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What the Fraction: A Divisive Look into the Necessary Revisions to the Department of Interior's Fractionated Land Buy-Back Program Amongst Diminishing Funding

David Baxter

I. INTRODUCTION

Following numerous conversations with American Indian¹ tribal leaders and landowners, the United States Department of Interior (DOI) has decided to revise its Land Buy-Back Program for Tribal Nations.² Feedback from American Indian tribal leaders and landowners was gathered through an open comment period, a listening session, and numerous DOI meetings.³ The program will continue to consolidate land, through the use of the remaining funds received from the *Cobell* Settlement, which consists of roughly \$540 million.⁴

Associate Deputy Secretary James Cason explained that this latest revision aims to maximize the remaining resources by reducing the largest amount of fractionated land as possible.⁵ The process of fractionation refers to the splitting up of a parcel of land, not in a physical sense, but through multiple undivided interests.⁶ Many original allotments now have hundreds or thousands of individual owners.⁷ This becomes an issue because it slows, and in some case completely stagnates, the land from being used in a productive way due to different majority consent requirements.⁸ Previously, fractionated lands have lain idle when they could have been used for residential, agricultural, recreational, commercial, or even cultural purposes.⁹

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1. The term "American Indian" will be used in lieu of the proper "Native American" in order to remain consistent with terminology used by the Department of the Interior and frequented in various Acts and Treaties.
 2. *Press Releases: Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands*, U.S. DEP'T OF THE INTERIOR (July 31, 2017), <https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation>.
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR (Aug.17, 2017), <https://www.doi.gov/buybackprogram/FAQ>.
 7. *Id.*
 8. *See* Press Release, U.S. Dep't of the Interior, *supra* note 1.
 9. *See Frequently Asked Questions*, *supra* note 6.

II. BACKGROUND

Beginning with the 1823 decision of *Johnson v. M'Intosh*, regarding American Indian land "ownership," the United States has left tribal lands in a state of systematic fractionation.¹⁰ The General Allotment Act of 1887, also known as the Dawes Act, allowed the U.S. government to divide American Indian lands across the United States for allotment.¹¹ Orchestrated to help American Indians escape poverty, this Act distributed acreage of lands to individuals, rather than allowing tribal ownership.¹² Under this Act, the head of each family would receive 160 acres with each person receiving eighty acres of American Indian land.¹³ The DOI continued to hold this land in trust, continuing the fiduciary relationship between the American Indians and the government.¹⁴

The Dawes Act led directly to the fractionation problem seen today for several reasons.¹⁵ The Dawes Act contained numerous restraints on alienation while the land was held in trust by the government, disallowing American Indians from transferring property at will.¹⁶ Additionally, succession customs historically used by tribes were continuously ignored in favor of state laws governing succession.¹⁷ This was illustrated by the fact that the right of American Indians to write wills was not federally approved

10. Rebekah Martin, Comment, *Defending the Cobell Buy-Back Program*, 41 Am. Indian L. Rev. 91, 91 (2016).

11. *Id.* at 94.

12. *Id.* (citing Terry L. Anderson, Property Rights Among Native Americans, FOUND. FOR ECON. EDUC. (Feb. 1, 1997)), <http://fee.org/freeman/property-rights-among-native-americans> ("Indian land tenure systems were varied. While some ownership was completely or almost completely communal, other ownership was more like today's fee simple. The degree of private ownership reflected the scarcity of land and the difficulty or ease of defining and enforcing rights.")

13. *Id.* (citing Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 580 (2010-2011)).

14. *Id.* (citing *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited Jan. 13, 2016)).

15. Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729, 740.

16. *Id.*

17. *Id.*

until 1910.¹⁸ Expansion of American Indian lands was near impossible as tribal lands not distributed to individuals were determined to be “surplus” and opened for white settlement, meaning descendants had no choice but to share the lands which they held a fractionated interest in.¹⁹ Finally, the Dawes Act instilled complex rules about leasing permissions, which essentially made it “easier for Indians to transfer land to Whites, harder for them to transfer it to other Indians, and much more difficult to reorganize Indian land holdings to increase efficiency.”²⁰

