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I. INTRODUCTION

Since European settlers first arrived in America, they have been faced with the dilemma of how to deal with the Native American Indians.[1] In the United States, following colonial independence from England, the Constitution put Indian affairs in the hands of the federal government. The power of Congress to regulate commerce with the tribes[2] and the President's power to make treaties with the individual tribes[3] is explicit in Articles I and II, respectively. Between 1790 and 1834, a series of Trade and Intercourse Acts were adopted with the intent of keeping Indians and non-Indians separate,[4] however, no attempt was made at that time to govern the individual tribes.

In the Cherokee Cases,[5] Chief Justice John Marshall fashioned what would become the foundation of the legal status of Indians. In *Cherokee Nation v. Georgia*,[6] the Cherokees brought an original action to the United States Supreme Court challenging Georgia state laws which attempted to govern all activities of the Cherokees in Georgia.[7] In *Cherokee Nation*, the Tribe's ability to attain standing depended on its

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1. Federal policy regarding Indians is often viewed in distinct time frames: the Colonial Period (1492-1776), the Pre-Constitution Period (1776-1789), the Trade and Intercourse Era (1789-1835), the Removal Period (1835-1861), the Reservation Policy (1861-1887), the Allotment and Forced Assimilation Period (1871-1934), the Indian Reorganization Act Period (1934-1940), the Termination Period (1940-1962), and the Self-Determination Era (1962-present). MONROE E. PRICE, LAW AND THE AMERICAN INDIAN 68-90 (1983).

2. U.S. CONST. art. I, § 8, cl. 3.

3. U.S. CONST. art. II, § 2, cl. 2.

4. *See* Act of June 30, 1834, 4 Stat. 729 (codified as amended in scattered sections of Chapters 5 & 6 of 25 U.S.C. §§174-264 (1991)); Act of Mar. 30, 1802, 2 Stat. 139; Act of July 22, 1790, 1 Stat. 137 (expired).

5. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

6. 30 U.S. (5 Pet.) 1 (1831).

7. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

status as a "foreign state."[8] The Court held that the Tribe retained "nation" status, but was not a "foreign state" under the Constitution.[9] Marshall stated in his decision:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those Tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right to possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[10]

The relationship of the Indian tribes and the federal government as ward and guardian is one that has endured to this day.

As the movement of non-Indians expanded westward at a rapid pace in the mid-nineteenth century, it became apparent to the federal government that a new Indian policy would be required. Beginning in 1850 and continuing through 1887, federal policy restricted the tribes to designated reservations.[11] Although reservations were originally used to distance the Indians from non-Indian settlers, they eventually became vehicles in a movement to "civilize" the Indians through a series of assimilationist policies.[12]

In 1887, a new shift in government policy culminated with the enactment of the General Allotment Act (Dawes Act).[13] This legislation had a dual purpose; by dividing the reservations into individual plots and distributing the land to individual Indians, it was assumed that the Indians would prosper as middle-class farmers and abandon their traditional ways.[14] At the same time, the "unused" lands would be opened for settlement by non-Indians.[15] The Dawes Act and its resulting policies became the most disastrous piece of land legislation in U.S. history concerning Indians. Accustomed to communal land tenure practices, the tribes responded poorly to the Act's policy of forced private land

8. *Id.* at 16.
9. *Id.* at 19-20.
10. *Id.* at 17.
11. S. EXEC. DOC. No. 31-1 (1849).
12. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 169 (3d ed. 1993).
13. Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended in scattered sections of Chapters 9 & 10 of 24 U.S.C. §§ 331-380 (1995)).
14. GETCHES, *supra* note 12, at 168.
15. *Id.*

ownership. Both allotment and its accompanying assimilationist programs ravaged the Indian land base, destroyed existing tribal governments, and devastated Indian culture while opening large areas of Indian land to non-Indian settlement.

Although the allotment policy was formally terminated in 1934 with the enactment of the Indian Reorganization Act (Wheeler-Howard Act),[16] its effects have endured the New Deal reforms and continue to affect the economic, social, cultural, and spiritual lives of the tribes to this day.

Perhaps nowhere in Indian country have the effects of allotment been more readily apparent than on the Pine Ridge Reservation in South Dakota, home of the Oglala Lakota Nation. Part II of this article explains the policy of allotment, its intended purposes, and its eventual enactment as federal Indian policy. Part III discusses the resulting effects that these and ensuing policies have had on the Oglalas at Pine Ridge. Part IV discusses the land tenure practices of the allotment period. Part V concludes by considering possible alternatives and remedies that may be available to the Tribe and the federal government in addressing these lingering problems.

II. THE POLICY OF ALLOTMENT

The federal government's reservation policy, which was initiated in the mid-nineteenth century, had several purposes.[17] Initially, reservations were used to segregate Indians from non-Indians in order to alleviate the confrontational issues that plagued westward expansion.[18] Eventually, however, the reservations became vehicles to implement the government's policy to "civilize" the Indians through attempted assimilation.[19] As the cost for maintaining the reservations began to spiral and the demand for prime land in the west increased, the pressure on the government to enact a new Indian policy became more evident.[20] Faced with this growing political dilemma and working within its power as guardian of the tribes, the government enacted a series of assimilationist policies to serve the "best interests" of the tribes.[21] The Bureau of

16. Act of June 18, 1934, 48 Stat. 984-88 (codified as amended in scattered sections of Subchapter V of 25 U.S.C. §§ 461-492 (1995)).

17. GETCHES, *supra* note 12, at 168.

18. *Id.*

19. *Id.* at 169.

20. *Id.*

21. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-68 (1903). In this case, Lone Wolf, a Kiowa, argued that according to the 1867 Medicine Lodge Treaty, any further cessations of Kiowa or Comanche lands would require the approval vote of "at least three-fourths of all the adult male Indians occupying the same," and that the implementation of allotment was a violation of article 12 of the treaty. *Id.* The United States Supreme Court held that Congress was acting within its authority as guardian over the tribes, that Congress had the legislative powers to pass laws in conflict with treaties made with the Indians, and that it was "presume[d] that Congress acted in perfect good faith in the dealings with the Indians . . . and that the legislative branch of the government exercised its best

Indian Affairs (BIA), under the auspices of the Department of Interior and in cooperation with Christian missionaries, engaged in a campaign to convert the nomadic hunters to Christian farmers by eliminating Indian government, religion, and culture.[22] Fundamental to this movement was the policy of allotment. In theory, if Indians were allotted their own land to be farmed individually, they would reject tribalism and eventually become independent farmers, rather than remain wards of the federal government.[23]

A. THE DAWES ACT

Although allotment of tribal lands to individual members was not a novel idea in 1870, it was still not official government policy. Allotment had been utilized in some treaties in the early nineteenth century and forced upon other tribes during the tenure of the Commissioner of Indian Affairs George Manypenny, which began in 1853.[24] There were also some early statutes enacted which specifically authorized allotment of tribal lands to individual Indians,[25] however it was not until the enactment of the Dawes Act of 1887 that allotment became official government policy.[26]

The proponents of allotment were an alliance of disparate partisans. A large contingent of predominantly western land owners and potential homesteaders who were eager to open the "unused" Indian territory to non-Indian settlement supported the policy but ironically it was actually eastern politicians, sympathetic to the plight of the Indians, who would draft the legislation and endorse it in Congress.[27] These "friends of the Indians" viewed allotment as a way to preserve what remained of the Indian land base and theorized that by substituting white civilization for the Indian tribal culture, the Indians would develop an appreciation for private land ownership which was essential for effective assimilation.[28] The optimism of Senator Dawes, the author of the bill, is evident in his address concerning the General Allotment Act to the Fifth Mohonk Conference in September of 1887:

> It seems to me that this is a self-acting machine that we have set going, and if we only run it on the tract it will work itself all

judgment in the premises." *Id.*

22. GETCHES, *supra* note 12, at 168, 190-93.

23. *Id.*

24. *Id.* at 190. The 1798 Treaty of the Oneida Indian Nation included a provision for allotment. *Id.* It became general policy for Commissioner Manypenny to attempt negotiating allotment provisions in treaties. *Id.*

25. Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended in scattered sections of Chapters 9 & 10 of 25 U.S.C. §§331-380 (1995)).

