian Removal Act of 1830 proclaimed an "exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi,"[16] white encroachment upon Black Hawk's village forced the Sac and Fox leader to react. Each year, upon returning from winter hunting, the Sac and Fox found their village burned-out, their cornfields fenced in, and their cemeteries plowed up.[17] When told by the Indian agent at nearby Rock Island that he should move across the Mississippi, Black Hawk took matters in his own hands and led a revolt against the white settlers.[18] Although "Black Hawk's war" [[19]] in Illinois was short lived, it served as a prelude to the Treaty of Chicago on September 27, 1833.[20]

In the Treaty of Chicago, the Potawatomi ceded nearly five million acres of land in Wisconsin and Illinois.[21] In exchange, they received a near acre-for-acre amount of land west of the Mississippi and east of the Missouri River in an area that the state of Missouri was trying to acquire for its own citizens.[22] In addition, the Potawatomi agreed to emigrate to the west as quickly as possible, for removal was now obligatory under the Act of 1830, and not an option as it had been in the earlier years.[23] The mandatory deadline for removal was September, 1836.[24] As a result, a large group of Potawatomi from southern Wisconsin left their lands in

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at 229, 231-32. Andrew Vieau, Sr. acquired the mill in 1843 and ran it as a mill and trading post until selling it three years later. *See id*.

[12] *See* FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 42 (Francis Paul Prucha ed., 3rd ed. 2000) [hereinafter DOCUMENTS].

[13] *See id*.

[14] Treaty with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, Potawattomie, Tribes, Aug. 19, 1825, 7 Stat. 272 [hereinafter Treaty at Prairie du Chien].

[15] *Id.* at pmbl., art 1.

[16] Indian Removal Act of 1830, 4 Stat. 411.

[17] *See* ROBERT M. UTLEY & WILCOMB E. WASHBURN, INDIAN WARS 135 (1987 ed.).

[18] *Id*.

[19] Black Hawk's revolt lasted less than three months. *See id.* at 135-39.

[20] Articles of a Treaty Made and concluded at Chicago, in the State of Illinois, between Lewis Cass and Solomon Sibley, Commissioners of the United States, and the Ottawa, Chippewa, and Pottawatamie, Nations of Indians, Aug. 29, 1821, 7 Stat. 218 [hereinafter Treaty at Chicago].

[21] *See* JAMES A. CLIFTON, THE PRAIRIE PEOPLE CONTINUITY AND CHANGE IN POTAWATOMI INDIAN CULTURE, 1665-1965, 241 (1998).

[22] *Id*.

[23] *See id.* at 257.

[24] *See id.* at 241-42.

1836 and moved west.[25] The following year they settled on the United Bands Reservation[26] in western Iowa at Council Bluffs.[27]

Among those who joined the movement to Council Bluffs were Madeline Vieau Yott's two brothers, Louis Vieau,[28] and Jacques Vieau, Jr. Presumably, Madeline and Jacques Yott's family was removed at the same time, for they ultimately ended up in Kansas with her brothers.[29] During their decade in Iowa, the United Bands were faced with two major concerns expressed by a Potawatomi leader named Half Day: "We have the enemy of the Sioux above, and the whiskey below, and can hardly tell which is the worst."[30] But the stay at Council Bluffs was short lived. The people of Iowa were pushing for statehood, and as history has shown, the Indians had to go. On June 17, 1846, the Council Bluffs Potawatomi agreed to move to the new National Potawatomi Reserve in Kansas within the next two years.[31] By the fall of 1847, the Council Bluff Potawatomi, including members of the Vieau family, were on their way to Kansas to join other Potawatomi who had migrated west after the Treaty of Chicago, and those of Chief Menominee's band who were removed from Indiana by military force in 1838.[32]

James Brisque Yott was approximately eleven years old when he left Wisconsin with his parents Madeline Vieau and Jacques Brisque Yott. At some point, presumably in Kansas (since he would have been less than twenty-one years old during the Council Bluffs period), he married his second wife, Angeline Phelps. In 1871, my great-grandmother, Ellen Yott was born to James and Angeline. Ellen Yott was the original allottee of Citizen Potawatomi Tract 87 (CP 87). She married Joseph Hass, the original allottee of CP 100, and they began a family in the late 1880's.

Joseph Haas was the son of Margaret Bourassa(s), the original allottee of CP 99 and Rueben Haas, a non-Indian. Margaret was the daughter of Mnitoqua, born about 1807 near Pokagon's[33] village in southern Michigan, and Leon Bourassa, a trapper of unknown heritage. Mnitoqua took the name of Margaret Bourassa upon marriage to Leon.[34] She was a named recipient of "one quarter

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[25] *See id*.

[26] *See id.* at 280, 317-19 (which included the United Bands of Odawa, Ojibwa, and Potawatomi).

[27] *See* CLIFTON, *supra* note 20, at 280-81.

[28] *See* Vieau, *supra* note 1, at 219 n.6. Louis Vieau became a Potawatomi chief in Kansas, and was the first person named on the 1863 Tribal Roll for [Kansas] Pottawatomie Indians. *See infra* note 37.

[29] *See* Campbell e-mail, Oct. 17, 2000, *supra* note 5; *see also* Campbell e-mail, Nov 04, 2000, *supra* note 7.

[30] CLIFTON, *supra* note 20, at 324.

[31] *See id.* at 281—3.

[32] A Catholic priests asked Chief Menominee to call all his people to come to service at the local church. *See* "GRANDFATHER, TELL ME A STORY" AN ORAL HISTORY PROJECT CONDUCTED BY THE CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA ix (Dr. Francis Levier & Patricia Sulcer eds., 1984) [hereinafter GRANDFATHER]. "When all the people were gathered inside the church the army came in and captured them all," and on September 4, 1838 the Potawatomi "Trail of Death" began. *Id*.

[33] Pokagon, a Potawatomi chief from the Saint Joseph River, and his followers remained on their small farms ("consolidated" into a small reservation in 1828) and were not removed west. *See* R. DAVID EDMUNDS, THE POTAWATOMIS KEEPERS OF THE FIRE 214, 229 (1979).

[34] Mnitoqua also went by the name of Marguerite. Indian records of the day also had the tendency to confuse individuals. It was not exceptional for names to be handed down in succeeding generations. *See* Campbell e-mail, Oct. 19, 2000, *supra* note 5. In this case, not only was Leon Bourassa's wife and daughter named Margaret (Marguerite) so was his mother and sister. *See* Petition

section of land, to be located under the direction of the President of the United States" by the 1826 Treaty with the Potawatomi (The Wabash Treaty) in which the Potawatomi ceded much of their land for annuities, education and assimilating goods.[35]

No records have been found as to the disposition of Mnitoqua's quarter-section. However, she and Leon Bourassa continued to live on the site of an old Potawatomi village in what is now Oak Park, Illinois, choosing to stay and tend the graves of her ancestors at what came to be known as "Indian Hill."[36] She stayed at least until the mid-1800s, several years after "Black Hawk's war," and the Treaties of Prairie du Chien and Chicago forced the others to remove.[37]

Margaret Bourassa, Leon's daughter,[38] evidently went with the others to Kansas for she married Rueben Haas there in Wabausee County and gave birth to Joseph Haas, my great-grandfather, sometime in the 1860s.[39] In 1893, she and her six children ultimately received Citizen Potawatomi allotments near Sacred Heart Church, located outside the town of Asher, Oklahoma.[40]

Following the consolidation of the various bands of Potawatomi Indians upon the Kansas reservation in 1846, arguments regarding allotment and citizenship between the acculturated and mostly Christian Council Bluff Potawatomis, and the more traditional Prairie Potawatomis politically divided the reservation.[41] In 1861, unable to resolve their differences, the reservation was physically divided in half by treaty and two new tribes were created: the "Prairie Band" which continued to hold its half of the reservation lands in common, and the "Citizens Band" which agreed to 160 acre allotments and citizenship.[42] These Citizen Band allotments in Kansas are recorded in the 1863 Tribal Roll for Pottawatomie Indians.[43]

The Potawatomi, sectionalized by the Treaty of 1861,[44] seemed doomed from the start. When Kansas Territory was organized in 1854 it diminished Indian Territory to the present state of Oklahoma, less the panhandle area. Three years after achieving statehood in 1861 (the same year Potawatomi allotments were made), the Kansas legislature called for the removal of all Indians from the state.[45] By this time, however, the Citizen Band was "suffering from the ravages of

from Joseph Coulter to the Bureau of Indian Affairs to Change the Blood Quantum of Mnitoqua 2 (June 22, 1992) (on file with author) [hereinafter Petition].

[35] Treaty with the Pottawatimies, Oct. 16, 1826, 7 Stat. 295-99.

[36] *See* Sherry Thomas, *Mounds Are All That Remains of Village,* PIONEER PRESS, August 24, 1994 (Oak Park, Ill.) at 15.

[37] *See Id.*

[38] *See,* Petition, *supra* note 33, at 2.

[39] *See Id.*

[40] *See Id.*

[41] *See* Lee Sultzman, *History,* Potawatomi History, *at* (last visited Sept. 23, 2001) [hereinafter Potawatomi History].

[42] *See id*. Band affiliation at the time of the 1861 treaty was not compelled. *See* REV. JOSEPH MURPHY, POTAWATOMI OF THE WEST: ORIGINS OF THE CITIZEN BAND 265-8 (1988). Membership after the treaty was thus based on the "arbitrary" decision of the individual. *See id.* The Secretary of the Interior continued to issue membership transfers between bands as late as 1869. *See id.*

[43] *See Kansas Kin,* RILEY COUNTY, KANSAS GENEALOGICAL SOCIETY, August 1979, at 50.

[44] Treaty with the Potawatomi, Nov. 15, 1861, 12 Stat. 1191.

