



**INSTITUTE FOR
AGRICULTURE AND TRADE POLICY**



About Alleen Brown

Alleen Brown completed IATP's food justice journalism internship in the fall of 2010. She has written for various Twin Cities publications, including the Pioneer Press and MinnPost.com. She graduated from the University of Minnesota with degrees in journalism and global studies. When she's not uncovering deep societal injustices, Alleen enjoys gardening, riding her bike and speaking Spanish.

About IATP

Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. IATP is headquartered in Minneapolis, Minnesota with offices in Washington D.C. and Geneva.

Landowners without land

Hundreds of thousands of American Indians own land on reservations, but few have access to it. The Cobell settlement will put almost \$2 billion towards Indian land consolidation, but is it too little too late?

Buffalo evolved on the plains. Their hooves don't compact land the way cattle do, and the better soil drainage helps rainwater maintain the aquifer. They birth their own calves. They melt frozen drinking water with their breath. Their meat has more protein and less fat than beef – a European import. It was a mainstay of Lakota Indians' diet before settlers, government officials and decades of laws and policies pushed the Lakota and the buffalo onto smaller and smaller pieces of land.

"We lived with the buffalo and we grew together. We nourished each other and we acknowledged each other," said LeMoine LaPointe, former director of the Healthy Nations program at the Minneapolis American Indian Center and a Lakota from the Rosebud Reservation in South Dakota. "It was really a way of life that is still very much a part of us to this day, but a way of life that's constricted today by laws and regulations and our relegation to square tracts of land considered individual property."

David Bartecchi, executive director of the non-profit Village Earth, thinks those square tracts of land can be used to keep the Lakota's longstanding relationship with the buffalo close. His organization helped start the Lakota Buffalo Caretakers Cooperative, a ranching cooperative made up of three families on the Pine Ridge Reservation in South Dakota. The families raise buffalo sustainably and sell the meat as a specialty product. Village Earth supports them through financial assistance, advising and an adopt-a-buffalo program where online donors can buy buffalo for the ranchers. Bartecchi hopes the cooperative members' experiences will be a model for other Lakota who want to ranch on Pine Ridge. He thinks a return to a localized food system that includes Lakota consumers and producers could help address the dire economic and dietary health problems that Pine Ridge faces. But in order for more families to join the cooperative, tribal members need access to capital and land.

In theory, finding access to land shouldn't be so difficult. Pine Ridge is a community of landowners. According to Village Earth, 60 percent of the reservation's 1,773,716 acres is divided into individually owned allotments. Yet very few of those individuals live on, work or directly control the land they technically own.

The situation is not unique to Pine Ridge, and a process known as "fractionation" is to blame. Fractionation dates back to the 1887 passage of the General Allotment Act, which divided 138 million acres of communally owned tribal land across the nation

into 160-, 80- or 40-acre parcels. The legislation was officially meant to “civilize” Indians by assimilating them into a sedentary, agrarian lifestyle. It would also expand European Americans’ hold on American Indian land. The government deemed 60 million acres “surplus to Indian needs” and divided it among railroad companies, homesteaders and itself. Surplus land was often the most fertile on the reservation.

“The closest word that we have for land is what we call *makoce*. That refers to everything that we see in front of us, but there is no feeling of ownership over it. What’s prominent is a feeling of being related to it all,” LaPointe said. “We didn’t quantify our relationship with nature this way. It was designed to break up our families, our villages and our nation.”

The remaining land was distributed to individual Indians and held in trust of the federal government, under the premise that Indians are incapable of managing their own affairs. It was and to this day remains a system rooted in the government’s racist assumption that it can manage Indian reservations better than Indians. Indians cannot sell or lease their trust land without federal approval, and the government is supposed to distribute any revenues earned from the land (through leasing to farmers, railroads, mining companies and other private interests) to the individual landowners.

As soon as the first allottees died, the government began dividing property among their descendants. But through fractionation, heirs did not inherit pieces of land with specific boundaries. Instead, they inherited fractions of the title—a title held in trust by the federal government. This system leaves most of today’s allotment heirs with tiny, in effect unusable, fractions of ownership.

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Today, 30 percent of federally recognized tribes living on reservations across the United States own fractionated land. Fractionation makes land management incredibly complicated for both tribes and individuals. It also costs the federal government a lot of money. In many cases, the cost of administering an individual’s trust account is higher than the account’s balance. And since many allotment owners do not leave wills, the government spends approximately \$54.5 million annually in probate court costs

The federal government manages approximately 56 million acres of trust land on behalf of tribes and Indian landowners. Individuals own 11 million and tribes own 44 million. As of 2009, there were 153,950 allotments left, divided into 4.5 million “fractionated interests.”