26. *Id.*

27. GETCHES, *supra* note 12, at 190-93.

28. *Id.* at 192.

> out, and all these difficulties that have troubled my friend will pass away like snow in the spring time, and we will never know when they go; we will only know they are gone.[29]

Allotment was not, however, without its' detractors. In a minority report of the House Indian Affairs Committee in 1880, the Committee concluded:

> The real aim of this bill is to get at the Indian lands and open them up for settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them . . . . If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves whether he will or not, is infinitely worse.[30]

In a separate debate concerning allotment, Senator Teller stated:

> If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when 30 or 40 years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion, they would not be clamoring for this at all.[31]

Despite these dissenting viewpoints and numerous objections from a number of the tribes themselves,[32] the Dawes Act was signed into law in 1887.[33]

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29. PRICE, *supra* note 1, at 544 (citation omitted).

30. GETCHES, *supra* note 12, at 193.

31. *Id.*

32. The Senecas, Creeks, Choctaws, and Cherokees all expressed objections to Congress concerning the implementation of allotment to their Tribes. *See* GETCHES, *supra* note 12, at 193-94.

33. Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended in scattered sections of Chapters 9 & 10 of 25 U.S.C. §331-380 (1995)). The major provisions of the original act were as follows:

> (1) a grant of 160 acres to each family head, of 80 acres to each single person over 18 years of age and to each orphan under 18, and of 40 acres to each other single person under 18;
> (2) a patent in fee to be issued to every allottee but to be held in trust by the Government for 25 years, during which time the land could not be alienated or encumbered;
> (3) a period of 4 years to be allowed the Indians in which they should make their selections after allotment should be applied to any Tribe - failure of the Indians to do so should result in selection for them at the order of the Secretary of Interior;
> (4) citizenship to be conferred upon allottees and upon any other Indians who had abandoned their Tribes and adopted "the habits of civilized life." Upon demands for equalization, the Act was amended in 1891, providing for "allotments of 160 acres of grazing land, or 80 acres of farming land, to each Indian."

GETCHES, *supra* note 12, at 191 (citing 25 U.S.C. § 331) (citation omitted).

When allotment was finally implemented at the Pine Ridge Reservation in South Dakota, it was allegedly performed with much precipitance.[34] There was skepticism among the Tribe from the beginning.[35] Other problems ranged from the failure of crews to allot areas that would have sufficient irrigation for cultivation, to land shortages on Pine Ridge that left only the parched and barren Badlands to be allotted to the 200-250 children born there each year.[36] The policy was not carried out in a fair manner or one that would protect Indian interests.[37] Although there were provisions in the Act for "surplus" lands to be sold for non-Indian development, many protested that the lands most suitable for farming were withheld from allotment from the beginning and sold as "surplus" to non-Indian homesteaders.[38] For example, Bennett County in the southeast corner of Pine Ridge contains the richest farmland in the entire Pine Ridge area. Presently, such a diminutive percentage of this area is Indian owned that it is no longer delineated on most maps as being within the boundaries of the Pine Ridge Reservation. This land was never allotted to Indians, but was withheld and opened to homesteaders after the Indian allotments had been issued.[39]

B. THE LAND LEASE AMENDMENT

Originally, the General Allotment Act contained no provision to allow for allottees to lease their land if they so desired. Framers of the policy, who felt that the Indians must play an active role in the assimilation process, considered leasing counter-productive because simply leasing the land was inconsistent with the original intent of Congress.[40] However, as the Indians moved at a slow pace in embracing the white farm practices, many non-Indians grew impatient with land lying fallow. Many convincing arguments were presented to Congress to allow for the leasing of allotted lands to non-Indians, who would in turn make the land economically profitable for both Indians and non-Indians.[41] In 1890, the Dawes Act was amended to allow for such a leasing policy. Section 2 of the amendment reads:

> That whenever it shall be made to appear to the Secretary of Interior that, by reason of age or other disability, any allottee

34. JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934, at 20 (1991).
35. *Id.* (citation omitted).
36. *Id.*
37. *Id.* at 19-25.
38. Interviews with Tribal officers and members.
39. *Id.*
40. PRICE, *supra* note 1, at 552-53.
41. At the Mohonk Conference in 1889, Justice Strong, previously Associate Justice of the United States Supreme Court, and the Indian agent for the Omaha and Winnebago Tribes, offered arguments in favor of allowing the allottees to be able to lease their land. *Id.* at 551-52.

> under the provisions of said act or any other act or treaty cannot personally and with benefit to himself occupy or improve his allotment, or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by said Secretary, for a term not exceeding 3 years for farming or grazing, or 10 years for mining purposes.[42]

Congress' decision to allow for the leasing of allotted lands defeated any benevolent intentions that may have been espoused by the original allotment plan and eventually resulted in grave consequences for both the Indians and the allotment policy in general. These effects will be discussed in Part III.

C. THE BURKE ACT

The Dawes Act provided that the government would hold the title to each allotment in trust for twenty-five years.[43] This, combined with the fact that Indians were held to have attained citizenship upon receiving their allotment,[44] provided for a complex situation in which an Indian's person would be under the jurisdiction of the state in which he or she resided, while the Indian's land would be under the jurisdiction of the federal government until the twenty-five year trust period had expired.[45]

South Dakota Representative Charles Burke, concerned about this split in jurisdiction, introduced an amendment to the Dawes Act that would delay the granting of citizenship until the end of the twenty-five year trust period, thus postponing when the Indians would be subject to the laws of the individual states.[46] The Amendment also provided that the Secretary of the Interior (Secretary) could issue fee patents to competent allottees who were capable of managing their own affairs, effectively removing the federal restrictions over them and their land.[47] The decision as to competency became the responsibility of the Secretary and the Indian Office.[48] The Burke Act became law on May 8, 1906.[49] As with the Dawes Act and its subsequent amendments, this bill may have had estimable intentions, but the manner in which it was implemented would produce catastrophic results for the Indians and their land base. These effects will also be discussed in Part III.

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42. Act of Feb. 28, 1891, 26 Stat. 794-96 (codified as amended by 25 U.S.C. § 331 (1995)).

43. MCDONNELL, *supra* note 34, at 87.

44. *Id.* at 88 (citing *In re* Heff, 197 U.S. 488, 489 (1905), which held that an Indian became a citizen at the beginning of the trust period when he or she accepted the allotment).

45. *Id.*

46. *Id.*

47. *Id.* (citation omitted).

48. *Id.* Competency commissions were established by the Indian Office to review applications for competency. If the applications were approved, the 25 year trust period could be waived.

49. Act of May 8, 1906, 34 Stat. 182-83 (codified as amended by 25 U.S.C. § 349 (1995)).

III. CONSEQUENCES OF ALLOTMENT AND THE ACCOMPANYING ASSIMILATION POLICIES

The effects of allotment and its accompanying assimilationist policies on the Oglalas at Pine Ridge are innumerable and unsettling, but in certain instances, may be rectifiable. These consequences encompass a broad spectrum, from the loss of one's spiritual identity by way of the forced adoption of a foreign culture, to the economic inviability of land brought about by fractionation of allotment interests through inheritance laws.

Although it is the purpose of this paper to discuss the effects and alternative remedies of the allotment policies, it is difficult in most instances to separate these effects from those created by the attendant assimilationist policies. This section will initially address the social, cultural, and spiritual effects of the assimilationist policies, followed by a more in-depth deliberation on land tenure practices and their effects during the allotment period. The section will conclude with a discussion of the lingering problems of fractionation of trust property originated by Indian inheritance laws.