[45] *See* Potawatomi History, *supra* note 40.

the vices of civilized society," predominantly liquor consumption, and were also threatened by further encroachments from white society.[46]

The land patents issued to the Citizen Potawatomi after allotment were subject to virtually no safeguards against alienation.[47] As citizens, they secured title in fee to the allotment, and the land was legally subject to the same property taxes, levies and sale provisions as the lands of other citizens.[48] As a result, "being financially pressed to survive," they often sold their allotments for whatever they could get.[49] Loss of land from delinquent taxes and dealings with unscrupulous whites forced widespread alienation of their lands.[50] These depredations went unpunished in the courts.[51] During this period, the Citizen Band Potawatomi were referred to by one Indian agent as "quasi-citizens," because their special status in the courts "failed to recognize them as United States citizens with the full import of the term."[52]

Fortunately for the Citizens Band, Article 8 of the 1861 treaty provided the basis for another treaty whereby any "band or bands of the Pottawatomie Nation" which should desire might obtain new lands from the federal government.[53] In 1867, the Citizen Band initiated the Article 8 "escape clause option" and negotiated a treaty with the federal government for a new reservation in Indian Territory, "not exceeding thirty-miles square," and to be patented to the "Pottawatomie Nation."[54] As a result, the Citizen Band sold what lands they had in Kansas, and in the early 1870s began moving to the new reservation in Indian Territory, in the area now known as Shawnee, Oklahoma.[55] Among the Citizens who moved from Kansas to Indian Territory were the families of Joseph Haas and Ellen Yott.

II. The Allotment

The Indian policy of President Jackson's administration concentrated on the removal of Indians to the unorganized and, in theory, unpopulated lands west of the Mississippi, thereby clearing the way for the expansion of white settlement in the east.[56] In 1834, the Western Territory bill proposed a sort of Indian commonwealth, to be governed by a confederation of tribes.[57] Under the bill, the entire state of Kansas, most of Oklahoma, and parts of Nebraska, Colorado and

[46] MURPHY, *supra* note 41, at 290.
[47] *See id.* at 283-84. Article II of the 1861 Treaty applied protection against taxation, yet the process of naturalizing the Potawatomi as citizens in Article III left a loophole for the alienation of allotments. *Id.*
[48] MURPHY, *supra* note 41, at 289.
[49] *Id.* at 284.
[50] *See id.*
[51] *Id.* at 284-85.
[52] *Id.* at 288.
[53] *See id.* at 252-53.
[54] Treaty with the Potawatomi, Feb. 27, 1867, art. 1, 15 Stat. 531.
[55] *See* Potawatomi History, *supra* note 40.
[56] *See* DOCUMENTS, *supra* note 11, at 71-72 (reprinting a portion of President Jackson's annual message to Congress, December 7, 1835, favoring Indian removal).
[57] *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 771 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S].

Wyoming would comprise "Indian territory."[58] Although the bill was not enacted, and no Indian government was ever established, the name gradually came into common use to describe the area inhabited by Indians, and Congress frequently used the term in statutes and boundary definitions of Indian Territory.[59] The proposed establishment of an Indian "commonwealth" or "territory" failed largely because the unorganized territory west of the Mississippi rapidly disappeared as territorial governments and states were established there.[60] By 1868, the diminishment of the original Indian Territory was nearly complete;[61] and in Kansas, the Citizen Potawatomi were preparing for their final emigration to Oklahoma, the last remaining unorganized area reserved for tribes in the lower forty-eight states.[62]

Yet the Kansas experience was soon to begin anew. Illegal invasions of settlers claiming the right to homestead in Oklahoma Indian Territory eventually forced the President and Congress to open the land.[63] In March 1889, Congress authorized homesteading in Indian Territory,[64] and the President proclaimed the lands open to settlement. At noon on April 22 of that same year,[65] the land rush opened the "unassigned lands" (lands in Indian Territory yet to be opened to white settlement) comprising the area around what is now Oklahoma City. [[66]] The following year, Congress enacted the Oklahoma Organic Act establishing the Territory of Oklahoma in the western portion of Indian Territory, and diminishing Indian Territory to the lands held by the Five Tribes and the Quapaw Agency Tribes in the eastern portion of Oklahoma.[67] The Act also established a typical territorial government in western Oklahoma.[68] Shortly thereafter, federal policy began the allotment of Oklahoma Territory pursuant to the General Allotment Act (Dawes Act)[69] and special agreements and acts with the tribes. [[70]]

As illustrated by the Citizen Potawatomi experience in Kansas, the allotment concept was not new when the Dawes Act formalized the process. Many treaties executed before that time reserved certain tracts from ceded tribal lands to individual Indians or families.[71] These early voluntary allotments were commonly called "reservations."[72] Often, these individual reservations did not fall within the

[58] *Id.*
[59] *Id.* at 772.
[60] *Id.* at 771.
[61] *Id.* at 772.
[62] *Id.*
[63] *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 255 (abr. ed. 1984) [hereinafter THE GREAT FATHER].
[64] Act of March 1, 1889, ch. 333, § 1, 25 Stat. 783. *See also* THE GREAT FATHER, *supra* note 62, at 255.
[65] THE GREAT FATHER, *supra* note 62, at 256.
[66] Pipestem & Rice, *The Mythology of the Oklahoma Indians,* 6 AM. INDIAN L. REV. 259, 276 (1978).
[67] *See* Act of May 2, 1890, ch. 182, 26 Stat. 81. *See* COHEN'S, supra_ note 56, at 773.
[68] The Organic Act expressly preserved tribal authority and federal jurisdiction in both Indian and Oklahoma Territories. COHEN'S, *supra* note 56, at 773.
[69] General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).
[70] *See e.g.,* S.T. BLEDSOE, INDIAN LAND LAWS 237-40 (ed. 1979) (describing the agreements of the Absentee Shawnees and Citizen Potawatomis).
[71] COHEN'S, *supra* note 56, at 129.
[72] *Id.*

limits of a tribal reservation, but were scattered among white settlements where the Indians were "consequently exposed to all the evils resulting from unrestrained intercourse with the whites."[73] As such, they were not progressing towards assimilation, but were "rapidly deteriorating" due to the influence of white society.[74] The outcome of this initial allotment period was the break-up of tribal lands and tribal existence. As these Pre-Dawes Act "experiments" continued, the allotment process assumed a standard pattern that would ultimately serve as a model for the later legislation.[75]

By 1879, Congress recognized the early Indian allotments as failures.[76] Cohen's Handbook states that

> [Much] of the allotted land quickly passed from Indian allottees into the hands of white traders and land companies. Often Indians were defrauded of their lands. Some of the larger land swindles resulted in national scandals and congressional investigations. Proponents of allotment blamed the failure chiefly on the alienability of allotments, asserting that the results would differ if the lands were made inalienable.[77]

The Dawes Act ended the experimental phase of the breakup of tribal lands and existence, and made mandatory allotment of Indian reservations the official policy of the federal government.[78] Eastern philanthropists wanted to civilize the Indian, and western settlers wanted Indian land.[79] By making allotment of reservations compulsory, the government sought to accomplish both ideals: assimilate Indians into white society and at the same time open previously "restricted" Indian lands for white settlement.[80]

Section 1 of the Dawes Act authorized the President to allot reservation lands to individual Indians. Specific amounts were delineated as follows: one section is 640 acres; each head of family received one-quarter of a section (160 acres); each single person over eighteen, and each orphan under eighteen, received one-eighth of a section (80 acres); and each living person under eighteen, and each person who may be born prior to the date of the Presidential order directing allotment of a reservation received one-sixteenth of a section (40 acres).[81]

Section 2 of the Dawes Act permitted Indian allottees to select their own land, unless impracticable, in order to maintain prior improvements.[82] Section 5 addressed the alienability problem of the early Indian patents by restricting the title to allotments to be held in trust by the federal government for a period of twenty-five years, during which time encumbrances or conveyances were void.[83] If an

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[73] MURPHY, *supra* note 41, at 252 (citing Annual Report of the Commissioner of Indian Affairs 6 (1860)).
[74] *Id.*
[75] COHEN'S, *supra* note 56, at 129-30.
[76] *Id.* at 130 n. 30 (citing COMM. ON THE TERRITORIES, REPORT, H.R. REP. No. 188, 45th CONG., 3d SESS. (1879)).
[77] *Id.* at 130 (citations omitted).
[78] *Id.* at 131.
[79] *Id.* at 132.
[80] *Id.*
[81] *See* COHEN'S, *supra* note 56, at 133.
[82] *Id.* at 131.
[83] *See id.*

original allottee died within the trust period the allotted lands would descend according to the law of the state or territory where the lands were located. Section 5 further provided that surplus unallotted lands be sold to the federal government, which enabled these lands to be open to settlement.[84]

Section 6 subjected allottees to the jurisdiction of the state or territory in which they resided, and also granted citizenship to allottees and other "civilized" Indians.[85] Section 8 exempted the Five "Civilized" Tribes and other tribes residing in Indian Territory.[86]

The Dawes Act applied to the tribes in Oklahoma Territory through separate agreements with the United States.[87] Each agreement was made specific to the tribe and, under the provisions of the Dawes Act, defined the parameters of selecting individual allotments, who would take them, and designated any sections that were to be set apart for other purposes or organizations.[88] The agreements also ceded the remainder of the reservations to the United States.[89] Title of the allottee was perfected by the issuance of a patent, subject to the provisions and restrictions of Section 5.[90]

The Oklahoma Organic Act had been in effect for less than two months when the agreement with the Citizen Band on June 25, 1890, approved by the Indian Appropriation Act of March 3, 1891,[91] allotted the Citizen Potawatomi Reservation. Article One of the June 25th agreement provided that the Citizen Band agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest" to the unallotted portion of their reservation.[92] Article Two provided for specific sections of the reservation to be set apart for schools, and for use by the preexisting Sacred Heart Mission.[93] The article also confirmed tracts of lands to those who had previously improved the land, subsequent to the land purchase stipulated in the1867 treaty.[94]