“Allotment is horrendous. It is a heinous act by this government against our people. It was worse than the bullet that took the lives of many of our people because it made us orphans in our own land. It broke our tie with our mother, the earth. It was as heinous as our children being taken from their families and forcibly placed in federal boarding schools,” Lapointe said.

Ross Racine is the executive director of the Intertribal Agriculture Council based in Montana. He said that inaccessibility to land is related to the poverty, food insecurity and diet-related illnesses common on many reservations. The American Diabetes Association predicts that six out of 10 American Indians will develop diabetes in their lifetime. The 2009 American Community Survey found that nearly one in four American Indians live below the poverty line.

“If sustainable communities, both in food production and in health, became the driving force behind land use policies then this would change,” Racine said. “If we used our own land to produce healthy food, and income and job creation was kept in the community, we would have healthier and wealthier people.”

‘Sincere reconciliation’?

In December 2010, President Barack Obama announced a \$3.4 billion settlement to end a 14-year-old class-action suit against the federal government. *Cobell v. Salazar* accused the government of mismanaging income earned from leasing out 11 million acres of reservation land to farmers, ranchers, mining companies and other private interests. Elouise Cobell, a banker from the Blackfeet Nation in Montana, filed suit in 1996 after noticing inconsistencies in paying landowners the lease income they were due.

On December 8, President Barack Obama proclaimed, “With this announcement, we take an important step toward a sincere reconciliation between the trust beneficiaries and the federal government, and lay the foundation for more effective management of Indian trust assets in the future.”

Cobell is less sanguine. “This is significantly less than the full benefit to which Indians are entitled,” she said. “We are compelled to settle now by the sobering realization that our class grows smaller every year, every day, as our elders die.”

Of the \$3.4 billion, \$1.5 billion will be distributed among approximately 500,000 class members—that’s about \$1,000 per person if everyone eligible applies. And \$60 million is earmarked for a scholarship fund to help Indians attend college or vocational school. The remaining settlement funds—\$1.9 billion—will go into a land consolidation fund that will buy fractionated interests from individual owners and turn them over to tribes. The program will allow tribes to develop fractionated land, give allotment owners an opportunity to sell their interests and save the government money it would have spent on administering individual trust accounts.

Critics of the settlement say the cash payouts, which will begin no earlier than August 2011, are small comfort to Indians eeking out a living on reservations. The current version of the federal Indian Land Consolidation Program has been criticized for leaving out approaches that would stop fractionation before it got out of control, like support for estate planning. And for landowners who want to develop their own land, the program is no help.

Surreal estate

Joseph Reynolds knew that he owned land on the Rosebud Sioux Reservation in South Dakota. He inherited it from his grandparents, and figured there were as many as 1,000 acres waiting for him to build a life on. So when he moved back to South Dakota from California in 1971 or 72, 23-year-old Reynolds contacted the federal Bureau of Indian Affairs (BIA). They sent him a 12-page document detailing all his land.

Reynolds visited the reservation’s BIA office and asked if officials would show him what he owned. “That guy said, ‘I’ll take you out there. And that little baseball cap you’re holding—you can just throw that cap in the air and wherever it lands, that can be the land you own,’” recalls Fern Bordeaux-Boltz, Reynolds’ ex-wife, who now helps Rosebud reservation landowners gain control of their land.

Asay No Braid, who owns land on the Pine Ridge Sioux Reservation in South Dakota, wanted to exchange a 177-acre tract he inherited outright from his grandfather

A HISTORY OF THE ALLOTMENT AND TRUST STATUS OF INDIAN LAND

1829 – Andrew Jackson promises Choctaw and Cherokee Indians “land of their own, which they shall possess as long as grass grows or water runs.”

1887 – With the goal of civilizing Native Americans by assimilating them into a sedentary agrarian lifestyle, The General Allotment Act divides 138 million acres of tribal land and gives them to individual Indians. (Of those acres, the government deemed 60 million “surplus to Indian needs” and distributed them among railroad companies, homesteaders and itself.)

During the next 123 years, the allotments divide among known descendants. But heirs do not inherit physical pieces of land, only a percentage of the original property title. This process, known as “fractionation,” results in percentages of ownership becoming steadily smaller as the number of descendants grows.

1906 – The Burke Act indefinitely expands the 25-year expiration date of the allotments’ trust statutes. It also allows the government to declare some allottees “competent,” take their land out of trust, and tax it. Many Indians are not told of this change in status. Ultimately, Indians lose approximately 27 million acres of once-allotted land to tax foreclosures and forced sales.