A. EFFECTS OF ASSIMILATIONIST POLICIES

Even before the allotment period, it was apparent that the reservation system was creating areas of economic destitution that were rapidly evolving into America's first welfare states.[50] Non-Indians viewed gradual assimilation as the only practical and politically viable alternative to the outright destruction of Indian culture and the dissolution of the reservations.[51] The spirit of the laws and policies that were to follow are perhaps best summarized in a quote from a government Indian agent from the Yankton Sioux Reservation in 1877:

> As long as Indians live in villages they will retain many of their old injurious habits. Frequent feasts, community in food, heathen ceremonies, and dances, constant visiting—these will continue as long as the people live together in close neighborhoods and villages . . . . I trust that before another year is ended they will generally be located upon individual lands [or] farms . . . . From that date will begin their real and permanent progress.[52]

50. GETCHES, *supra* note 12, at 208.
51. *Id.*
52. *Id.* at 192.

Education became one of the most important tools employed by the government in assimilating the Indians.[53] Many believed that it was imperative to begin the assimilation process as early as possible by sending Indian children to boarding schools, thus denying parents any opportunity to nurture their children in the traditional ways.[54] This ideology gave rise to the Indian boarding schools.[55] The most prominent of these early schools was the Carlisle Indian Boarding School in Pennsylvania. Captain Richard H. Pratt, the first superintendent of the school, recapitulated the school's objectives in his notorious statement: "A great general has said that the only good Indian is a dead one . . . I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man."[56]

The BIA's boarding school system was modeled after the Carlisle School and administered for the federal government by various Christian missionaries.[57] The children were kept at school for up to eight years. During this time, they were not allowed to visit with their parents or other family members.[58] Indian dress, language, religion, and cultural traditions were forbidden.[59] The children were to have short hair, learn English, become baptized in the Christian faith, and take Christian names.[60] In Pine Ridge during the early twentieth century, the schools in the eastern half of the reservation were designated to Episcopalians, while schools in the western half were administered by Catholics.[61]

The rigid policies of the boarding schools were not only enforced on children, but on the adults as well. The first BIA agent at Pine Ridge, Dr. Valentine T. McGillycuddy, though sympathetic to the Oglalas in some ways, was also steadfast in his belief that the Indians could only survive through effective assimilation.[62] In order to implement his philosophy, McGillycuddy believed that the chief system had to be dismantled, hunting tendencies crushed, nomadic urges curtailed, and language, customs, traditional clothing, and religions banned.[63] McGillycuddy further believed that anyone who refused to submit to these changes must be jailed and have their rations cut off.[64]

53. *Id.* at 208.
54. *Id.* at 209.
55. *Id.*
56. Richard H. Pratt, *The Advantages of Mingling Indians with Non-Indians*, *in* AMERICANIZING THE AMERICAN INDIANS 260-61 (Francis Paul Prucha ed. 1973).
57. GETCHES, *supra* note 12, at 209 (citing PETER FARB, MAN'S RISE TO CIVILIZATION 257-59 (1968)).
58. *Id.*
59. *Id.*
60. JOE STARITA, THE DULL KNIFES OF PINE RIDGE 180 (1995).
61. *Id.*
62. *Id.* at 82.
63. *Id.*
64. *Id.*

In 1883, the speaking of the traditional Lakota language and the practice of Lakota culture and religious ceremonies, including the Sun Dance, were prohibited on Pine Ridge.[65] In a further act of suppression, in 1902 Pine Ridge agent John R. Brennan ordered all Lakota men employed by the government to cut their hair or lose their rations and their jobs.[66] Long braids were considered a symbol of manhood to the Lakota; they also embodied a spiritual connection and were thought to help in promoting a long life.[67] However, Brennan's superior, Commissioner of Indian Affairs William A. Jones, viewed the braids as a hindrance to effective assimilation of Indian men.[68]

These and similar government policies had a debilitating effect on the Oglala culture. Many children raised in the boarding schools were made to believe that they were from an inferior race. Thus, many developed an inferiority complex which in some instances, would take generations to reverse.[69] These policies also served to further segregate the children of full-blood traditional Oglala families from those children of non-traditional mixed-blood families.[70]

The assimilationist policies had an equally forcible effect on the roles of adult men and women in the Oglala society. In traditional Lakota villages, the men were hunters and warriors while the women were harvesters and gatherers.[71] Women also maintained the lodge, tanned hides, prepared meals, and frequently prepared medicines.[72] The men and women shared mutual respect and responsibilities within the village.[73] The federal government's policies changed these roles drastically. With the introduction of the reservation system, the traditional role of the Lakota man was removed and replaced by the federal government.[74] This, combined with the loss of their sacred lands and hunting grounds, led to the loss of a spiritual connection to the land for many Oglala men. In addition, for many, the inability to perform

65. *Id.* at 86.

66. *Id.* at 178.

67. *Id.* at 179.

68. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 764-66 (1984).

69. Interviews with Tribal officers and members.

70. This division between full-bloods and mixed-bloods would eventually result in the occupation of the hamlet of Wounded Knee on Pine Ridge in February, 1973. DOCUMENTARY: THE SPIRIT OF CRAZYHORSE (Michel Dubois and Kevin McKiernan 1990) [hereinafter DOCUMENTARY]. This siege involved an armed conflict between members of the American Indian Movement (AIM) and an alliance of federal marshals, the FBI, and mixed-blood non-traditional Oglalas under the supervision of the tribal chairman Dick Wilson. *Id.* Though the siege would eventually end in May, the civil war between these factions would last for several years until Wilson was overwhelmingly defeated in tribal elections in 1976. *Id.*

71. STARITA, *supra* note 60, at 226.

72. *Id.*

73. *Id.*

74. Interviews with Tribal officers and members; *see also* DOCUMENTARY, *supra* note 70.

traditional duties lead to a number of social problems, including alcoholism.[75]

Although the federal government excluded women from all tribal decision-making matters during the reservation period, their roles within the Tribe were not as radically altered as those of the men. Often during this period of transition, it was the women who persevered and held their families and culture together.[76]

Consequently, in the early years of allotment the spirit of many Oglala men had already been broken, leaving few with the desire to learn how to farm or ranch. This forced revision of traditional roles, combined with the remote concept of private land ownership, did not provide a solid foundation on which the government could expect effective assimilation.

These cultural conflicts would continue to plague the Oglalas for generations. With the adoption of the Indian Reorganization Act of 1934 (IRA) and the resulting termination of allotment, Commissioner of Indian Affairs John Collier proposed sweeping changes in federal Indian policy which were in direct opposition to the assimilationist policies of his predecessors.[77] His proposals, however, were met with strong opposition from various interest groups, including church organizations; private businessmen; some members of Congress; and in some instances, the Indian tribes themselves.[78] The result of this opposition was that Collier's plans were largely ignored.

Though the Indian Reorganization Act was successful in preventing further erosion of the Pine Ridge tribal land base, the effects of assimilation exhibited little variation until the mid-1970s. Following the siege at Wounded Knee in 1973 and the ensuing civil war on Pine Ridge between the traditionalists and the mixed-bloods, fundamental social changes started to appear on the reservation.[79]

In the wake of a cultural resurgence in the Indian community during the late 1970s and early 1980s, Oglala children were no longer forbidden from speaking their native Lakota, but were actually being taught their language in some schools. Tribal history was being taught in a manner that helped the children develop and identify within their

75. DOCUMENTARY, *supra* note 70.

76. STARITA, *supra* note 60, at 226-27.

77. THOMAS BIOLOSI, ORGANIZING THE LAKOTA 63 (1992).

78. STARITA, *supra* note 60, at 238.

79. Although the government promised to reevaluate the Treaty of 1868 (with special concern for the illegal taking of Indian lands) and promised to investigate complaints of BIA corruption in exchange for an end to the siege, no investigations were forthcoming. DOCUMENTARY, *supra* note 70. The siege, however, had succeeded in exposing the plight of the Indians to the rest of the nation. *Id.* Eventually many strong grassroots Indian movements began to appear including cultural, legal, historical, and social reform groups. *Id.* The effects of these movements and these various groups eventually started to appear on Pine Ridge. *Id.*

culture, the Sun Dance and other religious ceremonies returned to the reservation, and a sense of hope replaced that of despair for many Oglalas.[80]

There is now an ongoing healing process, both spiritually and culturally, at Pine Ridge. The Oglala social structure is constantly evolving. Instead of assimilating to a strict Euro-Christian lifestyle, the Tribe is acquiring the modern technical skills necessary to be economically competitive while re-establishing their own cultural traditions, language, and religion.

Although much of their culture has endured decades of suppression, not all facets of their indigenous civilization have survived intact. One example is the traditional form of government which disintegrated during the allotment years. The chief system has been replaced by an elected tribal council, which now governs tribal affairs.