In 1996, Elouise Cobell, the treasurer for the Blackfeet Tribe, filed a class action law suit against the DOI and the U.S. Treasury Department accusing the Bureau of Indian Affairs of “mismanaging, diverting and losing money that belongs to Indians” for decades.²¹ A settlement of \$3.4 billion resulted, with \$1.9 billion specifically earmarked for the “Cobell Land Buy-Back Program” [hereinafter “Program”].²² Consolidation of land that is highly fractionated is one of the largest goals of the Program.²³

At the genesis of this program, nearly 243,000 individuals owned 2.9 million purchasable fractional interests in 150 reservations across the United States.²⁴ Out of those owners, the whereabouts of about 13% were entirely unknown.²⁵ This new decision marks a change in the scope of the Program from focusing on the potential economic value of the land to simply increasing a tribe’s title share of land, and allowing the tribe to determine the use.²⁶ The current program has been fairly successful, reducing fractional interests by 23% since 2013; this new shift is a decision based in potential

18. *Id.* at 741 (citing Act of June 25, 1910, ch. 431, § 2 (codified as amended at 25 U.S.C. § 373)).

19. *Id.* at 40-41 (citing Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 19 (1995)).

20. *Id.* at 41 (quoting Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1614 (2001)).

21. Martin *supra* note 10, at 104 (citing Christopher Barrett Bowman, Comment, *Indian Trust Fund Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 52 Cath. U. L. Rev. 543, 544 (2004)).

22. Martin *supra* note 10, at 104 (citing *Cobell v. Salazar Class Action Website: Frequently Asked Questions*, INDIAN TR. SETTLEMENT, <http://www.indiantrust.com/faq.php.nonsearch> (last visited Sept. 7, 2017)). (NEED TO FIND 3.4 Billion)

23. Martin *supra* note 10, at 104 (citing *Cobell v. Salazar Class Action Website: Frequently Asked Questions*, INDIAN TR. SETTLEMENT, <http://www.indiantrust.com/faq.php.nonsearch> (last visited Sept. 7, 2017)).

24. See *Frequently Asked Questions*, *supra* note 6.

25. See *Frequently Asked Questions*, *supra* note 6.

26. See Press Release, U.S. Dep’t of the Interior, *supra* note 1.

economic success, both for tribes and for the Program.²⁷

So far, this program has spent \$1.2 billion, purchasing 40,000 tracts of land at forty-five different locations, from more than 700,000 fractional interests.²⁸ To date, 75% of the funds available under the *Cobell* buy-back program have been spent, which is the obvious reason for the strategic re-direction.²⁹

III. ANALYSIS

The primary goal of the Program, brought to light following tribal feedback, is finding a way to leverage available resources for tribal use.³⁰ To do so, the DOI will implement policies designed to increase the efficiency and opportunities at which will consolidate fractional interest, primarily allocating 51% of the lands to the tribe, so that they have the controlling interest in the land.³¹

A. Necessary Restructuring of the Targeted Audience

The targeted audience of the Program has completely changed with the latest revisions, as well as the strategy for acquisition.³² Initially, in 2014, forty-two tribes were identified as potential beneficiaries of this program.³³ In May of 2016, the Obama-era administration expanded the program to include 105 tribes, more than doubling the initial audience.³⁴ This new Trump-era change to the Program has slashed the audience to just twenty tribes, twelve of which previously received buy-back offers.³⁵ The DOI will

27. Renae Ditmer, *Examining Interior's Changes to Trust Land Buy-Back Program*, INDIAN COUNTRY TODAY, Sept. 3, 2017, <https://indiancountrymedianetwork.com/news/politics/examining-interiors-changes-trust-land-buy-back-program/>.

28. *Id.*

29. *Id.*

30. See Press Release, U.S. Dep't of the Interior, *supra* note 1.

31. See Press Release, U.S. Dep't of the Interior, *supra* note 1.

32. See generally Press Release, U.S. Dep't of the Interior, *supra* note 1 (explaining the change in the targeted audience to selected number of landowners).

33. Chris D'Angelo, *A Hard-Fought Victory To Restore Tribal Land Faces New Threat In Trump Era*, HUFFINGTON POST (Aug. 8, 2017, 11:04PM), https://www.huffingtonpost.com/entry/ryan-zinke-interior-tribal-land-program_us_5985042ee4b08b75dcc7043a.