Article 3 provided that 1400 members of the Citizen Band shall take allotments.[95] Article 4 provided that the government would pay the Citizen Band $ 160,000 as consideration for the lands ceded, to be used for making homes and

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] On March 2, 1871, the federal government abolished the policy of treaty making with Indian Tribes. The Act of March 2, 1871, 16 Stat. 566. Two main reasons were stated: humanitarian attacks on the treaty system; and the House of Representatives' objection to the concentration of authority for dealing with Indian tribes in the Senate (the House's voice in Indian affairs was limited to funding the deals made in the treaties ratified by the Senate). THE GREAT FATHER, *supra* note 62, at 164-65.
[88] *See e.g.,* BLEDSOE, *supra* note 69, at 237-40.
[89] *Id.*
[90] *Id.* at 216-17..
[91] 26 Stat. 1016.
[92] *See* 1Vine Deloria, Jr. & RAymond J. DeMallie, Documents of American INdian Diplomacy 326 (1999) [hereinafter DELORIA & DEMALLIE].
[93] See generally, REV. JOSEPH MURPHY, THE BENEDICTINE FOUNDATIONS OF THE SACRED HEART MISSION AND ST. GREGORY'S ABBEY AND COLLEGE (1987) (describing the influence Sacred Heart had upon the Citizen Band).
[94] Deloria & DeMallie, *supra* note 91, at 327.
[95] *Id.*

improvements on the allotments, and also provided an additional sum of $119,790.75 at the discretion of the government.[96]

The immediate impact of the Citizen Potawatomi Agreement was the termination of the reservation and the creation of individual allotments by which Citizen Potawatomi Tracts 87 and 100 came into the possession of my ancestors, Ellen Yott and Joseph Haas. Under the provisions of the General Allotment Act, Ellen Yott, approximately 19 years of age, received one-eighth of one section (80 acres), and Joe Haas, approximately 23 years old, received one-quarter of one section (160 acres). Although the specific details of their marriage are unclear, it is probable that they were married (at least at common law) at the time of allotment because Joe Haas received 160 acres, the amount allotted to each head of family, and because although not numerically sequential, the survey of the reservation lands created CP Tracts 87 and 100 side by side.

At the time of its enactment, the greater general impact of the Dawes bill was unforeseen. Subsequent amendments to the Act enabled alienation of allotments before the expiration of the twenty-five year trust period. For example, in 1902, Congress authorized the Secretary of the Interior to permit heirs to sell their lands upon inheritance.[97] And, in 1906, the Burke Act authorized the Secretary to issue patents in fee simple to any allottee who was "competent and capable of managing his or her affairs." A "competent" allottee was an Indian with a blood quantum comprised of 50% or more white blood.[98] Finally, one year later, Congress authorized the sale of lands by original allottees, a full five years before the termination of the original statutory trust period.[99]

The combination of these amendments to the Dawes Act (the original allottee's, or heirs thereof, new power to alienate their lands provided many opportunities for non- Indians to negotiate purchases often at a disadvantage to the owner),[100] and the government's policy of appropriating and ceding surplus lands through treaties and agreements, effectively reduced the national Indian land base from 138 million acres in 1887 to 48 million in 1934.[101] Then, on June 18, 1934, the pendulum of federal Indian policy swung the opposite direction with the passage of the Indian Reorganization Act (IRA).[102]

The purpose of the IRA was to end allotment of tribal lands, extend the existing periods of trust and restrictions on alienation of tribal lands, increase tribal landbases, permit tribes to set up legal structures designed to facilitate and encourage self-government and self-determination, issue charters of incorporation to petitioning tribes, and authorize tribes to organize and adopt constitutions and by-laws, subject to the approval of tribal members and the Secretary of the Interior.[103] Oklahoma tribes were exempt from many of the provisions of

[96] *Id.* at 328.
[97] 25 U.S.C. § 379 (1994).
[98] Act of May 8, 1906, 34 Stat. 183. *See also* Bobroff, *supra* note 3, at 1610-11.
[99] 25 U.S.C. § 405 (1994).
[100] Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act,* 85 IOWA L. REV. 595, 608. n. 54 (2000).
[101] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 21 (2d ed. 1988).
[102] Indian Reorganization Act, June 18, 1934, Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 et seq.) (1934).
[103] COHEN'S, *supra* note 56, at 147-49.

the IRA.[104] However, two years later after the passage of the IRA, Congress passed the Oklahoma Indian Welfare Act (OIWA) that authorized the organization of Oklahoma tribes in a manner similar to the IRA.[105] Unfortunately, while the IRA abandoned the policy and practice of allotment, the legacy of the Dawes Act remains in fractionated interests in the original allotted tracts, the result of successive generations of heirship divisions. Today, the remaining allotments held in trust for members of the Citizen Potawatomi Nation are no exception.

III. Fractioned Lands

The legacy of fractionation of Indian lands evolved from the Dawes Act. The Act originally prohibited any conveyance (e.g., sale, gift, devise, exchange, lease or mortgage, in other words, lands were completely inalienable) of an allotment before the expiration of the twenty-five year trust period.[106] During this period, (designed to expire in 1912 but subsequently shortened by successive amendments to the Dawes Act, then finally extended under Section 2 of the IRA), all allotted lands would descend according to the law of the state or territory where the lands were located.[107] Even today, the heirs of Indians who die intestate are determined through administrative review by examiners of inheritance employed by the Bureau of Indian Affairs (BIA).[108] Therefore, until the 1910 amendment authorized devise through will,[109] the deceased allotment owner's land descended to all his or her heirs as tenants in common. This guaranteed that some allotted land quickly came to be held by multiple owners, some tracts so fractionated that they became effectively unusable.[110] The 1910 Amendment allowing the testamentary devise of allotment land helped reduce the heirship problem if the allottee made a will. Regulations prescribed by the Secretary of the Interior[111] authorized the examiners of inheritance to review each will either before or after the testator's death before it could be approved or executed.[112] The decision of the examiner is final unless appeal is taken to the Secretary of the Interior, upon which it is handled through the Office of the Solicitor General.[113] A probate hearing is conducted, providing notice and fair opportunity to be heard to the parties involved.[114] If the will is finally disapproved, the allotment descends according to the law of intestate succession of the state where the property is located.[115]

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[104] 25 U.S.C. § 473 (1994).
[105] COHEN'S, *supra* note 56, at 774-75. Many allotted Indians in Oklahoma originally opposed the IRA because they felt it returned them to a condition of tribal ownership and segregation from the white community. THE GREAT FATHER, *supra*note 62, at 326-27.
[106] *See* Ch. 119, § 5, 24 Stat. 389 (codified at 25 U.S.C. § 348 (1994)).
[107] *See id*.
[108] Ethel J. Williams, Comment, *Too Little Land, Too Many Heirs--The Indian Heirship Problem,* 46 WASH. L. REV. 709, 721-22 (1971).
[109] Act of June 25, 1910, Ch. 431, § 2, 36 Stat. 856 (codified at 25 U.S.C. § 373 (1994)).
[110] Bobroff, *supra* note 3, at 1616.
[111] 25 C.F.R. 15.28 (1970).
[112] *Id.*
[113] *See* Williams, *supra* note 107, at 722.
[114] *See id.*
[115] *See* 25 U.S.C. § 373 (1994).

By the time the 1910 amendment to the Dawes Act passed, the effects of descent under state intestacy law, as applied to Indian allotments, were already wide-spread. The problem, however, became apparent soon after the 1887 enactment. As early as 1892, agents on Indian reservations reported that:

> [U]pon 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 up. Not being alienable there can be nothing done.[116]

A frequently cited, relatively modern situation, illustrates these early observations. During the early 1960's, a 116-acre parcel on the Yankton Sioux Reservation was owned as tenants in common by ninety-nine heirs of the original allottee.[117] The largest interest was approximately 7%, and if partitioned, would have been roughly equivalent to eight acres.[118] The interest was appraised at $586.00.[119] The smallest interest was approximately .000534 %, and valued at exactly sixty cents.[120] The owner of the smallest interest received a check for seven cents as his share of a lease fee, and found that it would cost him ten cents to cash the check.[121]

Similarly situated, Tract 1305 of the Sisseton-Wahpeton Lake Traverse Reservation is "one of the most fractionated parcels of land in the world."[122] Consisting of forty acres, it produces $1,080 in income annually and is appraised at $8,000.[123] Tract 1305,

> has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,849,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming 439 owners could agree) for its estimated $8,000 value, he would be entitled to $ .000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.[124]

As these examples show, the practical effect of the allotment program was the progressive fractionation of ownership of the land. When multiple interest owners hold reservation allotments in common the majority cannot make effective

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[116] Bobroff, *supra* note 3, at 1616 (citing the statement of the Puyallup Reservation Indian Agent in 1892 ANN. REP. OF THE SECRETARY OF THE INTERIOR 1930).
[117] Bobroff, *supra* note 3, at 1617.
[118] *Id.*
[119] *Id.*
[120] Williams, *supra* note 107, at 712, n. 11.
[121] *Id.* at 712, n. 12.
[122] *Hodel v. Irving*, 481 U.S. 704, 713 (1987) (citing M. LAWSON, HEIRSHIP: THE INDIAN AMOEBA (1982), reprinted in *Hearing on S. 2480 and S. 2663 Before the Senate Select Committee on Indian Affairs*, 98th Cong., 2d Sess., 85 (1984)).
[123] *Id.*
[124] *Id.*

use of their property.[125] A primary reason for this is the typical size of the tract. Allotments normally range from 80 to 160 acres, and their relatively small size impedes revenue-producing agricultural, industrial or mineral development. [126] Moreover, highly fractionated allotments are rarely partitioned.[127] Due to the typically small size of the tracts, an individual cotenant in common usually could not make economical use of the land. [[128]] Instead, the entire tract is generally leased to non-Indian farmers or ranchers, or left underused or idle.[129]