Another case in point in which the Oglala's disposition has changed is their perception of private land ownership. Perhaps the most inviolable quote from the revered Oglala Chief Crazyhorse is: "One does not sell the land on which the people walk."[81] However, one hundred years of allotment policies have altered many Oglalas' perceptions regarding land ownership. This may be the aspect of assimilation that has had the most profound and lasting effect at Pine Ridge. Although much of the land remains sacred to the Oglalas, many are reluctant to forgo their share of the allotments in order to benefit tribal land consolidation, even if their interest in the allotment is minimal. This dilemma will be addressed in greater detail in Part IV.

IV. LAND TENURE PRACTICES OF THE ALLOTMENT PERIOD

A. GOVERNMENT SPONSORED PROGRAMS

Given the nomadic tendencies of the Tribe, their perpetual resistance to European occupation, and the consequences of the early assimilationist policies, it is not unexpected that allotment and its intended purposes were not embraced at Pine Ridge.[82] Commissioner of Indian Affairs T. J. Morgan accurately portrayed the predicament at

80. STARITA, *supra* note 60, at 316.

81. DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1971). This was the reaction of Chief Crazyhorse when he was asked to participate in negotiations to sell the sacred Black Hills to the United States Government. *Id.*

82. DOCUMENTARY, *supra* note 70. The Oglalas who followed Crazyhorse were considered hostile by the U.S. Government in 1876. *Id.* This large band of Oglalas remained on the traditional hunting grounds of the Lakota longer than any other band. *Id.* They were part of the Indian village involved in the Battle of Little Big Horn. *Id.* This band eventually surrendered with Crazyhorse in May, 1877 at Fort Robinson, Nebraska. *Id.*

Pine Ridge in a report to his superiors at the Department of Interior in 1891:

> It is hard to overstate the magnitude of the calamity as they viewed it, which happened to these people by the sudden disappearance of the buffalo and the large diminution in the numbers of deer and other wild animals. Suddenly, almost without warning, they were expected at once and without previous training to settle down to the pursuits of agriculture in a land largely unfitted for such use. The freedom of the chase was to be exchanged for the idleness of the camp. The boundless range was to be abandoned for the circumscribed reservation, and the abundance of plenty to be supplanted by limited and decreasing government subsistence and supplies. Under these circumstances, it is not in human nature not to be discontented and restless, even turbulent and violent.[83]

It would become apparent that the concept of private land ownership would be more difficult to incorporate at Pine Ridge than on any other reservation.[84] This notion was reinforced by agent Major W. H. Clapp in his annual report to the Commissioner of Indian Affairs: "[The Indians fear] that if allotments are made, white settlers will be permitted to come upon the reservation and monopolize the grazing."[85]

Chiefs Red Cloud and Little Wound resisted attempts to partition the Oglala land.[86] They feared that the emphasis on individualism and the annulment of collective social behavior would devastate their culture.[87] Red Cloud also warned that the Indians would be unable to adapt to the radical cultural changes and that their allotted lands would eventually be appropriated by white ranchers.[88] Red Cloud's trepidations were observed by Pine Ridge agent Charles Penney in his annual report: "The allotments of their lands in severalty will result in the degradation of this people and their speedy extinction."[89] In spite of these warnings, the first lands were allotted at Pine Ridge in 1904.[90] During the next five years, 2,604 Oglalas were allotted parcels.[91]

83. STARITA, *supra* note 60, at 93-94 (citing T.J. MORGAN, COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORTS 132-33 (1891)).
84. *Id.* at 159.
85. *Id.* (citing MORGAN, *supra* note 83, at 276).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (citing MORGAN, *supra* note 83, at 289).
90. *Id.* at 187.
91. *Id.*

Even before allotment, however, some Oglalas had been farming on the reservation as a communal land base.[92] Between 1882 and 1890, these first attempts at farming had been relatively successful, but by the early 1890s severe droughts had ravaged their crops.[93] This, coupled with the continued decline of wild game, forced the Tribe to resume its dependence on the government for their food supply.[94]

In addition, in the years prior to allotment it was apparent that much of the land was better suited for grazing than farming, and many Oglalas chose to ranch rather than farm.[95] The federal government hired government farmers and ranchers to teach the Indians the principles of farming and stockraising.[96] Unfortunately for the Oglalas, this was all the assistance they would receive in financing their new way of life.[97] Although, in the first years of the policy Congress had appropriated some money for seeds, equipment, tools, these appropriations decreased dramatically until no money was allocated in 1904.[98]

The government farmers attempted to train the Indians in what were considered the "practical" methods of farming and ranching, believing that the Tribe was not advanced enough to absorb the technical and scientific aspects.[99] Farming methods were also adapted to the local conditions.[100] The ultimate goal of this plan was to allow enough independence for the farmers to eventually become self-sufficient.[101]

There was some initial success with these training programs. Some Oglalas faired well as ranchers, as the round-ups and brandings seemed more akin to their past roles as hunters.[102] The Oglala farmers made progress as well, and in 1916, increased their cultivated acreage by two thousand acres and produced more crops than in any other year to that point.[103] This initial progress continued until the post-World War I depression, when farm prices plummeted and remained depressed for the next decade.[104]

The cattle ranchers were also affected by the post war depression. In 1917, Indian ranchers who had begun to prosper before the war were urged by the government to sell their herds and lease their lands to

92. *Id.* at 160.
93. *Id.*
94. *Id.*
95. *Id.* at 93.
96. MCDONNELL, *supra* note 34, at 27.
97. *Id.* at 26.
98. *Id.*
99. *Id.* at 27 (citation omitted).
100. *Id.*
101. *Id.*
102. STARITA, *supra* note 60, at 154. In the early twentieth century their cattle herds grew to nearly 40,000.
103. MCDONNELL, *supra* note 34, at 33.
104. *Id.* at 36.

whites.[105] The high prices for cattle at the time induced most Indian ranchers to sell, and within a year almost all of their land was controlled by whites.[106] This proved disastrous for the ranchers; many quickly squandered their profits, and after cattle prices fell in 1921, the lessees demanded that their rents be reduced to which the Indian office agreed.[107] By the following year, many cattle companies had abandoned their pastures altogether because they were unable to pay their rents, leaving the Indians with nothing.[108]

In the aftermath of the post-war depression, Commissioner of Indian Affairs Charles Burke implemented what was known as the Five-Year Program (Program).[109] Under the Program, the superintendents were instructed to outline a program for economic development for their reservations over the next five years.[110] The Program called for the superintendents to work individually with each family to discuss plans for food production.[111] The Program also included farm clubs, where the Indians conducted extensive services, including community development programs and women's clubs for canning, gardening, and other purposes.[112] In addition, these programs provided farmers with credit, supplies, and implements.[113]

The Program was initially very successful at Pine Ridge. In 1923, corn production increased 75%, potato acreage increased by 300%, and crop production as a whole, increased by 25%.[114] Although Burke's Five-Year Program improved conditions to some degree, it eventually failed and farmers and ranchers remained subject to low farm prices and frequent droughts.[115] The allotment period ended in 1934 with the enactment of the Indian Reorganization Act, having attained no measurable progress in converting the Oglalas to successful and independent farmers and ranchers.[116]

Lack of interest, tribal traditions, unfavorable climate conditions, and lack of proper equipment still prevented many Oglalas from embracing this new way of life.[117] Eventually many would discover that they

105. *Id.* at 38.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 40.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (citation omitted).
114. *Id.*
115. *Id.* at 41-42.
116. *Id.*
117. *See id.* at 28.

would rather live on the money they could earn by selling or leasing their land.[118]

B. LEASING POLICY

The original Dawes Act prohibited the allottee from leasing the land during the trust period.[119] Congress initially held that leasing was inconsistent with the intent to rehabilitate the Indians into independent farmers.[120] However, the inability of the Indians to use their land efficiently, combined with pressure from western businessmen and land speculators, resulted in Congress eventually allowing Indians with "specific disabilities" to lease their lands.[121] Subsequently, Congress allowed for Indians who did not wish to improve the land themselves, to lease the land to non-Indians.[122] This liberalization of the original Act resulted in an increase in lease approvals nationally from 6 in 1894 to 2,500 in 1900.[123]

