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THE DIMINISHMENT OF THE GREAT SIOUX RESERVATION TREATIES, TRICKS, AND TIME

ALAN L. NEVILLE AND ALYSSA KAYE ANDERSON

Historically, Indian-white relations have been marred by mistrust and dishonesty. This is especially true in numerous land dealings between the United States government and the Lakota/Dakota/Nakota people of the northern Great Plains. Indeed, the U.S. Supreme Court noted, “A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history.”¹

Our focus here is to chronicle and analyze the tragic diminishment of the Great Sioux Reservation, first established by the Fort Laramie

Key Words: American Indian reservations, Dawes Act, fractionation, Homestead Act, Lakota Sioux, treaties

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Treaty of 1851.² The land loss progressed with the Homestead Act of 1862, Fort Laramie Treaty of 1868, Act of 1877, Allotment Act of 1887, Act of 1889, the Wheeler-Howard Act, the Pick-Sloan Flood Control Act of 1944, and the Indian Land Consolidation Act. Today, the Lakota/Dakota/Nakota people remain committed to reversing this trend by reacquiring lost tribal lands and reestablishing the prominence of their culture, language, customs, values, and beliefs. What we present is a multifaceted approach for tribes to consider in reacquiring lost lands. Although outright purchase of land is an option for any tribe, Brian Sawers recommends, because of the high cost of land, that tribes “rely on incorporation and eminent domain to consolidate ownership and control allotted lands in a tribal enterprise.”³

THE CHANGING PLAINS

Prior to white contact, the Lakota/Nakota/Dakota people lived in a great expanse of the Great Plains, ranging from Wisconsin to Wyoming, Canada to Nebraska. Historically, occupation of this great expanse of land was necessary for survival because the more western of the tribes, the

Lakota, relied almost exclusively on bison migrations to furnish all their needs. Joseph Marshall (Sicangu Oglala Lakota) called this dependence on the bison “the focal point of our survival.”⁴ Tom McHugh describes a way of life where many tribal members feasted on raw liver, kidney, tongue, eyes, testicles, belly fat, and other parts of the bison.⁵ Other uses of the bison include skin for robes, hair for lining or stuffing, horns for spoons and ladles, bones for arrow-making tools, teeth for ornamentation, large intestines as containers, and dung as fuel. Unfortunately, as settlers, gold seekers, railroads, and others moved west, the buffalo migrations were forever altered. Settlers and white hunters killed thousands of the bison, leading to their near extinction. According to Marshall, by the year 1900, “there were probably less than fifty bison south of the forty-eighth parallel, or the border between Canada and the United States. Without the bison, my ancestors lost a literal and figurative source of strength.”⁶

As the United States expanded westward, negotiating treaties with the numerous Indian nations to acquire land became a cornerstone of expansionist policy. Frank Pommersheim succinctly described this process: “The Indians usually agreed to make peace and cede land—often vast amounts of it—to the federal government in exchange for a cessation of hostilities, the provision of some services, and, most important, the establishment and recognition of a homeland free from the incursion of both the state and non-Indian settlers.”⁷ Even without the buffalo, the land was still essential to Native identities, culture, and survival.

The Fort Laramie Treaty of 1851 figures prominently in the establishment of the Great Sioux Reservation. Signed on September 17, 1851, this treaty reinforced the premise of peaceful relations and the desire to end hostilities between Indian tribes on one side and white settlers and the U.S. military on the other. Notably, the treaty further delineated the boundaries for the newly established Great Sioux Reservation: the Missouri River, Platte River, Powder River, and Heart River. This massive expanse of land totaled about 60 million acres. The Indian nations were to select principals or head chiefs, and for those