1934 – The federal government creates the last allotment of reservation land. Of the 138 million acres once allotted to American Indians, 48 million remain. The fractionation process continues to divide ownership of allotted land among more and more people.

1996—Elouise Cobell files a class-action lawsuit against the federal government after observing its inconsistent payment of landowners’ lease income. Cobell and other plaintiffs seek \$48 billion, although Cobell’s legal team calculates the government has withheld \$176 billion from Indian landowners over the last 110 years.

1999— A U.S. District Court finds the U.S. government to be in breach of its trust responsibilities. Interior Secretary Bruce Babbitt and Treasury Secretary Robert Rubin are found in contempt of court for failing to correct how the government handles millions of dollars generated from leased reservation lands.

2001— Interior Secretary Gale Norton is held in contempt of court for the same reason.

December 8, 2010—After 11 years of negotiating between the government and plaintiffs, President Barack Obama announces a \$3.4 billion settlement of Cobell v. Salazar. About 500,000 class members on reservations around the country are eligible to receive part of the settlement, but the majority of the settlement money is earmarked for consolidating fractionated interests so that tribes can directly manage more land.

Present—The government manages 56 million acres of land in trust on behalf of individuals and tribes. Non-Indians own and control more than 65 percent of all reservation land.

for a slightly smaller tract of tribally owned land near his sister. The siblings wanted to raise buffalo together. So in 2009, he applied to both the BIA and his tribe for the exchange and waited—but not quietly. “My older sister said ‘Call them and bug the hell out of them.’ So that’s what I did,” No Braid says.

After a few months, the reservation’s land office approved an exchange for a 160-acre tract of land. But when No Braid’s BIA appraisal came back, he found out his allotment land was worth more than the land he would receive. Hoping for an even trade, he tried for a different tract near a highway.

A month later, No Braid found out that his request to the tribe had been rejected, because the highway tract was slated for tribal development. He weighed his options for two months before finding out that the BIA had terminated his application.

Indian reservations are full of stories like Reynolds’ and No Braid’s. Sharon Redthunder of the Nez Perce tribe wanted to buy out her land’s co-owners on the Colville Reservation in Washington. But since most banks won’t deal with trust land, Redthunder would have had to take out an unaffordable personal loan. She was stuck, unable to leverage her land.

LeMoine LaPointe’s Lakota family stopped receiving lease checks from its land in South Dakota in the early ’90s because the federal government bought it without his mother’s or uncle’s consent. LaPointe believes the sale was related to an archaic law that allowed the land belonging to “incompetent” owners to be put up for sale, but unless he hires a lawyer, he says, he’ll never know exactly what happened to the land or who sold it.

The messy bureaucratic system birthed from fractionation makes it almost impossible for American Indians to actually live on or develop land they officially own.

The messy bureaucratic system birthed from fractionation makes it almost impossible for American Indians to actually live on or develop land they officially own. Owners’ options vary, but they are invariably complicated because so many people own the same piece of land. Any tribal or individual decision on land use has to be agreed upon by at least 50 percent of a tract’s owners. (The average allotment has 17 owners, but some have hundreds.)

And, as Redthunder discovered, buying out co-owners is complicated by banks’ unwillingness to deal with land held in trust by the government. The 2008 farm bill included authorization for a program that would offer loans to purchasers of highly fractionated land, but at the end of 2010 tribes were still being consulted about how the program would work. The USDA’s 2012 budget includes \$10 million for the program.

Cris Stainbrook is the executive director of the Minnesota-based Indian Land Tenure Foundation, which seeks to put all reservation land back under Indian control and management. “Indian people are smart enough to do this stuff. But the amount of persistence it takes is so far beyond what non-Indians have to go through, you can’t even imagine,” he says.

For example, Pine Ridge’s land exchange program, to which No Braid applied, requires no fewer than 12 back and forth interactions among various tribal and governmental offices.

Rationalizing the system

Whether or not the Cobell settlement cleans up the fractionation mess largely depends on the future of a BIA initiative known as the Indian Land Consolidation Program (ILCP), which could soon be flush with about \$1.9 billion in settlement funds. Through the program, which began in 1999, the BIA has been trying to transfer control of reservation land to tribes. It does this by buying allotment interests from willing individual sellers, and then transferring the property title to the tribe. It focuses on buying out people who own less than 2 percent of their allotment.

As of March 2011, ILCP had purchased 427,313 interests or 642,554 acres. That’s a small dent in the 4.5 million fractionated individual interests dividing ownership of 11 million acres spread throughout U.S. reservations.