Unlike common law co-tenancy rules, where any concurrent owner may sell, partition, or lease a fractional interest without unanimous consent by all cotenants,[130] federal law provides restrictions of the same on Indian allotment lands. This frequently creates enormous difficulties where lost or recalcitrant cotenants exist.[131] Under present law, sale of allotment tracts generally requires the unanimous consent of the owners.[132] Similarly, partitioning of fractional interests is restricted,[133] and has been made generally ineffective by the cost and difficulty of partitioning allotments.[134] The cost is prohibitive unless the land is valuable and all owners are solvent.[135] Even if the land were worth the cost of partitioning and funds were available, missing, minor, incompetent, or recalcitrant heirs often prevent partition under present law.[136]

Unanimous consent also is needed to lease allotment land.[137] However, in certain circumstances the Secretary of the Interior may lease allotted lands in heirship status "when the heirs or devisees… have not been determined," or when the "lands are not in use by any of the heirs and the heirs have not been able to agree upon a lease."[138] The Secretary has broad authority over grazing permits, as well as the authority to lease allotment land for the purposes of mining, oil and gas production, and timber harvesting, subject to the provisions of the Federal Code of Regulations.[139] The Secretary also has the power to grant rights-of-way across trust

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[125] *See* Williams, *supra* note 107, at 710.
[126] *See* Guzman, *supra* note 99, at 609.
[127] *See* Bobroff, *supra* note 3, at 1617.
[128] *See* Williams, *supra* note 107, at 715.
[129] *See* Bobroff, *supra* note 3, at 1617.
[130] *See generally* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 340-51(4th ed. 1998) (for a good synopsis of common law co-tenancy principles).
[131] *See* Guzman, *supra* note 99, at 608.
[132] *See* 25 U.S.C. § 483 (1994) ("The Secretary of Interior… is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, [and] to remove restrictions against alienation… with respect to lands or interests held by individual Indians). *But see* Sampson v. Andrus, 483 F. Supp 240 (D.S.D. 1980) (the court finding the narrow administrative interpretation of "upon application of the Indian owners" defeats the intent of the statute, thereby applications made by less than all the owners should be given consideration).
[133] *See* 25 U.S.C. § 483. The Act also applies to the partition of Indian allotments. However, in *Sampson* the court granted the Secretary of the Interior the discretion to authorize allotment partition upon the application of a single cotenant.
[134] *See* Williams, *supra* note 107, at 729.
[135] *See id.* at 715.
[136] *See id.* at 729
[137] *See* Act of Aug. 9, 1955, ch. 615, 69 Stat. 539 (codified at 25 U.S.C. § 415 (1999)).
[138] 25 U.S.C. § 415a (1994). *See also* COHEN'S, *supra* note 56, at 625.
[139] *See generally* COHEN'S, *supra* note 56, at 624-26.

and restricted allotment lands.[140] The consent of a majority of owners is needed unless the Secretary "finds that the grant will cause no substantial injury to the land or any owner."[141] Other statutes authorize the Secretary to grant particular kinds of rights-of-way, for example, for the construction of roads and highways, and for railway, telegraph, and telephone lines.[142] Just compensation, "but not less than fair market value," must be paid to all allottees for a right-of-way unless waived.[143]

Inflexible adherence to statutory provisions and restrictions, such as those mentioned above, resulted in the highly fractionated condition of allotment lands presently held in trust or restricted. Proponents of the Dawes Act never foresaw that these same tracts of land would still be subject to inheritance over 100 years later.[144] They expected that by the time the trust period expired these tracts would be managed by individual Indian landowners who had integrated themselves into mainstream American society.[145] Instead, the trust period was repeatedly extended when it became apparent that Indian fee owners were losing their land to unscrupulous white "land sharks," local non-Indian taxing authorities, and poor management.[146]

In response to the Dawes legacy, the BIA assumed the role of real estate manager, at great expense to the federal government. This forced the heirs into the role of powerless absentee landlords, a situation that perpetuates the dependent status of Indian allottees and often results in bitterness and suspicion of the agency.[147] In executing the federal government's trust responsibility over Indian lands, the BIA and the Secretary of the Interior are charged with the maintenance of ownership records and the approval all sales, leases, gifts, and rights-of-ways on allotted lands. [148] Additionally, the Interior administers and monitors lease agreements and collects and distributes income to the appropriate allottees.[149] As a result, the method of dividing interests on paper has compelled the BIA to spend 50 to 75% of its $33 million 1999 realty budget to administer fractional interests in allotted lands.[150] A small portion of this annual budget goes to administer CP 87 and 100.

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[140] *See* 25 U.S.C. § 323-28 (1994).
[141] COHEN'S, *supra* note 56, at 626 (citing 25 U.S.C. § 324).
[142] 25 U.S.C. §§ 311-322a.
[143] COHEN'S, *supra* note 56, at 626, n. 159 (citing C.F.R. § 161.12 (1980)).
[144] *See* Bobroff, *supra* note 3, at 1618.
[145] *See id.*
[146] *Id.*
[147] *See* Williams, *supra* note 107, at 718-19. *See generally, Cobell v. Babbitt*, 52 F. Supp.2d 11 (D.D.C. 1999) (involving multi-billion dollar class action suit filed against the Departments of Interior and Treasury alleging failure to perform trust responsibilities related to collection and distribution of income from allotted lands). Recently, the D.C. Circuit Court ruled that the federal government breached its fiduciary duties to allotment owners and is liable to provide an accounting of mismanaged funds. *Cobell v. Norton*, 240 F.3d 1081, 1105-06 (D.C. Cir. 2001). As of this writing, Secretary Norton and other members of the Interior Department are in the D.C. District Court on contempt charges stemming from the failure to address the mismanagement of approximately $10 billion of Indian trust accounts. *See generally,* Indian Trust: *Cobell v. Norton*, at http://www.indiantrust.com (tracking the progression of the *Cobell* litigation in federal court) (last visited March 24, 2002).
[148] *See* Bobroff, *supra* note 3, at 1619.
[149] *See id.*
[150] *Id.* (citing *Joint Hearings of the House of Representatives and the Senate Committee on Indian Affairs on S. 1586* (1999) statement of Kevin Gover, Assistant Secretary of the Interior, Bureau of Indian Affairs).

IV. The Legacy Applied to CP 87 and 100

Citizen Potawatomi Allotments Tracts 87 and 100 are typical in that they are Indian lands held in trust by the federal government, and are thereby subject to the same statutory rules and regulations that led to the fractionation of Indian lands across the country. However, the relatively small number of individual interests (eighteen) in the two tracts does not cause the level of administrative headache to the BIA, the Tribe, and the heirs, as does the Yankton Sioux, Sisseton-Wahpeton Lake Traverse, and other similarly situated reservations. Nevertheless, the legacy of the Dawes Act compels the BIA, the Citizen Potawatomi, and the heirs of CP 87 and 100 to cope with the same problems experienced by highly fractionated Indian allotment lands.

Joseph Haas and Ellen Yott, original allottees of CP 87 and CP 100, both died intestate after the turn of the 20th century. Their allotments descended to their five children in equal interests under Territory of Oklahoma law, pursuant to Section 5 of the General Allotment Act.[151] It is worth restating that prior to 1910 Indian allotments were not devisable by will.[152]

Ethel Haas, born in the early 1890's, inherited a one-fifth interest in both CP 87 and 100 upon the death of her parents, or approximately thirty-two of the combined 160 acres. In 1914, she gave birth to my father, Jack Welliver. Within the next decade, Ethel entered an asylum at Cheyenne Arapaho Indian Hospital in Oklahoma where she died of consumption in 1923. Jack was eight years old. By this time, Ethel's husband Arthur had already succumbed to consumption. My father was enrolled at Concho Indian Boarding School while his mother was hospitalized. After she died, he grew up an orphan, finishing school at Concho, and then attending Chilocco Agricultural High School until graduation.[153]

Ethel Welliver died intestate. My father, an only child, was her only heir and therefore inherited her interest in CP 87 and 100 under Oklahoma State intestacy laws. Had Arthur Welliver survived his wife, he and my father would have split her interest equally. However, after probate determination by BIA inheritance examiners, Arthur Welliver, a non-Indian, would have received his interest in fee simple. This occurs when a deceased allottee or heir is "survived by a white spouse, the Department [of the Interior] has no supervisory control over the share that goes to the white spouse. That interest in the land is alienable and taxable."[154] In other words, "[w]hen a probate closes and a portion of the trust property is inherited by a non-[I]ndian [that interest] goes out of trust" and is therefore no longer susceptible to federal administration.[155] Although this situation

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[151] *See supra* text accompanying notes 86-89.

[152] *See supra* text accompanying notes 107-113.

[153] My father's guardian upon the death of his mother was one of Ethel's brothers. In the words of my father " after spending the first summer with him after my mother died, he took me back to school [Concho] and I never saw or heard from him again." Interview with Jack Welliver, in San Luis Obispo, Cal. (Oct. 25, 1999).

[154] W. F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED 537 (1952). *See also* COHEN'S, *supra* note 56, at 619.

[155] E-mail from Jessica Lantagne, Oil and Gas Realty Specialist, Citizen Potawatomi Nation, to the author (Nov. 27, 2000, 09:36:00 MST) (on file with author) [hereinafter Lantagne e-mail].

did not occur upon the death of Ethel Welliver, several interests did pass to non-Indians upon the death of some of her siblings and their heirs.