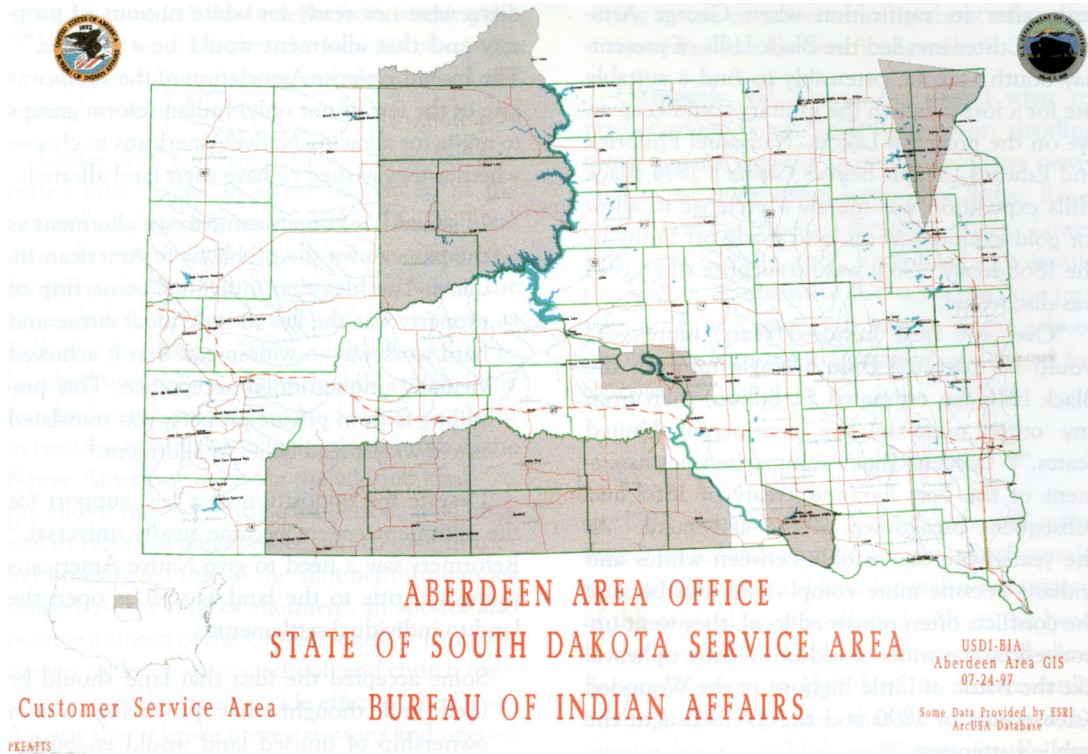
tribes agreeing to sign the treaty, they were promised “the sum of \$50,000 per annum for the term of 10 years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements.”⁸ It seemed the people had finally achieved their “homeland free from the incursion.”

The next important legislation that affected the Lakota/Dakota/Nakota people was the passage of the Homestead Act of 1862. This act allowed for any person who was head of a family, at least twenty-one years of age, and a citizen of the United States to make claim on one quarter section of land (160 acres). But this seemingly innocuous act became increasingly important in later years when surplus reservation lands—acres left over after each person received his or her 160 acres—were sold to the United States government at a *reduced* rate. The government in turn sold the surplus lands to homesteaders, thus bringing about a phenomenon known in Indian country as “checkerboarding,” the intermixing of allotted land and surplus land, creating a noncontiguous land base for the tribe.⁹

THE TREATIES

The Fort Laramie Treaty of 1868 was in many ways the quintessential negotiation between the U.S. government and the Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee bands of Sioux. In discussing the Indian Peace Commission of 1867–68, Kerry Oman detailed the significant accomplishment of the commission in not only in bringing together the various tribes and government officials but also in securing an end to hostilities in the Great Plains. “Their efforts helped end Red Cloud’s War upon the Northern Plains, and, as a result of their reports and recommendations, they greatly influenced federal Indian policy.”¹⁰

Signed on April 29, 1868, the treaty’s Article 2 reestablished the Great Sioux Reservation as identified in the first Fort Laramie Treaty of 1851. Once again, the government, motivated



MAP 1. Source: U.S. Department of the Interior, Bureau of Indian Affairs.

by westward expansion and the desire to acquire land, was compelled to negotiate with the Lakota in large part due to the successful raids conducted by Red Cloud and Crazy Horse along the Bozeman Trail. This period of conflict was known as “Red Cloud’s War.”¹¹ Oman underscores the magnitude of this tumultuous period saying that “For the only time in history, the U.S. army was giving in to the demands of a ‘hostile’ Indian leader.”¹² Ironically, it was both Red Cloud (Oglala) and Spotted Tail (Brulé) who did eventually sign the 1868 treaty.¹³

While the treaty contained several historically important provisions, those that affected land diminishment included Articles 3, 6, 11, and 16. Articles 3 and 6 delineated land division. Specifically, a tract of 160 to 320 acres was assigned to each head of the family to be used for farming, despite the fact that the government clearly knew western South Dakota was “a dry region with

poor soils, where even subsistence gardens fail in many years.”¹⁴ Article 11 directed that the Indian tribes withdraw all opposition to the construction of railroads then being built in the Plains, permit the peaceful construction of any railroad not passing over their reservation, withdraw all opposition to the construction of the railroad built along the Platte River, and withdraw all opposition to the military posts and roads established south of the North Platte River. Finally, Article 16 declared the country north of the North Platte River and east of the summits of the Big Horn Mountains to be unceded Indian territory, where “no white person or persons shall be permitted to settle upon or occupy any portion or the same; or without the consent of the Indians first and obtained, to pass through the same.”¹⁵

With the 1868 treaty, the Lakota people hoped their land diminishment had finally ended, but that hope was dashed only a few short

years after its ratification when George Armstrong Custer invaded the Black Hills of present-day South Dakota, ostensibly to find a suitable site for a fort in which the military could keep an eye on the powerful Lakota. Nathaniel Philbrick and Edward Lazarus believe Custer's 1874 Black Hills expedition was merely a pretense to allow for gold exploration on land made off limits by the 1868 treaty.¹⁶ So it was no surprise when gold was discovered.