Leasing was not only in complete defiance of the Act's original intent, but its implementation through the Indian Office perpetuated the federal government's ever-increasing policy of violating its trust responsibility to the Indians.[124] It would become another government policy unfavorable to the Indians' long range interests; precipitating the eventual loss of more Indian land.[125] In many instances, once the Indians had leased their lands for agricultural or mining purposes, the Indian office encouraged them to sell the land.[126] Although this contradicted the intent of the Act as well, it was argued once again that the land would become more productive and that the Indians would be provided with a source of income.[127] Furthermore, government policy prevented Indians from using their trust lands as collateral to borrow money to purchase equipment, seeds, and stock, many were forced into leasing or selling their lands to neighboring non-Indian farmers.[128] Consequently, many Indians were left landless; working for subsistence wages on lands that they once owned.[129]

118. *Id.* (citation omitted).
119. *Id.* at 43.
120. *Id.*
121. *Id.* at 45.
122. Act of Feb. 28, 1891, 26 Stat. 794-96 (codified as amended by 25 U.S.C. § 331 (1995)).
123. MCDONNELL, *supra* note 34, at 43.
124. *Id.* at 60.
125. *Id.*
126. *Id.* at 55.
127. *Id.*
128. STARITA, *supra* note 60, at 229.
129. *Id.*

C. FEE PATENTS

With the enactment of the Burke Act in 1906, the allotment policy was dramatically altered to allow "competent" allottees to be issued a fee patent (a deed from the federal government) to their allotment before the twenty-five year trust period had run; thus removing any federal restrictions on the property.[130] The decision as to competency was the responsibility of the Secretary of Interior and the Indian Office.[131] The intent of the Burke Act had been to keep the Indians under federal protection as long as possible, and the amendment allowing for exemptions was to be implemented only in specific cases.[132] Unfortunately, as with other programs that may have been conceived with noble intentions, the implementation of this Act proved to be disastrous to the Indians.

Many more Indians applied for fee patents than could properly be processed, which made it difficult to accurately assess each application.[133] In some instances, non-Indians persuaded Indians to apply for fee patents, only to cheat them out of the land once it had been released from federal trusteeship.[134] In spite of numerous attempts by several Commissioners of Indian Affairs to correct the competency commission's procedural mismanagement, the abuses continued unabated.[135]

On Pine Ridge, traders encouraged Oglalas to acquire large credit debts, then took mortgages on their allotments to settle the accounts.[136] This practice was not only unscrupulous, it was illegal in that the government's policy was to transfer the trust land to the allottees free of encumbrances.[137] Debts incurred before fee patenting could not be held against the allottee's land.[138] The fact that very few Oglalas could read, write, or speak English at this time should have made it highly unlikely for the competency commission to assess any Oglalas at Pine Ridge as competent according to the government standards for competency.[139] Nevertheless, many were assessed as competent, received fee patents, and soon sold their lands.[140] Many others immediately secured a loan or a mortgage on their land, and absent any business experience or

130. Act of May 8, 1906, 34 Stat. 182-83 (codified as amended by 25 U.S.C. § 349 (1995)).
131. *Id.*
132. MCDONNELL, *supra* note 34, at 88.
133. *Id.* at 89. The act resulted in over 60% of the Indians losing their land. *Id.*
134. *Id.*
135. *Id.* at 89-91; *see also supra* note 48 (explaining the origin of the competency commissions).
136. *Id.* at 101.
137. *Id.*
138. *Id.* at 101 (citation omitted).
139. *Id.* at 106 (citation omitted).
140. *Id.*

understanding of taxes or interest, lost the land when lenders foreclosed.[141]

Most fee patentees were eventually divested of their property and forced to move in with friends or family while continuing to rely on the government for survival.[142] The effects of fee patenting were contrary to self-reliance in that many Indians were now more dependent on the government than at any other time.[143] Several subsequent suits were filed in an attempt to set aside forced fee patents or fee patents that were attained through questionable practices, but statutes of limitation barred most of these suits.[144]

The enactment of the IRA in 1934 froze in perpetuity all allotted lands that were still in trust at the time.[145] Allotment had failed, in most instances, to successfully convert the Oglalas into successful and independent farmers and ranchers. Leasing and the issuance of fee patents had only served to ravage the tribal land base. By 1916, of the 2.5 million acres the Tribe had once owned, only 150,000 acres remained.[146] The rest had been assigned to individual Indians or sold as surplus to whites.[147]

Although the doctrine of allotment ceased with the enactment of the IRA in 1934, little was done in an attempt to reverse the harm caused to the Indians. In the years following allotment's dissolution, the land at Pine Ridge would be subject to more government sponsored land tenure programs,[148] most of which eventually failed to inspire any sustained economic growth on Pine Ridge. It became evident that much of the original tribal land base had become the property of non-Indians and that fractionation of the remaining trust lands through inheritance was rendering these lands economically inviable.[149]

D. FRACTIONATION

Perhaps the most notorious consequence of allotment is the phenomenon of fractionated heirships. Under the Dawes Act, upon the death of an allottee, the federal government as trustee would either sell the land or

141. *Id.*

142. *Id.* at 114.

143. *Id.*

144. *See, e.g.*, United States v. Mottaz, 476 U.S. 834, 850-51 (1986) (holding that an action against the government pursuant to the Quiet Title Act of 1972 was barred because the 12 year limitations period had passed).

145. *See* U.S. DEP'T. OF INTERIOR, ANNUAL REPORT OF SEC. OF INTERIOR 78-83 (1934). To this day, most of these lands remain in trusteeship to the federal government.

146. STARITA, *supra* note 60, at 187.

147. *Id.*

148. *See* Taylor Grazing Act, 43 U.S.C. § 315 (1994) (establishing grazing districts to promote the highest use of public lands).

149. STARITA, *supra* note 60, at 187; Interviews with Tribal members and observations.

divide the land equally among the heirs.[150] Indian probate laws directed that the property of the deceased descend to their heirs as undivided "fractional" interests in the individual allotments (tenancy in common).[151] For example, if an Indian allottee owning a 160-acre allotment died leaving five heirs, the heirs would inherit a one-fifth interest in the entire 160-acre allotment as opposed to each individual inheriting 32 acres.[152] These laws were implemented to serve for the original twenty-five year trust period, at the end of which the federal government's trust responsibility would cease.[153]

In 1934, however, Section 2 of the IRA extended the trust period on any lands still in trust "until otherwise directed by Congress."[154] Apparently under the assumption that this extension would be temporary, Congress did not amend the Indian probate laws to reflect the change in status of these lands.[155] Consequently, the aforementioned illustration of probate procedure has been applied to the remaining trust lands for sixty years. This has created a bureaucratic quagmire of enormous proportions not only for the Indians, but for the BIA and the Department of Interior who maintain these land records.

Amazingly, in 1934 (the same year that allotment was effectively terminated), Secretary of Indian Affairs John Collier foresaw the problems allotment would bring:

> [E]qually important with the outright loss of land is the effect of the allotment system in making such lands as remain in Indian ownership unusable.
>
> There have been presented to the House Indian Committee numerous land maps, showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both of these classes of Indian-owned land are checkerboarded with white-owned land already lost to the

150. Act of Feb. 8, 1887, 24 Stat. 388-91 (codified as amended in scattered sections of Chapters 9 & 10 of 25 U.S.C. §§331-380 (1995)).

151. BUREAU OF INDIAN AFFAIRS, DRAFT LEGISLATIVE PROPOSAL TO ADDRESS THE INDIAN HEIRSHIP PROBLEM THROUGH AMENDMENTS TO THE INDIAN LAND CONSOLIDATION ACT (Nov. 29, 1994) (on file with author) [hereinafter DRAFT LEGISLATIVE PROPOSAL].

152. *Id.*

153. *Id.*

154. 25 U.S.C. § 462 (1994). Between 1887 and 1934, the Indian land base had been reduced from 138,000,000 acres to 48,000,000 acres. DRAFT LEGISLATIVE PROPOSAL, *supra* note 151. This was accomplished by a combination of government sales of "surplus" lands, sales by allottees who had received fee patents, and sales by the federal government of heirship lands. *Id.* This section was implemented in an attempt to salvage what remained of Indian land. *Id.*

155. DRAFT LEGISLATIVE PROPOSAL, *supra* note 151.

> Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.
>
> . . .
>
> On the checkerboarded land maps, the heirship lands each year become a greater proportion of the total of the remaining Indian land. These heirship lands belong to numerous heirs, even up to the number of hundreds.
>
> . . .
>
> The above conditions force some of the Indian allotted land out of any profitable use whatsoever, and they force nearly all of it into the condition of land rented to non-Indians, and rented under conditions disadvantageous to the Indians. The denial of financial credit to Indians is of course, an added influence.
>
> The Indians are practically compelled to become absentee landlords with petty and fast-dwindling estates, living upon the always diminishing pittances of lease money.
>
> . . .
>
> The operation gets nowhere at all; under the existing system of law it cannot get anywhere; it creates between the Indians and the Government a relationship barren, embittered, full of contempt and despair; it keeps the Indians' own minds focused upon petty and dwindling equities which inexorably vanish to nothing at all.
>
> For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.[156]

The frustration and morass demonstrated in Collier's address is still evident today, only magnified by sixty years of neglect and failed government policy.