34. *Id.*

35. *Id.*

continuously assess progress, leaving open the possibility to revise the schedule as resources allow, but many feel this is an unfair change against the original intent of the program.³⁶ Opponents of the changes have pointed out that the five reconsidered reservations out of the twelve are in the Secretary of the Interior's home state of Montana, a fact that makes some question the motives behind this particular change.³⁷ Additionally, some argue that this particular change was not among those asked for by American Indian tribe members.³⁸ The DOI based these changes on factors including "the severity of fractionation, appraisal complexity, degree of ownership overlap between locations or geographic proximity; tribal readiness; past response rate; and cost and efficiency (including land value)."³⁹ Regardless, this narrowing to a more targeted audience is clearly necessary as funding for the Program begins to dwindle.⁴⁰

One of the more fundamental changes in the approach that the DOI is implementing relates to the strategy for acquisition.⁴¹ This revision will create a focus on acquiring interests in all mineral-tracts, which have been determined to not possess viable mineral value, and interests that are less than twenty-five percent in surface or both type tracts.⁴² One highlighted problem of the previous policy was a transaction where \$1.63 million was spent to purchase only three acres from two individuals in southern California.⁴³ This strategy will allow for more interests to be purchased because of the decreased value that comes along with a no longer viable mineral tract, and hopefully prevent wasting the little funding the Program has left.⁴⁴ This would also allow for the mass consolidation of interests in tracts that control use of land below the surface, which may lead to more ability to leverage surface tract sales in the future.⁴⁵ By purchasing and targeting the lower

36. *Id.*

37. *See Id.*; *See also Trump administration moves in new direction with Cobell buy-back program*, INDIANZ (July 31, 2017), <https://www.indianz.com/News/2017/07/31/trump-administration-moves-in-new-direct.asp> [hereinafter *Trump*].

38. D'Angelo, *supra* note 33.

39. *See* Press Release, U.S. Dep't of the Interior, *supra* note 2.

40. *See* Press Release, U.S. Dep't of the Interior, *supra* note 2 (discussing the 1.2 billion dollar that has been spent out of the 1.9-billion-dollar budget).

41. *See generally* Press Release, U.S. Dep't of the Interior, *supra* note 2 (discussing the 1.2 billion dollar that has been spent out of the 1.9-billion-dollar budget).

42. *See generally* Press Release, U.S. Dep't of the Interior, *supra* note 2 (discussing the 1.2 billion dollar that has been spent out of the 1.9-billion-dollar budget).

43. *See Trump*, *supra* note 37.

44. *See Frequently Asked Questions*, *supra* note 6.

45. *See generally Frequently Asked Questions*, *supra* note 6.

percentage interests, the DOI is aiming to maximize the tribal ownership in as large an area as possible.⁴⁶

B. Effective Facilitation of Tribal and Co-Owner Purchases

A big difference illustrated by the Program's change is the new emphasis on tribal involvement in the continuation of the Program.⁴⁷ Since the Trump administration has been clear that the project will not receive new funding, a new resource is needed to continue the Program.⁴⁸ This resource has been determined to be the tribes themselves, and is illustrated by the DOI policy that tribes who pledge to use tribal funds to purchase back their own lands will receive priority for the Program.⁴⁹ Subsequently, in the name of land consolidation, co-owners are being encouraged to attempt to purchase co-owner interests.⁵⁰ Again, opponents of this change argue it is against the original intent of the Program, which was to re-pay American Indians for years of mismanagement of funds, as opposed to coercing them into purchasing back their wrongfully divided tribal lands.⁵¹ Additionally, another goal of the Program change is to make surveyed information available to tribes, so that they can continue this Program once the federal funding runs out.⁵² This information includes mapping and land appraisals, which are intended to facilitate both landowner-landowner purchases as well as landowner-tribal purchase.⁵³

C. Beneficial Procedural Changes to the Program

Key procedural changes have been made to the Program directly in response to tribal feedback, notably to maximize the use of appraisals, streamline agreements with tribes, and extend the time of purchase offer

46. See generally *Frequently Asked Questions*, *supra* note 6.

47. Andrew Westney, *Will DOI Have Tribes' Backs When Land Buy Program Ends?*, LAW 360, (Aug. 4, 2017, 7:39PM), <https://www.law360.com/articles/951346?scroll=1>.