Moving forward from the first two decades of the twentieth century to the present, the land does not seem to have changed much in a hundred some odd years. CP 87 and 100 are adjoining tracts of land divisible only by a dirt road that appears to bisect the property nearly in the center. As such, they are treated as a single unit for administration purposes. My father recalls that some of the allottees lived on the land when he was little, but he doesn't recall whom, when, or how long they lived there. When I visited the land this past October, there was no visible evidence of prior inhabitance except for an obvious clearing of a portion of the land; however, no foundations, abandoned dwellings, or remnants of anything else existed to indicate prior occupation. I suppose this is not too unusual. Evidently, owners often would stay on a property for a while "and then move on without ever contacting or being bothered by anyone."[156] Accordingly, CP 87 and 100 appeared to have been unoccupied for quite some time, except by the "squatter" my dad has frequently been known to talk about. It turns out, though, that the squatter probably was the person occupying the adjacent parcel on the south end of the lot, who used the dirt road as a short cut to get home. He did, at least, until Bob Lester put a lock on the gate.

Bob Lester is the neighbor to the west side of the property. He currently holds a dry land farming and grazing lease of CP 87 and 100 pursuant to Act of Aug. 9, 1955, and existing regulations.[157] The current five-year BIA lease agreement[158] describes CP 87 and 100 in three parts as follows: 1) eighty-two acres timbered areas with approximately twenty acres open native pasture; 2) ten acres open native and Bermuda grass pasture; and 3) forty-eight acres open areas established to Bermuda grass pasture. Accordingly, Mr. Lester grazes cattle on the 160-acre tract.[159] The lease provides for the annual payment of $954.00 in consideration to the BIA.[160] It is interesting to note that Appendix "A" of the lease is a discovery clause that provides "should any previously unrecorded and/or… undetected cultural material such as pottery, arrow heads, spear points, bones" etc., "be discovered," all activity in the area "must cease" and be reported to the Citizens Band Potawatomi Tribe Land Operations Office.[161] "Failure to comply… is considered a violation of the Archeological Resources Protection Act and potentially the Native American Graves Protection and Repatriation Act."[162] The

[156] *Id.*
[157] 25 C.F.R. 162.1 (2000) (leasing and permitting).
[158] 25 U.S.C. § 403 (1994) ("Any Indian allotment held under trust may be leased… for a period not to exceed five years, subject to… rules and regulations as the Secretary… may prescribe") (Allotment lease on file with tribe and author).
[159] If during the lease period an interest holder in the allotment wanted to use the land for some other purpose, for example, growing pecans, the permission of the lessee must be obtained first. The use cannot interfere with the purposes for which the land is leased. Interview with Jessica Lantagne, Oil and Gas Specialist, Citizen Potawatomi Nation, in Shawnee, Okla. (Oct. 12, 2000) [hereinafter Lantagne interview].
[160] *See* Allotment lease (on file with tribe and author).
[161] *Id.*
[162] *Id. See also,* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-13 (Supp. 1991).

addition of this clause indicates that both the Tribe *and* the BIA recognize the land as being uniquely Indian and culturally significant.

According to Jessica Lantagne of the Citizen Potawatomi Realty Office, the Fair Market Value of CP 87 and 100 for farming and grazing purposes is $640.00 and $700.00 respectively.[163] These values are based on the entire allotment as a whole, not actual value per acre.[164] The annual rental income perhaps reflects this because a portion of the entire area is barren of vegetation and not suitable for grazing. The $1340.00 total does not reflect the actual value of the land if it were to be sold as is.[165] Moreover, this total reflects surface value only, and would not include the value of any undiscovered mineral, gas, or oil.[166] Several years ago, the property was tested for oil or gas with negative results. Had the test result been positive, the Bureau of Land Management (BLM) would conduct a mineral appraisal and specify a standard value per acre.[167] Then, at the discretion of the Secretary of the Interior, advertisements for competitive bidding would be placed.[168] Oil and gas leases would then be negotiated, provided that the winning bid met or exceeded the BLM price per acre.[169] Mineral leasing may be also awarded based on competitive bidding at the discretion of the Secretary.[170]

In addition to the farming and grazing lease, two utility easements are leased to the Oklahoma Gas and Electric Company pursuant to federal statute and regulations.[171] Unlike the grazing permit that leases both tracts as a single unit for a five-year lease period, the easements are leased in perpetuity and are specific to the character of the individual allotment and the easement. For example, CP 87 contains an easement 100 feet wide, 93.76 rods long, encompassing 3.58 acres, and having a transmission line anchor site within.[172] Annual rental value is $415.00.[173] CP 100 contains an easement 100 feet wide, 37.39 rods long, encompassing 1.42 acres.[174] Annual rental value is $315.00.[175] CP 100 generates less revenue because less acreage is utilized and there is no transmission line anchor site located on the tract.

Like revenues generated by other lease agreements, easement payments are made to the BIA. The BIA then issues annual checks to the Indian heirs holding undivided interests in the trust land.[176] The amount of each check is calculated on

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[163] Lantagne e-mail, *supra* note 154.
[164] *Id.*
[165] *Id.* At the time of this writing, the author had not yet acquired the actual appraisal value of the land from the BIA.
[166] *Id.*
[167] Lantagne interview, *supra* note 158.
[168] *See* 25 C.F.R. § 172.4 (1980). For a general overview of allotment leasing *see* COHEN'S, *supra* note 56, at 624-26.
[169] Lantagne interview, *supra* note 158.
[170] *See* 25 C.F.R. § 172.6 (1980).
[171] *See* 25 U.S.C. §§ 312, 319, 323, 324 (1994); *see supra* text accompanying notes 138-141.
[172] *See* Department of the Interior, Office of Indian Affairs Allotment Record CP 87 and CP 100 (on file with the Tribe and the author).
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] Lantagne interview, *supra* note 158.

the individual heir's percentage of interest in the land.[177] Based on the lowest common denominator of 600, my father owns a 0.20 (120/600), or twenty percent interest in the combined 160 acres of CP 87 and 100 (as Ethel's only heir he inherited her entire 1/5 interest in the original allotment, and thereby owns the greater share today).[178] The smallest interest, owned by four individuals, is 0.005 (3/600), or one-half of one percent.[179] Accordingly, my father receives a larger portion of the annual lease BIA payments. My analysis of the individual payments must end here because, unlike the examples illustrated in Yankton Sioux, Sisseton-Wahpeton Lake Traverse above,[180] the records at the Tribal Realty Office are not a matter of public record.

The Department of the Interior's trust responsibility pursuant to the Dawes Act, subsequent amendments to the Act, and federal statutory regulations, extends only to Indian heirs. When a non-Indian inherits, the interest in the allotment is no longer restricted and becomes a fee simple patent. If the land was previously leased, after probate closes it becomes the responsibility of the individual lessee(s) to contact and make payments to the non-Indian landowner(s). [[181]] The land itself, though, is still restricted in the sense that the non-Indian cannot alienate or partition the property without the consent of all allottees.[182]

Presently there are three non-Indian interest owners of CP 87 and 100. Absent unanimity, the non-Indian owner cannot legally do much with the property. The easiest way a non-Indian owner could alienate his or her portion would be to sell the interest to one of the Indian landowners, provided a willing buyer existed. However, under current federal laws such an investment would suffer from the circuitous nature of the Dawes legacy. The purchased interest would be placed back into trust, and once again become subject to the rules and regulations that forced the non-Indian to alienate to begin with, i.e., the requirement for unanimous consent of all interest owners to change the characteristics of the land.

V. Possible Solutions

A. The Indian Land Consolidation Act

Congress has attempted to resolve the fractionation problem of Indian allotment lands. In 1983, it passed the Indian Land Consolidation Act (ILCA).[183] The purpose of the Act was to allow tribes to: 1) consolidate their tribal landholdings; 2) eliminate certain undivided fractionated interests; and 3) keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance.[184] Section 2206(a) of the original Act prohibited descent of

[177] Interview with Carol Haney, Realty Specialist, Citizen Potawatomi Nation, in Shawnee, Okla. (Oct. 12, 2000).
[178] *Id.*
[179] *Id.*
[180] *See supra* text accompanying notes 113-123.
[181] Lantagne e-mail, *supra* note 154.
[182] *See supra* text accompanying notes 128-141.
[183] 25 U.S.C. §§ 2201-2211 (Supp. I 1983).
[184] *See* S. REP. NO. 98-632, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5470, 5471.

undivided allotment interests amounting to less than two percent of the total acreage, or producing less than $100.00 in the preceding year. Such an interest would escheat to the tribe. Similarly, the 1984 amended version prohibited descent if the land produced less than $100.00 in at least one of the five years preceding the death of the interest holder.[185] The United States Supreme Court reviewed the law twice, first in its origin version in *Hodel v. Irving*,[186] and as amended in *Babbitt v. Youpee*,[187] and rejected both versions, holding that the escheat provision resulted in a taking without compensation, and therefore was unconstitutional under the Fifth Amendment.

The ILCA also provided that "any Indian tribe may, subject to the approval of the Secretary [of the Interior], adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section…"[188] The Court in *Irving* and *Youpee* made no analysis of the Indian escheat provision, because the government did not rely on it in its argument, and because no tribal escheat measures had been developed at the time. Thus it was unclear whether the enactment of tribal code providing escheat of fractionated interests to the tribe would similarly be unconstitutional.

Considering the Court's aversion to the term "escheat," any tribal code provision would presumably also be deemed unconstitutional under federal law. However, as established by the Supreme Court in *Santa Clara Pueblo v. Martinez,*[189] federal courts will be reluctant to address issues arising from tribal decisions regarding their members and self-governance.[190] Furthermore, *Santa Clara* limits federal review of tribal actions under the Indian Civil Rights Act (ICRA)[191] to habeas corpus claims testing the legality of detention by order of an Indian tribe.[192] Consequently, whereas the ICRA prohibits the taking of property without compensation, this and other civil actions are unlikely to result in detention and therefore may not be remedied in federal courts.[193] As such, enforcement of much of the Indian Civil Rights Act is therefore up to the various tribal courts.[194] This argument by necessity relies on the proposition that if a tribe enacts an escheat provision it will presumably also have a tribal court.