Brenda Walhovd, ILCP's acting director, says that a tribe only needs to buy out half of all allotment interests in a tract of land to assume full control of it. For example, Wisconsin's Fond du Lac Chippewa tribe used the federal program to double the acreage under tribal management and establish a logging enterprise. After South Dakota's Rosebud Sioux tribe gained control of land through the federal program, it was able to provide housing for homeless tribal members.

Federal funding for ILCP has been cut significantly since the program started. It received \$34 million as recently as 2007, but funding was cut entirely in 2009. In 2010, it received \$3 million; in 2011, \$1 million. "We have kind of a stockpile of applications," Walhovd says, referring to the unanswered requests from people who want to sell their land.

Once Cobell lawsuit funds start flowing, however, ILCP may have nearly \$2 billion to disperse. According to plaintiff attorney Guilder, the government will consult tribes on how the program can be improved before distributing the money. "The government has indicated that they are open to reviewing the manner in which they operate [ILCP], recognizing that they've never had so much money to run the program," he said.

Some tribal advocates criticize the program's focus on buying up very small interests. Stainbrook says that the government could do more good for tribes by buying larger tracts of land that are relatively undivided, which would prevent fractionation before it starts.

For its part, the BIA likes to paint a portrait of happy Indians thankful to sell their small land holdings. The allotment sale stories documented by the land consolidation program demonstrate the desperation of the sellers. Here are three anecdotes from ILCP's literature:

*"It's taking advantage
of people's desperation,"*

Bartecchi says.

*"People don't have
any other option."*

■ "Landowner was very happy when she received her money. She bought school clothes for her children."

■ "I have cataracts in both eyes and need surgery. Medicaid won't pay for it, so I'm glad I got this money so I can have the surgery done."

■ "Landowner bought himself a dependable vehicle to get to work. He never owned a vehicle and lives in a rural part of the reservation."

But Bartecchi said that because of the land's spiritual, familial and cultural importance, most of the Pine Ridge allotment owners he works with wouldn't sell fractionated land to the government if they could actually use it. "It's taking advantage of people's desperation," Bartecchi says. "People don't have any other option."

On the Rosebud reservation in South Dakota, Lakota tribe members do have an option besides selling their fraction of ownership to the government: the Tribal Land Enterprise (TLE), which some hold up as a model of tribal land management. Landowners in the program can trade their allotment interests for shares in TLE, and shareholders can trade for tracts of land or cash or simply let the value of their shares appreciate.

In other words, the tribe increases its land base without taking away an individual's stake. Tribe members who do not own land can lease it from TLE at a reduced price. In 2009, TLE's lease revenues totaled \$4.5 million, which it used to purchase more land.

Revenue and jurisdiction aren't the only reasons TLE buys land. "This is our way of helping our tribe to regain its original reservation," says Fern Bordeaux-Boltz, TLE's board chairperson. "To me, money's not the issue; it's the attachment we have to Mother Earth. Whatever we have to do to get it back, that's what we have to do."

Other tribes have approached TLE seeking help on starting a similar enterprise, Bordeaux-Boltz says, noting that the corporation, founded in 1943, is the only one of its kind in the country.

Bordeaux-Boltz is in favor of doing away with the BIA entirely. "If we say we're a sovereign nation, and we can develop our own rules and regulations, then why are we dealing with the middleman?"

'I just got screwed'

The federal settlement still has to be approved by a district court. A hearing is set for June 20, followed by a period for appeals.

If ILCP does become flush with cash, the federal program still won't address the underlying causes of fractionation. It won't give tribes money to develop any land ILCP helps them regain control of. The consolidation program won't change the fact that banks don't accept trust land as collateral for loans. There's no end in sight to the federal government's paternalistic practice of holding tens of millions of reservation acres in trust. Sharon Redthunder, Joseph Reynolds and Asay No Braid will still have to deal with the mess left by the General Allotment Act 124 years ago.

"Making land available to new farmers is a small increment of this overall process," Racine said. "It is very important that we retain our present, and even increase, Indian ownership on the reservations, but while doing so, if we have not improved the quality of life on those reservations, then what have we done?"

No Braid figures that even if his buffalo dream doesn't work out, there's still the land. "To be honest with you, that's all we have. My family's not rich. We struggle day to day. If anything were to happen, at least I'd have somewhere to go and pitch a tent."

No Braid is lucky he's the sole inheritor of his land. Reynolds, who now lives in Tennessee, never was able to live on the Rosebud reservation land he thought he'd inherited. Today, even the measly \$.33 annual payment he received for the fraction of his title is gone. "I don't even try to look too much into it," he says. "I can't do nothing about it. I just got screwed."

This piece originally appeared on In These Times, June 27, 2011, titled "This Land is Our Land" on www.inthesetimes.com.