48. See *Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands*, *supra* note 2.

49. See *Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands*, *supra* note 2.

50. See *Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands*, *supra* note 2.

51. See source cited *supra* note 37.

52. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

53. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

validity.⁵⁴ Previously, an appraisal conducted by the DOI was valid as a fair market price for a period of nine months.⁵⁵ The change implemented increases the validity of these mass appraisals by three months, allowing for a total of twelve months.⁵⁶ By extending the amount of time that these appraisals remain valid by over 33%, more time is allowed for tribes to review purchase offers.⁵⁷ This change highlights the infeasibility of re-assessment of tribal lands, largely due to the mass-appraisal technique utilized by the program.⁵⁸

Additionally, the DOI is seeking to clarify the parameters and intricacies of funding, in order to maximize the amount of funding that goes towards consolidation of land interests.⁵⁹ As previously mentioned, the goal is to use as much of the \$1.9 billion for consolidating land interest for tribes, this will ensure that money is not wasted throughout the many parts of the purchasing process.⁶⁰

A third procedural change to the program involves lengthening purchase offers.⁶¹ A purchase offer under the original parameters of the Program would have lasted for forty-five calendar days from when the original offer cover letter was dated.⁶² The DOI has decided to extend this offer deadline to sixty days, in an effort to help both tribes and current landowners.⁶³ The 33% increase in time was implemented because it will allow more time for landowners to make informed decisions, while still maintaining the efficiency the Program demands.⁶⁴

IV. CONCLUSION

Ultimately, this re-direct in focus to maximize the remaining funds for the Program is an overall efficient move.⁶⁵ There are clearly not enough funds to

54. Andrew Westney, *DOI Narrows Scope Of Tribal Land Buy Back Program*, LAW 360 (Aug. 1, 2017, 6:13PM), <https://www.law360.com/articles/949812/doi-narrows-scope-of-tribal-land-buyback-program>.

55. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

56. See Westney, *supra* note 54.

57. See Westney, *supra* note 54.

58. See U.S. DEPARTMENT OF THE INTERIOR, *supra* note 6.

59. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

60. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

61. See *Frequently Asked Questions*, *supra* note 6.

62. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

63. See *Trump Administration*, *supra* note 37.

64. See Press Release, U.S. Dep't of the Interior, *supra* note 2.

65. See *supra* text accompanying notes 30-64.

“buy-back” the entirety of the land, so it is rather logical that the priority should go to those lands that will allow maximum purchases, and lead to the maximum economic development possible.⁶⁶ However, it also seems to be an acknowledgement that the project is wildly under-funded.⁶⁷ Furthermore, as it is clear that those presenting the bill were aware it was underfunded, this change calls attention to the fact that there should have been a prioritization system from the beginning.⁶⁸

Some changes are more concerning than others. While the procedural changes were clearly asked for by the tribes and helpful to continue the Program,⁶⁹ other changes, such as the change in audience, are clearly a response to the dwindling funds, and not what the tribal members asked for.⁷⁰ Furthermore, the methodology in changing the audience was not well explained, which combined with the conflict of interest involving the Secretary of the Interior is cause for possible concern.⁷¹ Additionally, the change in targeted property, while explained primarily as a strategy to reduce cost, seems against the true intent of the Program: to pay back the American Indians.⁷² The aspect of the Program designed to shift the burden of buy-back to the tribes themselves also seems counter to the original intent of the Program; this aspect seems to forget that the DOI created this problem over hundreds of years of mistreatment.⁷³

Hopefully, the primary legal impact of this Program change will be to instill in the DOI, and other governmental departments, the necessity to either fully-fund or create an efficient prioritization plan for programs of this nature from the start. It should be a requirement for every unfunded program to have a prioritization plan that is formulated with the limitations in mind because few programs of this nature are fully-funded. Unfortunately, due to the low press and attention this issue has garnered, I truly doubt this Program change will have much legal significance in the long run.

Overall, while these changes are primarily positive, they seem to be overdue, and should have been implemented at the genesis of this Program for maximum efficiency.⁷⁴

66. *See supra* text accompanying notes 30-64.

67. *See supra* text accompanying notes 30-64.

68. *See supra* text accompanying notes 30-64.

69. *See generally supra* Part III, C.

70. *See generally supra* Part III, A.

71. *See generally supra* Part III, A.

72. *See generally supra* Part III, A.

73. *See generally supra* Part III, B.

74. *See generally* Part I-III.