In addition to the escheat provisions, the ILCA also provided tribes with the authority to enact probate codes that prohibit non-Indians or non-tribal members from inheriting any interest in trust or restricted lands within the tribe's reservation or subject to tribal jurisdiction.[195] The effect of the tribal probate code would depend on whether the decedent died intestate or left a will. If a will devises the interest to an ineligible person, that person receives the interest unless, during

[185] *See id.*
[186] 481 U.S. 704 (1987).
[187] 519 U.S. 234 (1997).
[188] 25 U.S.C. § 2206(c) (1994).
[189] 436 U.S. 49 (1978).
[190] *Id.*
[191] 25 U.S.C. § 1301-41 (1994).
[192] 436 U.S. at 58.
[193] CANBY, *supra* 100 at 251.
[194] *Id.* at 252.
[195] 25 U.S.C. § 2205(a) (1994).

the period the probate is pending, the tribe acquires the interest by paying fair market value for it.[196]

However, if an interest owner dies intestate, the interest that would have passed under applicable state probate laws for intestate inheritance would instead be inherited by an heir who would have inherited the interest if the ineligible person did not exist.[197] In such a case, the ineligible person may designate the interest to any Indian or tribal member he or she wishes. The interest will then pass to the designated person rather than to an heir entitled to inherit under state intestate laws. If no eligible heirs exist, the interest escheats to the tribe.[198] As noted above, this tribal escheat provision and the restriction limiting otherwise lawful intestate inheritance may or may not constitute a questionable taking without compensation.[199]

Because of its plenary authority over Indian affairs,[200] Congress can authorize tribal probate codes for inheritance as a means to alleviate the fractionation problem occurring on Indian lands. Accordingly, Congress can presumably amend federal probate requirements to exclude non-Indians and non-member Indians. This raises the question of whether such congressional and tribal authority to exclude ineligible persons is discriminatory and potentially unconstitutional. The codes, in effect, preclude tribal members from devising their property interests to whomever they choose, and also potentially deny otherwise legally entitled heirs their inheritance. Therefore, the constitutional validity of the tribal code provision included in the ILCA is an open question yet to be addressed by the courts.

In an effort to resolve these constitutional issues, on November 7, 2000, President Clinton signed the Indian Land Consolidation Act Amendments of 2000.[201] The amendment strikes and rewrites Section 2206 in its entirety to provide new rules for the descent and distribution of allotment lands by intestate succession and inheritance by will.[202] The amendment's most significant change is in the treatment of non-Indian heirs.

The amended law restricts the ability of non-Indian heirs to become owners of interests in trust or restricted allotment lands. If an Indian interest owner dies intestate, the probate judge will give the ownership interest to a decedent's spouse or heirs of the first or second degree[203]—the decedent's parents, children, grandchildren, grandparents, sisters and brothers—but only if they are Indian.[204] If the spouse or other enumerated heir is a non-Indian, this person will receive a life estate in the land.[205] The remainder interest in the life estate descends to any of the decedent's collateral heirs[206]—the decedent's brothers, sisters, aunts, uncles, nieces, nephews, and first cousins—but only if they are Indian and also own a share

[196] 25 U.S.C. § 2204 (1994).
[197] 25 U.S.C. § 2205(a)(1) (1994).
[198] *Id.* at § 2205(a)(2).
[199] *See supra* text accompanying notes 169-171.
[200] *See U.S. v. Kagama*, 118 U.S. 375 (1886).
[201] Pub. L. No: 106-462, 114 Stat. 1991, 25 U.S.C.A. §§ 2201-19 (2001).
[202] *See id*. § 2206.
[203] *Id.* § 2201(5).
[204] *Id.* § 2206(b)(2).
[205] *Id.*
[206] *Id.* § 2206(a)(3)(c).

in the allotment.[207] If there are no Indian heirs, or if no such heirs own an interest in the same allotment, the land will descend upon the death of the life estate holder to the tribe that exercises jurisdiction over the allotment.[208] An Indian with a preexisting interest in the parcel can prevent descent to the tribe by buying the interest from the decedent's estate at the fair market value of the property.[209]

Similarly, testamentary devise of interests in trust or restricted allotment lands may only be made to the decedent's Indian spouse, another Indian person, or to the tribe with jurisdiction over the land.[210] If the interest is devised to a non-Indian, that person holds the interest as a life estate,[211] and the remainder descends to the decedent's Indian spouse or Indian heirs of the first or second degree.[212] In the absence of any eligible Indian heirs, the remainder interest descends to the decedent's collateral heirs of the first or second degree, provided such heirs are a co-owner in the allotment at the time of the decedent's death.[213] If the land does not descend to an Indian heir or heirs, the tribe that exercises jurisdiction holds the remainder interest unless purchased by an Indian co-owner of the parcel.[214]

Notwithstanding the life estate provision for devise to non-Indians, a decedent that does not have an Indian spouse or any Indian lineal descendants or heirs may devise his or her allotment interest(s) to any heirs of the first or second degree or collateral heirs of the same degree.[215] However, the tribe exercising jurisdiction over the land may purchase the interest by paying the Secretary of the Interior its fair market value and transferring the payment to the devisee unless 1) the devisee renounces the interest in favor of an Indian person, or 2) the devisee takes a life estate in the land pursuant to the intestate succession provision of Section 2206(a)(6)(B).[216] If the devisee takes a life estate, the remainder will descend to the tribe.[217]

The Act also attempts to reduce fractionation of allotment shares. When the decedent dies intestate, and the interest or remainder interest constitutes less than 5 five percent of the whole allotment and passes to more than one person, the multiple heirs will hold the interest as joint tenants with the right of survivorship.[218] If the interest constitutes more than five percent of the whole, the heirs will hold the interest as tenants in common.[219] Similarly, if the testator devises an interest to more than one person, the devise shall be presumed to create a joint tenancy with the right to survivorship unless the testator expressly states that the devisees hold as tenants in common.[220]

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[207] 25 U.S.C.A. § 2206(b)(3) (2001).
[208] *Id.* § 2206(b)(4).
[209] *Id.* § 2206(b)(5).
[210] *Id.* § 2206(a)(1).
[211] *Id.* § 2206(a)(2).
[212] *Id.* § 2206(a)(3)(A).
[213] 25 U.S.C.A. § 2006(a)(3)(B) (2001).
[214] *Id.* § 2206(a)(4)-(5).
[215] *Id.* § 2206(a)(6)(A).
[216] *Id.* § 2205(c).
[217] *Id.* § 2206(a)(4).
[218] *Id.* § 2206(c)(2)(B).
[219] 25 U.S.C.A. § 2206(c)(2)(A) (2001).
[220] *Id.* § 2006(c)(1).

The 2000 amendments attempt to resolve the constitutional issues raised in *Hodel* and *Irving*. Section 2006 (a)(6) appears to remedy the constitutional issue raised by the escheat-to-tribe provisions contained in earlier versions of the Act. The 2000 amendments do not create an outright taking of interests in allotment lands by the federal government. Rather, the new amendments give the owners various options in devising otherwise diminutive interests in allotment lands. However, limiting a decedent's capacity to devise to a non-Indian only in the absence of eligible Indian heirs may still carry unconstitutional implications. The end result is that the decedent cannot devise the interest to anyone he or she wishes. This restriction may infringe upon a fundamental right to do what one wishes to with one's own property.[221] As such, the courts may soon be called upon to determine the constitutionality of the 2000 amendments as they have had to do with previous versions of the Act.

As written, the Act ensures that future dispositions of Indian allotment land will ultimately remain in or return to Indian ownership. This is specifically accomplished when the decedent devises the interest to an eligible Indian heir, and when a non-Indian devisee sells his or her land to the tribe. Similarly, if a non-Indian devisee without Indian heirs takes a life estate, the remainder descends to the tribe. Therefore, the intended result of the unconstitutional escheat-to-tribe provision of previous versions is accomplished.

The Act does not effectively reduce fractionation. In the case of intestate succession, it prevents interests of less than five percent from becoming further fractionated by providing that multiple owners hold as joint tenants with the right to survivorship. Theoretically, as joint tenants, the interest will eventually end up in the possession of a single heir. However, the Act does not impact fractionation until an interest becomes less than five percent of the whole allotment. To illustrate, under the Act multiple owners of an interest greater than five percent continue to hold interests as tenants in common, basically, the way allotment lands historically have been held. Thus, the initial interest in excess of five percent will continue to become fractionated until all holders of allotment lands hold less than five percent.

Similarly, the Act does not prevent testamentary fractionation. If a will is made, the Act allows the fractionation of an interest if a testator expressly provides that the devisees are to hold as tenants in common. Presumably, if successive wills expressly create tenant in common devises, the problem of fractionation of allotment lands will continue.

B. Tribal Self-Administration of Trust Lands

In striking down the escheat-to-tribe provision of the ILCA, the U.S. Supreme Court acknowledged the necessity of finding a solution to the fractionation problem.[222] One solution recognized by the court is the condemnation of Indian land. The Fifth Amendment of the U.S. Constitution allows the government to take private property for public use. However, this application may also be susceptible to the same fate as the escheat-to-tribe remedy.

[221] See *supra* text accompanying notes 212-213.
[222] *Babbitt v. Youpee*, 519 U.S. 234 (1997). *See also* COHEN'S *supra* note 56, at 622.

The courts would need to determine 1) if an allotment interest is really a "private" property under current federal Indian law and, 2) how the government could justify the "public" use of an isolated allotment tract in the middle of nowhere so as to avoid the taking problem in *Hodel* and *Irving*?

So far, attempts by the federal government to alleviate the Indian land tenure problem have yielded no favorable results. Therefore, one constructive solution to the fractionation problem is for tribes to assume the responsibility for allotments within their own reservations and jurisdiction.