On Pine Ridge, of the approximately 2,779,200 acres within the boundaries of the reservation, approximately 1,070,058 acres remain in individual trusts subject to these probate laws.[157] Many of these shares are so minute that the cost to the Department of Interior to administer the land far exceeds both the income derived from the property and the

156. GETCHES, *supra* note 12, at 196-97 (quoting from *Effects of Allotment: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong. 16-18 (1934) (Memorandum of John Collier, Secretary of Indian Affairs)).

157. TERRY L. ANDERSON & DEAN LUECK, AGRICULTURAL DEVELOPMENT AND LAND TENURE IN INDIAN COUNTRY 150 (1992).

actual value of the property itself.[158] Also, in many instances it is exceedingly difficult for all the heirs to agree on how the land should be utilized.[159]

In 1984, Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA).[160] ILCA allowed tribes to adopt, with the consent of the Secretary of the Interior, plans providing for the sales and exchanges of tribal lands in order to eliminate fractional interests and consolidate tribal holdings.[161] It also allowed for tribes to purchase allotments, with the consent of at least 50% of the owners, and provided for escheat to the tribe of individual interests that represent less than two percent of the tract and cannot earn $100 annually.[162] In 1987, the United States Supreme Court in *Hodel v. Irving*[163] held the escheat provision of ILCA to be an unconstitutional taking of property under the Fifth Amendment.[164]

Pine Ridge has incorporated a consolidation plan under ILCA, which has had limited success.[165] Some allottees have been able to consolidate shares through the selling and trading of fractional parcels with the Tribe and with other tribal landowners.[166] The Tribe has also consolidated more land within tribal trust jurisdiction through trading and purchase provisions.[167] The process has been tedious and burdensome however, and has failed to eliminate the heirship problem.[168]

158. DRAFT LEGISLATIVE PROPOSAL, *supra* note 151.

159. *See* Ethel J. Williams, Comment, *Too Little Land, Too Many Heirs - The Indian Heirship Land Problem*, 46 WASH. L. REV. 709, 725 (1971).

160. 25 U.S.C. §§ 2201-2211 (Supp. 1996).

161. *Id.* § 2203(a).

162. *Id.* §§ 2204, 2206.

163. 481 U.S. 704 (1987).

164. Hodel v. Irving, 481 U.S. 704, 718 (1987). Although the fractional ownership resulted in less than one cent per year in rent for some of the heirs, the Court held that the value of the property may substantially exceed its income-producing value. *Id.*

165. Interview with Robin White, Director of Land Office at Pine Ridge (June 1995). The procedure for consolidating land via allotment exchange at Pine Ridge is as follows: (1) the landowner must check the map in the Tribal land office to verify if the proposed land can actually be exchanged; (2) the landowner must then apply at the BIA office at Pine Ridge; (3) the lease income for the land is then determined and must be verified by the BIA; (4) then a field check is arranged by BIA; (5) next the Tribal Land Committee must approve the application for appraisal; (6) the application then returns to BIA and an appraisal is ordered; (7) after the land is appraised, the application returns to the Tribal Land Office to compare the worth of the properties in the proposed exchange; (8) the Land Office then brings the application to the Finance Committee, the Executive Committee and to FMHA (to determine if there is a lien on the property income) for their approval; (9) if all is approved, the Land Office then sends the application back to BIA to execute the deed. *Id.*

166. *Id.* Most trading takes place between landowners and the Tribe. *Id.*

167. *Id.* The Tribe has not actively moved to consolidate; however, landowners often offer larger portions of fractionated land for smaller portions on Tribal land in order to consolidate their parcel. *Id.* By this process, the Tribal land base has increased minimally. *Id.*

168. *Id.* This process averages two to three years to complete. *Id.* One landowner reported that the process has taken six years. *Id.*

Nationally, the number of Indian owned interests in trust lands has increased from 350,000 in 1984, to over 1.5 million in 1994.[169] The cost to the BIA for maintaining the heirship records and administering the land is exorbitant. An estimated 50-75% of the BIA realty budget is absorbed in managing these fractional interests.[170] This is money that could otherwise be utilized for social services, transportation, land management, or other more practical applications.[171] Not only is this a financial and bureaucratic problem for the Government, but federal restraints on alienation combined with the requisite securing of consent from the numerous owners effectively cripples the Indians' utilization of the land as well.[172]

In recognizing this problem, the BIA has moved to amend ILCA. In December of 1994, a draft of a legislative proposal was issued to all Indian landowners for their consideration. The BIA made an appeal to the tribes and Indian landowners for their cooperation, assistance, and suggestions in revising the ILCA. Any proposals put forward have two stipulations; they must (1) consolidate land ownership, and (2) prevent further fractionation.[173] The BIA is currently reviewing the proposals.[174] Although an amended proposal is considered imminent, no legislation has been introduced in Congress as of this writing.

V. ALTERNATIVES AND REMEDIES

Trying to rectify the many consequences of allotment and assimilation is as overwhelming as the scope of these effects themselves. Although the federal government and the courts will continue to offer directives for some solutions, the majority of the cultural, spiritual healing, and reform must take place within the Oglala community. However, the two lingering land issues of land loss and fractionation will need the deliberation of Congress as well as the cooperation of the Tribe in order to attain a workable solution. These land use issues will be discussed in more detail subsequently.

169. Letter from BIA, to Indian Landowners 1 (Nov. 29, 1994) (on file with author) (regarding proposed amendments to ILCA).

170. DRAFT LEGISLATIVE PROPOSAL, *supra* note 151.

171. *Id.*

172. *Id.* Because the land is in trust to the federal government, it cannot be used as collateral or freely alienated, thus capital lenders will not allow the landowners to borrow against it. *Id.* Also because the land tracts are held by so many heirs in common, it is necessary to secure the consent of all landowners before any property development can be initiated. *Id.* With some land tracts having owners numbering in the hundreds, this can be an exhausting feat even if all were to be in agreement; which is rarely the case at Pine Ridge. *Id.*

173. Letter from BIA, *supra* note 169.

174. The Tribal Council at Pine Ridge has requested and received an extenuation in responding to the BIA proposed amendments to the ILCA.

The divisiveness among the Oglalas predates allotment and can be traced as far back as the Treaty of 1868.[175] The ensuing government policies only worked to exasperate this situation.[176] Although the problems that plagued Pine Ridge during the tenure of Dick Wilson in the 1970s are no longer visibly evident, there is still an element of mistrust that pervades not only the tribal government, but the various districts as well.[177] Though progress towards a more autonomous nation has been made in recent years, many Oglalas feel that this movement can only be successful upon a resolution of trust amongst the entire Tribe.[178]

The current policy of the federal government concerning Indians is one that supports self-determination for the tribes.[179] Much legislation has been enacted in recent years to assist in this process.[180] Although these steps are undoubtedly helpful, it is still a slow process. For the Oglalas at Pine Ridge, the ability of the people to stand and speak in one voice may ultimately be what is needed to consummate the healing process within their culture and community.