In his keynote address at the seventh annual "Indian People, Indian Law Convocation," [223] Kevin Gover, then Assistant Secretary of the Interior for the BIA, told the audience that it is generally time for tribes to work towards greater self-sufficiency, and that tribes can be successful, as many have already shown, without the "safety net" provided by the federal government.[224] Applying this message to the fractionation problem of Indian lands, tribes can, and should, if it is within their economic and organizational capacity, assume the administrative responsibility of their trust and restricted lands. The result would promote tribal self-determination and provide an opportunity for potential expansion of the tribal land-base while minimizing the federal expense and control associated in managing allotment interests that generate negligible annual incomes. This approach, however, should not be made at the expense of the individual interest holder.

The Citizen Potawatomi Nation has taken a giant step in this direction. The Tribal Real Estate Office has assumed the responsibility for maintaining the records of the trust lands belonging tribal members. Jessica Lantagne states that in many aspects, "[w]e are the BIA [in that] we adopt the role and the goals of the BIA. We are responsible for implementing the policies and procedures of the BIA."[225] The Real Estate Office negotiates and manages all farming, grazing, oil, and gas leases, plus all rights of way agreements on trust property.[226] It coordinates appraisals of the lands, handles the assignments of leases to individuals and companies, determines bond amounts, and is responsible for receiving the rental fees and for preparing the proper documentation for dispersal of fees to individual interest holders.[227] Additionally, the Office conducts on-site inspections of oil and gas production facilities to ensure compliance with lease terms, and takes action to ensure that any infractions are remedied and that the land is restored.[228] Finally, the Office is responsible for canceling leases if lessees are negligent in their obligations to the agreements, and for diffusing any problems or concerns of the Indian landholders regarding the property.[229]

Tribal self-management of allotment lands within a tribe's jurisdiction is an important step in the quest for Indian control of Indian lands. However, under current federal laws, nearly all options available to non-Indians for the control of land tenure, such as the partition, lease and sale of an individual's interest in a

[223] Assistant Secretary of the Interior Kevin Gover, Address at the Annual Indian People, Indian Law Convocation (Oct. 27, 2000) University of New Mexico School of Law, Albuquerque, NM.
[224] *Id.*
[225] Lantagne e-mail, *supra* note 154.
[226] *See id.*
[227] *See id.*
[228] *See id.*
[229] *See id.*

piece of land, are not available to tribes and its members. This is due to the ultimate authority of the Secretary of the Interior and/or Congress to manage Indian lands. So far, the history of U.S./Tribal relations shows that the federal government has virtually been incapable of retarding the snowballing fractionation of Indian lands caused by the Dawes Act. As a result, tribes must become more than surrogate BIA agencies, and assume actual land tenure control of tribal real estate.

C. The New Tribalism

> The earth and myself are of one mind. The measure of the land and the… measure of our bodies are the same… —Hinmaton Yalakit (Joseph, Nez Perce Chief (1830-1904)).[230]

> The Future of Indian land tenure depends upon action by tribes… and Indian landowners. Indian people's survival depends on land… ownership. Tribal societies are tied to their lands through history,… culture, religion and economies. The land is the heart of the people. It… must be made whole again for tribal cultures to emerge strong. —Indian Land Tenure Community (2001).[231]

Indian peoples traditionally possess an emotional and spiritual bond to the land. Any approach to land tenure must therefore take into consideration this bond, as well as the unspoken social and cultural elements deeply held by tribal communities. Today, Indian land is representative of survival. In light of the two hundred plus year history of the relationship between the federal government and tribes, Indian people are ready to take control of the future of Indian land tenure. A recently organized group exemplifies the effort to address the fractionation problem, and to restore traditional tribal lands to tribal ownership.

"In 1991, the Indian Land Working Group (Working Group)[232] was formed at a Pendleton, Oregon, conference to" formulate a strategy to address "Indian land tenure issues such as acquisition, legislation, education, fractionation and consolidation."[233] Ten years later, the Working Group has evolved into a community of seventy-five tribes in the Northwest area of the United States, as well as Indian people on and off reservations, tribal governments, and non-Indians who are connected to Indian land tenure issues.[234] Indians are involved with the Working Group for obvious reasons: they have a stake in the control of fractionated interests of allotment lands, and in the control of tribal land bases in general. Non-Indians have a stake as neighboring landowners, business people with interest in reservation communities, and as fee land co-owners who inherited allotment interests and are prohibited by federal laws and restrictions from utilizing their interests.[235] Together, the Working Group embodies and advocates the concept of a

[230] NATIVE AMERICAN WISDOM 97 (Running Press 1993).
[231] *Executive Summary* of The Indian Land Tenure Partnership Plan (Feb. 2001) (unpublished proposal, on file with author) [hereinafter Plan]. In the interest of simplicity, the Indian Land Tenure Community, and the Indian Land Working Group, are treated synonymously.
[232] *Id.* at 11.
[233] *Id.*
[234] *Id.* at *Executive Summary.*
[235] *Id.* at 20.

"new tribalism," the incorporation of the traditional and sacred relationship with land and the self-determination efforts of Indian communities. Accordingly, the Working Group is dedicated to reverse the history of fractionation, loss of trust status lands, and diminishment of reservation land bases.[236]

The new tribalism is based on the implementation of a strategic plan to control the "long term acquisition, consolidation, inheritance, and management of fractionated or alienated allotments."[237] Continued fractionation impacts and weakens the economic value of allotment land, and increases the dependence of tribes and individual Indians on the federal government for the administration of these lands.[238] Also, conversion of trust or restricted land to non-Indians in fee status further reduces the tribal land base. One solution would be the enactment of tribal probate codes. However, as noted earlier,[239] tribal codes restricting inheritance and descent of allotment lands to certain people may or may not be discriminatory in the eyes of the federal courts. Therefore, the primary key to reducing fractionation and resolving the Indian land tenure problem is the edification of the general Indian community.

Increased knowledge of Indian land tenure is needed at the tribal level. The "passing of allotments by will is not widespread due in part to cultural and spiritual norms on dying, and to a lack of trust in the BIA."[240] Moreover, the BIA does not have a plan or the resources to implement estate education and planning programs.[241] Thus, the best to avoid the continued fractionation of land is for tribes to initiate educational programs that are based in tribal culture in order to educate tribal members about estate planning.[242] It is therefore imperative that tribes take it upon themselves to generally educate their members about land tenure and the importance of wills and their creation, and specifically teach them how to make a will, and encourage them to do so.[243]

The general lack of knowledge of land tenure among Indian communities is widespread, from the young not understanding basic land tenure principles, to the elderly who in the past have typically not been involved in estate planning. [[244]] Lack of knowledge and personal empowerment have been the primary causes of the "Indian" land problem: multiple ownership from fractionation, loss of land by alienation, and loss of management control due to inflexible federal Indian laws and regulations.[245] Education of all tribal members about land tenure empowers them to choose options and make positive, informed decisions "about how their land is currently managed and how their heirs will receive the land in the future."[246]

Educating owners of allotment interests and the general Indian population should necessarily begin at the reservation level and extend to distant tribal members living away from the land base, or far from the reach of the tribal

[236] *Id.* at 12.
[237] Plan, *supra* note 230, at 12.
[238] *Id.* at 16.
[239] See *supra* text accompanying notes 180-198.
[240] Plan, *supra* note 230, at 13. *See also supra* text accompanying notes 144-145.
[241] *Id.* at 16.
[242] *Id.* app. G, at G5.
[243] *Id.*
[244] *Id.* at 21.
[245] *Id.* See also *supra* text accompanying notes 125-141.
[246] Plan, *supra* note 230, at 21.

headquarters. Tribes must develop a culture-based land tenure curriculum for tribal colleges and schools, tribal community and business organizations, and other Indian-related organizations in the community.[247] Edification by means of classroom, extension, and at-distance mediums must incorporate the communication of traditional oral history between elder and youth, as well as to the general Indian population, to teach Indian land tenure principles and the related legacy of Indian land diminishment resulting from the Dawes Act.[248] In addition, owners of fractionated interests should be trained in estate management for inclusion in the land tenure decision-making process.[249] As such, tribes must initiate a concentrated effort to educate and motivate entire tribal communities to change the status quo and to become proactive in Indian land tenure issues. This change will create credibility in the eyes of a scrutinizing federal government and provide the momentum for a positive future.

As tribal communities and individual Indians take control to abate the negative effects of fractionation, they must at the same time strive to consolidate these interests into parcels sizeable enough to be capable of sustaining economic development, and reacquire original Indian lands alienated as a result of the Dawes Act. One objective of the Indian Reorganization Act provided for the "proper consolidation of Indian lands" to strengthen the tribal land base and tribal control over it.[250] However, as fractionation of Indian estates continued exponentially in the wake of the IRA, Congress' intended objective became difficult, if not impossible, to achieve. Fractionated estates increasingly became leased to non-Indian farmers and ranchers, often at less than market value.[251] Additionally, the BIA frequently foreclosed on allotments for payment on non-secured debts owed by Indians to local merchants.[252] This practice accelerated the alienation of Indian land, which could only be reacquired by purchase if the non-Indian owner was willing to sell the property and if an Indian individual or the tribe had the money.[253] Frequently, this hasn't been the case.

The conversion process is similar today. If a tribe or an individual member has the revenue to purchase the land, these fee lands are held in flux for several years while the BIA completes the tedious and complex administrative fee-to-trust process.[254] Fee-to-trust conversion is "fraught with pitfalls that can lead to administrative appeals and federal court" by individual landowners or municipalities contesting the individual's or the tribe's application for conversion.[255] For the individual, the process is personally degrading: because an Indian must declare that he or she has lost the capacity to manage her own affairs

[247] *Id.*
[248] *Id.* at 22.
[249] *Id.* at 25.
[250] 25 U.S.C. § 464 (1994). *See also* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 194 (4th ed. 1998).
[251] Plan, *supra* note 230, at 8.
[252] *Id.*
[253] *Id.*
[254] *Id.* at 8, 14.
[255] *Id*. at 14. *See also*, Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452-3466 (Jan. 16, 2001) (to be codified at 25 C.F.R. pt. 151) (explaining the current federal procedures to move land acquired by Indians from fee simple to trust status).

and ask for assistance from the BIA.[256] Conversely, changing land from trust-to-fee status is quick and efficient. An Indian individual simply applies for a competency evaluation and declaration by the BIA, and in affirming capacity, the BIA releases the land from any continued responsibility mandated by the federal trust status.[257] Considering this, even in light of the IRA, the history of federal/tribal relations indicates a tendency towards the diminishment, rather than the acquisition and consolidation, of Indian property since the early twentieth century amendments to the Dawes Act.[258]

Financing for land acquisition and consolidation is an obstacle for many tribes today. A few tribes who have very profitable tribal enterprises, such as gaming operations, may be in a better position and can afford to spend large amounts of money for land financing.[259] Other tribes may have profitable enterprises yet they must limit the amount of money spent for acquisition because those profits go to tribal programs and services.[260] The two primary federal financing programs, the USDA Indian Land Acquisition Program, and the land consolidation pilot project under the Indian Land Consolidation Act, conditionally support self-determination and are inadequate to satisfy the needs of tribes seeking to increase the tribal land base.

First, the USDA has made twenty-seven land acquisition loans to tribes under the Indian Land Acquisition Program.[261] "Unfortunately, most tribes participate in the program to finance purchase of fractionated interests from tribal members wanting to sell."[262] Often, the income derived from the consolidated interests is inadequate to pay the loan debt.[263] Tribes are then forced to acquire additional funding to pay the debt, or revert to the practice of leasing the land to non-Indians, or face foreclosure on the land to repay the federal government. Consequently, if the land does not produce an adequate return, Indian self-determination and control of the land is defeated.

Second, Congress appropriated $5 million in FY 2000 to the BIA to fund the "Indian Land Consolidation Pilot" program.[264] The program is designed to "address the serious trust problems associated with fractionated ownership of Indian lands" and "to consolidate ownership of fractionated lands, maximize the economic benefits and utilization of these lands, and to improve the federal governments ability to administer and manage trust funds."[265] Any income generated from these consolidated interests is paid back to the federal government until its expenditure is recovered.

However, the consolidation program has a few main drawbacks. The initial problem is that the decision regarding the selection of fractionated interests to be acquired is made by the federal government, not by the tribes or Indian

[256] Plan, *supra* note 230, at 14.
[257] *Id.*
[258] See *supra* text accompanying notes 96-100.
[259] Plan, *supra* note 230, app. E, at 10.
[260] *Id.*
[261] *Id.* app. E, at 6.
[262] *Id.*
[263] *Id.* app. E, at 7.
[264] *Id.* app. F, pt. 2, § IV, at 1.
[265] Plan, *supra* 230, app. F, pt. 2, § IV, at 1.

individual.[266] The experience of one of the twenty-seven recipients of the pilot program, the Lac du Flambeau Tribe of Wisconsin, serves as an illustration. In acquiring fractionated interests for the tribe, it appears that the BIA was more interested in purchasing parcels from any interested seller, rather than considering the economics of the tribe.[267] Similarly to USDA loans, if the acquired land is not capable of generating income, the government cannot be repaid for the acquisition, and the tribe does not receive any future economic benefit from the land.[268]

On the other hand, if the Lac du Flambeau tribe administered the acquisition and consolidation program, instead of the BIA, potentially more beneficial and economically viable land would be purchased under the program. As noted above, the BIA's primary goal is finding a willing seller, regardless of the economic potential of the fractionated interest. However, because the tribe is presumably more familiar with the lands than the agency, it is thereby in a better position to select lands that could become economically viable if consolidated. Moreover, if the Lac du Flambeau administered the program instead of the agency, the tribe would actualize one of the primary objectives of the federal government's policy of self-determination and self-sufficiency:[269] that programs for Indian self-determination "should be planned and administered by the tribes themselves; federal 'domination should end.'"[270]

Another drawback of the pilot program, and in federal funding in general, is that the $5 million appropriated for land acquisition simply buys $5 million in fractionated interests at market rate.[271] Instead, if the money were given to an Indian funding institution to guarantee and subsidize the interest on private loans to tribes, the funds could be financially leveraged to acquire more than $5 million of fractionated interests in the near future.[272] Proper leveraging and management of that amount could raise its acquisition potential to nearly $100 million in five years.[273] Consequently, the creation of such an Indian financial institution is one of the primary goals of the Indian Land Working Group.

The Working Group has initiated the establishment of a partnership between itself and a proposed Indian Land Tenure Foundation (ILTF) and the Northwest Area Foundation, collectively called the Indian Land Tenure Partnership (Partnership).[274] As proposed, ILTF would provide funding and engage in a collaborative effort with the Working Group to provide for the education and empowerment of tribal members in today's land tenure issues. In other words, ILTF will be the financial stronghold of the new tribalism. While the entire process advocated by the Partnership is beyond the scope of this article, a brief synopsis of the plan follows.

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[266] *Id.* app. F, pt. 1, § I., at 10.
[267] *Id.* app. F, pt. 2, § IV, at 2.
[268] *Id.*
[269] *Id.*
[270] *See* COHEN'S, *supra* note 56, at 717 (quoting D. GETCHES, ET AL., FEDERAL INDIAN LAW 110-11 (St. Paul: West Publishing Co., (1979)).
[271] Plan, *supra* note 230, app. F, pt. 1, § I., at 10.
[272] *Id.*
[273] *Id.* app. F, pt. 1, § I, at 11.
[274] *Id.* at Executive Summary.

ILTF, a non-profit organization, will solicit funding from other non-profit organizations, as well as private institutions and public agencies, to capitalize the organization.[275] After initial startup, funding for the Working Group's projects, such as, education, and empowered land tenure management programs, will begin.[276] Ultimately, ILTF will raise funds to carry out the Working Group's land tenure goal of restoring Indian land to Indian tribes and individuals. This potentially would entail the purchase and consolidation of fractionated interests to create ownership in an economically viable piece of land, enable the purchase of traditionally Indian lands that have been alienated to non-Indians, and provide the means to promote economic growth and Indian use of Indian land.[277]

The new tribalism has the potential to stem the tide of the adverse effects of the Dawes Act. If successful, the Partnership's Indian land tenure plan may provide a paradigm that other tribal organizations, communities, and individuals can employ for their own self-determination and empowerment, and therefore begin to counteract the effects of the past two hundred years of the federal/Indian relations.

VI. Conclusion

The fractionalization of Indian allotment land is the result of a lack of forethought on the part of the Dawes Act proponents. Had they seen past their immediate desire to civilize the Indians in America (or, in reality, apportion the majority of Indian landholdings to non-Indians) they might have realized that descent through intestate law would backfire and create multiple owners of undivided interests in the allotments that did survive the times. Perhaps they were banking on the realization of the "Vanishing Indian" syndrome. Yet, we did not go away.

The solution to the problem should at least begin within the tribe. Tribal responsibility of what has historically been a BIA activity is the first step towards remedying the situation. However, easing the burden of the BIA will not make the problem disappear. Any viable solution will have to consider the rights of the individual landowner. But until the problem is put to rest, the self-management approach taken in the interim by the Citizen Potawatomi, and the "new tribalism" approach of the Indian Land Working Group, seem to be positive steps in achieving true self-determination within the realm of Indian land tenure.

In the introduction I mentioned a letter. It was from the nephew of the man who my father claims to this day abandoned him when he was a child. My father did not reveal the contents of the letter other than to say his cousin was trying to raise the consensus needed to alienate the property. I do not know if his cousin had the nod of the other owners, or whether he had a ready buyer. If a potential buyer was a cotenant, a member of the Citizen Potawatomi, or the tribe itself, the Secretary of the Interior would be likely to grant assent to the sale, and maybe partition off my father's 32 acres.

[275] *Id.* at 37.
[276] *Id.* at 37, 41.
[277] Plan, *supra* note 230, app. F, pt. 1, § I., at 5.

Whatever the motivation behind the letter, my father was a recalcitrant heir – he was unwilling to let go of the property. Throughout the legacy of allotments, some owners holding small interests in land would not reply to inquiries out of disinterest, while others, realizing that their signature was needed to achieve unanimity, would demand a bonus before they signed.[278] My father is obviously not a disinterested party as evidenced by his enthusiasm over my own visit to the property last fall. Nor do I believe he is holding out for a better deal. He is eighty-five years old. Would that really benefit him at this stage of his life?

Cynics among the readers may have already formed their own answers. "Sounds like he is bitter over an unfortunate childhood and this is his way to get back at his uncle's family," one might say. My father is resentful. And he would be the first to admit it, if you could get him to talk about growing up alone in the BIA schools, knowing that there was no family to go home to during the holidays and summer breaks, and knowing that the person who was his guardian had abandoned him. But that conversation is rare.

I believe that his reluctance to alienate the allotment is due to two things. First, the land is a manifestation of a unique chapter in Indian history, both generally and personally. The allotment is representative of the ramification of two centuries of federal Indian policy and how it affected his forebears. Additionally, the land is a connection to a family he barely knew. It belonged to his mother, and to her parents before that. And though not located upon the traditional Potawatomi homeland, it is nonetheless his family's Indian land.

The second reason my father is "recalcitrant" is me. Although I have a blood connection to the land, he wants the opportunity to give me the legal interest, which under current federal Indian law, cannot be done through inter vivos gift. I can wait a long time, though, for that to happen. In the meantime, I can think about what can be done to improve both the co-tenancy problem of CP 87 and 100, and the land itself. Who knows, maybe I'll buy the land and grow pecans.

[278] Williams, *supra* note 107, at 714.