The solutions in addressing the land use issues affecting the Oglalas are of a magnitude beyond the scope of power for the Tribe alone to render. The checkerboard ownership of lands, federal restrictions, and heirship fractionation have rendered much of the land economically inviable. The economic development of reservation lands and land

175. DOCUMENTARY, *supra* note 70. The Treaty of 1868 was signed by Red Cloud and many other Oglala leaders. Crazyhorse refused to sign the treaty. *Id.* When Red Cloud's Oglala bands went to live on the designated agency (which predated the Pine Ridge Reservation) Crazyhorse and his followers remained on the traditional hunting grounds until 1877. *Id.* The agency Indians became known as the "hand around the forts" while Crazyhorse and his followers were dubbed "hostiles" by the Government. *Id.* Many believe that the jealousy harbored by the other Oglala Chiefs eventually led to Crazyhorse being assassinated after his surrender in 1877. *Id.* This rift within the Tribe is still acknowledged to this day. *Id*

176. *Id.* The "hand around the forts" were thought to have been favored by the Indian agents and received preferential treatment regarding rations. *Id.* The "traditionalists" usually lived in remote parts of the reservation and resented this inequity. *Id.* This was one of the major issues that eventually led to the 1973 siege at Wounded Knee and the ensuing civil war on Pine Ridge. *Id.* Though not as visible today, there is still mistrust among those tribal members that have a close relationship to the federal government and those that live in the remote districts. *Id.*

177. *Id.*

178. One does not have to spend an extended time at Pine Ridge conversing with the people to detect the resentment and mistrust that pervades the various factions within the Tribe. Though there seems to be a resignation to that fact, most voice an optimism and wish a more harmonious community would once again emerge.

179. Though this statement may not be supported by many Indians, the Clinton administration has voiced support of tribal sovereignty and Senator John McCain, the Chairperson of the Senate Select Committee on Indian Affairs, and Senator Daniel Inouye, the vice-Chairperson, have emerged as strong advocates of tribal sovereignty in the United States Senate.

180. Among recent legislation is Title II of the Native American Free Exercise of Religion Act signed into law by President Clinton on October 6, 1994. This title deals with the right of Native American religious practitioners to use the divine sacrament peyote in their religious ceremonies. *Id.* There have also been strong arguments put forward by Senator McCain in favor of tribal sovereignty in support of the proposed amendments to the Indian Gaming Regulatory Act of 1988. *See* Act of Oct. 17, 1988, Pub. L. No. 100-497, 1988 U.S.C.C.A.N. (102 Stat.) 2467.

usage in general are matters which Congress will need to act in conjunction with the Tribe, individual tribal landowners, and non-Indian landowners if a workable solution is to be achieved.

Allotment and assimilation were radical policies precipitated with little or no understanding of the cultures they were to affect. Any remedial policy or action may not only have to be equally as radical to be of any real consequence, but must also address the issues of tribal land loss within the boundaries of the reservation, cultural considerations, and the problems of consolidation and fractionation. No action should be initiated by Congress containing anything short of a long range plan that includes tribal considerations.

The remainder of Part V will discuss the current BIA proposed amendments to the ILCA, followed by several alternatives that would be available for consideration in remedying these lingering land problems.

A. BIA PROPOSAL FOR AMENDING THE INDIAN LAND CONSOLIDATION ACT

In November of 1994, the BIA released to the tribes and to individual landowners a proposal for consolidation that would amend ILCA.[181] The proposal was accompanied by a letter asking the tribes and the landowners to consider the proposal and offer other solutions that may help to alleviate the fractionated heirship problem.[182] Accordingly, any proposal to solve the fractionated heirship problem must serve to: (1) consolidate land ownership, and (2) prevent (or substantially reduce) further fractionation.[183] The individual landowners were given a deadline of February 15, 1995, in which to respond to the BIA.[184]

The basic elements of the BIA proposal are as follows:

- The proposal creates a land acquisition program and authorizes the Secretary of Interior to purchase fractional interests of any size from owners who are willing to sell. These interests will ultimately be transferred to the tribes.
- A priority for purchase is given to owners of fractional interests amounting to two percent or less and to income producing land.
- The Secretary will attempt to either purchase all of the interests in a parcel, or partition out the purchased interests into a single

181. *See* DRAFT LEGISLATIVE PROPOSAL, *supra* note 151.
182. *See* Letter from BIA, *supra* note 169.
183. *Id.*
184. *Id.*

parcel, for transfer to the tribe on whose reservation the land is located.

- All income from a parcel transferred to the tribe will be paid to the Secretary until the purchase price paid by the Secretary has been recovered.
- Income from the purchased interests and from parcels transferred to tribes will be put into a revolving fund which will be used for the purchase of additional fractional interests.
- The proposal changes the test in the present Indian Land Consolidation Act which is used to determine whether fractional interest of two percent or less will escheat to the tribe when an owner dies. The new test avoids presumptions and would be based on actual income produced by a fractional interest or on the appraised value of the interest.
- To prevent further fractionation, inheritance of interests is limited to members of the tribe on whose reservation the land is located. Where an owner dies without a will, inheritance is further limited to the decedent's immediate family: spouse, children, grandchildren, parents, grandparents, brothers and sisters. A non-member spouse can only receive a life estate.
- Tribes are authorized to change the limitations on inheritance established by the proposal.
- New limitations on who can inherit do not become effective for two years. The Secretary is required to provide notice of the limitations and alert owners of estate planning options.[185]

The response by most tribal members at Pine Ridge to this proposal has been one of confusion and mistrust. The remoteness of many of the districts on Pine Ridge, the absence of telephones in many homes, and the fact that public transportation is almost nonexistent provides for a communication problem not only between tribal members and the federal government, but between tribal members and the tribal government as well. Because of this dilemma, many tribal members misinterpreted the February deadline for proposal response to be the deadline for which they must apply in order to consolidate any lands that they may have interests in. Consequently, the tribal land office at Pine Ridge has been overwhelmed with applications for consolidation of fractionated interests causing this laborious process to be even further delayed.

185. *Id.*

Some of the members in the outlying districts have also responded unfavorably to the proposal for the Secretary to purchase small fractionated land shares. Many members were not aware of the original escheat clause in ILCA until many years after it was actually in effect.[186] This has created an environment of mistrust between tribal members and any agency involved in land transfers.

Other responses to the BIA proposal include opposition to the clause limiting non-tribal members from inheriting reservation land. The existence of inter-tribal marriages has created a situation in which an individual may have vested interests on several reservations. Opponents claim that consolidation laws should not infringe on the family's right of inheritance.

Even those members well versed in the existing land consolidation policies remain frustrated because of the tedious process that one must pursue in order to consolidate their land interests. This bureaucratic process is not effectively addressed by the new proposal and many feel overwhelmed by the system. Given this environment, it may be difficult for the government to expect effective alternative proposals from the landowners, as many are still not clear on the current policies. Although the Pine Ridge tribal members' reactions to the BIA proposal are varied, they are almost unanimous in their opinion that it does not positively address the problems at hand.

B. ALTERNATIVE REMEDIES

The problems associated with fractionation of Indian lands and Indian land loss are substantial. To properly address these issues the federal government must consider more options than simply re-working previous failed policies. ILCA has been largely unsuccessful in both reversing fractionation and significantly consolidating Indian lands under tribal jurisdiction.[187] It may be necessary to consider new and more innovative approaches towards remedying these problems while also reducing government bureaucracy.

It is difficult to envision a policy as radical as assimilation and allotment being implemented presently in the United States. It may, however, take the implementation of a policy more radical than Congress has thus far been willing to consider to effectively address the problems at hand.

The following proposals are based on the opinions and observations of a group of individuals with diverse backgrounds including: attorneys, historians, geographers, land use specialists, and Oglala tribal members at Pine Ridge. These proposals are based on legal theory and logic and, as

186. 25 U.S.C. §§ 2201-2211 (Supp. 1996).

187. Letter from BIA, *supra* note 169.

offered, do not consider the political climate of the federal government or that of the State of South Dakota, though those issues are addressed in the subsequent discussion of each proposal. These alternative remedies are not to be viewed as inflexible. They are offered as an origin for further deliberation towards effective solutions and policies concerning fractionation, Indian land loss, consolidation, and government bureaucracy. Although this article concerns itself primarily with the Pine Ridge Reservation, these issues affect many reservations. As a result, any national policy will not only need to be cohesive, but also flexible enough to accommodate the characteristics and geographic considerations of each reservation (i.e. level of development, amount of available water, etc.).

1. *Proposal One: Eminent Domain*

The basic elements of this proposal are as follows:

- The United States Government takes all non-tribal land (both Indian and non-Indian) within the boundaries of the reservation by eminent domain. "Approximately 50-75% ($33 million) of the BIA realty budget goes to administering these fractional interests."[188] If those interests are eliminated, a portion of that money could be used to compensate aggrieved landowners.
- The federal government would remain as trustee, but would designate the land to the jurisdiction of either an independent land brokerage office or an independent land committee for administration.
- This independent office would then re-allot these lands at their discretion with the presumption that a well developed or consolidated Indian allotment would be returned to the original allottee. A balancing test would have to be employed weighing the interest of the allottee against the interest of the tribe.
- An independent appeals process would need to be employed to provide recourse to any aggrieved allottee.
- Any aggrieved allottee would be given the opportunity to use their compensation towards the purchase of another parcel of land within the reservation that is equal in value and designated as residential by the tribe and the independent office.

188. DRAFT LEGISLATIVE PROPOSAL, *supra* note 151.

- Any further trading, selling, or consolidation of land would be handled only through this independent designated body.

The power of the federal government to take property for public use is explicit in the Fifth Amendment of the United States Constitution.[189] As trustee of Indian lands as described in *Cherokee Nation v. Georgia* by Chief Justice John Marshall, the federal government also has a fiduciary duty to act in the "best interest" of the tribes.[190] It was this "best interest" of the tribes argument that the United States Supreme Court used to justify the actual implementation of allotment in *Lone Wolf v. Hitchcock*.[191] Although the Court's presumptions in *Hitchcock* "that Congress acted in good faith in the dealings with the Indians" and that "the legislative branch of the government exercised its best judgement"[192] were later rebuked in *United States v. Sioux Nation of Indians*,[193] the case remains valid precedent.[194] It is this precedent that empowers Congress to not only act in the "best interest" of the tribes, but to act towards correcting an injustice that was initiated primarily by their failure to act initially in the true best interest of the Indians.

By assigning administrative and procedural powers to an independent commission, the government could eliminate the inherent mistrust that many tribal members harbor towards the BIA and abolish many bureaucratic procedures. An independent commission would also decrease the prospects of nepotism in the decision making process.

Once the reservation land has been consolidated, a master land use plan could be employed to designate areas of primary tribal development, areas for residential relocation of fractionated allottees, and areas of nondevelopment. All landowners, who are currently domiciled on their allotment or who have successfully consolidated, would have a presumption that they would remain on their original location unless the tribe can demonstrate a compelling tribal interest. All other fractionated

189. U.S. CONST. amend. V. Courts have rarely restricted the use of eminent domain because of a failure of "the public use" test. In *Poletown Neighborhood Council v. Detroit*, the city was allowed to condemn a large deteriorating neighborhood in order to allow General Motors to construct a new assembly plant. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 459 (Mich. 1981). The court found the requisite nexus between construction of this plan and public use. *Id.* In this proposal, the public use would include all the Indian communities that surround the land to be taken.

190. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-20 (1831).

191. 187 U.S. 553, 564-68 (1903).

192. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-68 (1903).

193. 448 U.S. 371 (1980).

194. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The Sioux Nation sued the United States Government for violations of the Treaty of Fort Laramie (Treaty of 1868). *Id.* at 374. The Sioux Nation argued that the 1877 annexation of the Black Hills by the United States was an abrogation of the treaty. *Id.* The United States Supreme Court upheld a decision by the court of claims that the annexation was in fact an illegal taking and found compensation due to the Indians, including interest. *Id.* at 424. Justice Blackmun's opinion weakens the presumption of congressional good faith. *See id.* at 423-24.

landowners would be allowed to use their compensation to purchase a land parcel to which they would hold exclusive rights.

All non-Indian landowners would be given the opportunity to negotiate with the tribe concerning the future use of their land. The tribes could be allowed the option of waiving the actual enforcement of eminent domain on certain non-Indian owned lands if these lands have shown to be beneficial to the tribe in their current status and would continue to be a benefit in the future.[195]

This proposal effectively eliminates fractionation by offering each landowner one single parcel of property, consolidating land in that all land not reallotted would become part of the tribal land base, returning non-Indian owned lands within the exterior boundaries of the reservation that have been lost to the tribe due to failed government trusteeship to the tribes, and eliminating costly government bureaucracy.

Initial opposition to this proposal may come from Indians and non-Indians alike. Although most Indian landowners would benefit from the proper application of this proposal, tribal members would have to be thoroughly educated as to its procedural application in order to overcome the level of mistrust that exists within most tribal members towards any political body that appears to be taking their land.

Most non-Indian landowners may have strong opposition to this proposal. Many of these landowners can trace the title of their land to the original homesteaders who were actually encouraged by federal government policies.[196] On Pine Ridge, the fact that much of the land remains in an undeveloped state may induce some non-Indian land holders to voluntarily settle with the government concerning their holdings. However, the current political climate in South Dakota and in many other states is not one sympathetic to returning land to the Indians. Therefore, this proposal would face serious resistance both statewide and federally from well organized lobbyists.[197]

2. *Proposal Two: Buyout*

This proposal includes the basic elements of Proposal One with one major deviation. Proposal Two would offer all landowners (Indian and non-Indian) the option of a buyout, instead of proceeding through

195. In a situation where a non-Indian owned enterprise was determined by a tribe to have had a positive effect on the reservation and the loss of this enterprise would have a detrimental effect, they would be allowed to waive this taking in their own best interest.

196. These landowners argue that they legally own this land and that they should not be made to pay for questionable government policies. The Indians argue that to allow homesteading on Indian lands was a violation of the government's trust responsibility to the tribes.

197. In 1987, Senator Bradley introduced a bill in the Senate (the Bradley Bill) which would have returned all federally owned land in the Black Hills to the Lakota (Sioux) Nation. S. 705, 100th Cong., (1987). This bill never passed the Senate.

eminent domain. This plan would still offer the advantage of an independent office to administer land transfers, but would depend largely on the education and cooperation of all landowners in order to succeed.

Due to the reliance on the cooperation of the parties, this proposal's effect on consolidation and fractionation would be less substantial than that of Proposal One, and the land loss issue would be affected minimally. This proposal would still be an improvement over the current policy.

3. *Proposal Three: Tribal Input*

Proposal Three is a nonspecific proposal whose dominant theme is more tribal input concerning land policies that pertain to their reservations. Many Oglalas seem resigned to the fact that the federal government is not concerned with their viewpoint and that no government plan will successfully serve the long range interest of the Tribe. A land plan that effectively incorporates the ideas of tribal members would not only help to build a confidence between the tribes and the government, but would be consistent with Senator McCain's recent proposals to reduce BIA staff and promote tribal autonomy.[198] There must be a policy that is cohesive enough to be implemented on a national scale, yet flexible enough to accommodate the individual problems, circumstances, and concerns of the various tribes. The tribal members have a better understanding of what these needs are and such a plan would further the federal government's goal of self-determination.

Meetings with various tribal members at Pine Ridge elicited a myriad of ideas regarding land consolidation and associated land issues. These theories included: (1) direct government loans or grants to individual landowners to buyout other fractionated land owners; (2) tribal probate laws that effectively address the heirship problem; and (3) a less burdensome process regarding consolidation. If the federal government is eventually unwilling to consider an innovative plan that will fully address all issues with regard to fractionation, consolidation, and land loss, any new policy should contain nothing less than effective negotiation and dialogue with representatives from each affected tribe regarding these and other concepts that may help in leading to a resolve that will serve all parties well.

198. In budget discussions for 1996 concerning the Department of Interior and specifically BIA, Senator McCain has been an advocate for less funding for BIA and direct money blocks being distributed to tribal governments.

IV. CONCLUSION

The consequences of allotment and accompanying assimilationist policies have been devastating to the Oglalas at Pine Ridge Reservation. It is a testament to the spirit of these people that their native traditions have survived despite one hundred years of suppression. The process of healing the cultural and spiritual wounds is painstaking and slow, but is evident in the work of many who live there.

Presently, Congress has an opportunity to address the myriad of land use issues that plague this and other reservations. ILCA has not rendered positive results and a novel approach is needed. There are many issues that must be considered and many voices that must be heard in this process, but it is a process that must begin and must be carried forth if a just and lasting solution is to be ascertained.

For many years the United States has concerned itself with the determination of various "homelands" for many diverse groups worldwide. Congress now has a chance to properly address the "homelands" issue of the indigenous people of this country by adopting a responsible Indian land policy that is at once coherent and effective.