"Over the next hundred years, more gold would be extracted from a single mine in the Black Hills (an estimated \$1 billion) than from any other mine in the continental United States."¹⁷ Doreen Chaky summarized her assessment of the Fort Laramie Treaty of 1868 and subsequent breakdown of the agreement: "As the years wore on, trouble between whites and Indians became more complicated, but because the conflicts often remained local, they went unnoticed by the wider world until some upheaval like the Battle of Little Bighorn or the Wounded Knee events of 1890 and the 1970s caught the public's attention."¹⁸

THE ALLOTMENT ACT OF 1887

After the 1874 Custer expedition's success, and motivated not only by land but by gold, the U.S. government was again compelled to negotiate for the Black Hills region. But Congress had abolished the treaty system in 1871, so an agreement between a tribe and the government required an act of Congress, voted on by both houses of Congress and signed by the president. Thus was born the next important document affecting the Lakota/Dakota/Nakota people, the Act of 1877. This legislation, passed by the Forty-Fourth Congress, established a drastically altered Great Sioux Reservation. This new reservation essentially encompassed western South Dakota *minus* the immediate Black Hills area (Article 1). Notably, the act was signed by Red Cloud and Spotted Tail.¹⁹

While it seemed like a good idea to most, some whites voiced opposition to allotting land to Native Americans. Most notable of these objectors was Senator Henry Teller of Colorado, of whom Leonard A. Carlson states: "He believed that In-

dians were not ready for white notions of property and that allotment would be a disaster."²⁰ The Indian Defense Association of the 1880s was one of the few (if not only) Indian reform groups to argue for allowing Native Americans to choose whether they wished to have their land allotted.

In general, reformers came to see allotment as the panacea for the problems of American Indians. The idea that individual ownership of property was the key to individual virtue and hard work was so widespread that it achieved virtually unquestioned acceptance. This prevailing faith in private property was translated into a widespread belief in allotment.²¹

Despite the opposition of a few, support for the allotment system became nearly universal.²² Reformers saw a need to give Native Americans individual title to the land as well as open the land to individual settlement.

Some accepted the idea that land should be used and thought that protecting Indian ownership of unused land would encourage idleness. Others recognized the intense desire of white settlers to acquire Indian lands and hoped that allotting lands would remain in Indian hands. Some reformers, including Senator Dawes, were aware of the pressure by whites to acquire Indian lands.²³

On February 8, 1887, Congress passed the Allotment Act of 1887, also known as the Dawes Act, which led to one of the most substantial exchanges of land from Native Americans to whites. The act was a concerted effort to shift the Indians from a life of hunting to one of farming, the chief feature of the government's Native American policy. Many saw the Dawes Act as a way to integrate Native American Indians and non-Native American Indians. Jill Martin summarized this hope for integration:

Proponents argued that allotments would move the Indians along on the path to civilization. Many people believed that breaking up of the tribal and communal existence was the best way to advance and "civilize" the Indians. Once the Indian received his own land,

and received all the benefits from working the land, he would realize the benefits of capitalism over communalism, and would be on the road to assimilation.²⁴

Under this rationale, "[t]he Dawes Act generated little debate in either the House or the Senate," and the bill was passed.²⁵ The land was divided into individual allotments under the general authority of the president; however, the act excluded the Five Tribes and the Osages, as well as a few others. "Each adult received three hundred twenty acres and each child received one hundred sixty acres."²⁶ This land was to be placed in trust for twenty-five years for the sole use of the Native American receiving the allotted land. "At the end of the end of the trust period, an allottee was to receive a patent-in-fee, which gave him or her unrestricted title to the allotment (title in fee simple). At the time of allotment, an allottee also became a citizen of the United States."²⁷ Land was also set aside for agency, school, and church use.

One very detrimental side effect of the Dawes Act was that it broke up reservations and opened the land to non-Indian acquisition. After allotments were selected by Native Americans, the remaining land or surplus was sold to non-Indians at a fixed price, with the proceeds going to the government. The money went into a trust fund held by the government, with a percentage of this fund earmarked to pay for the establishment of a public service infrastructure on the reservation in order to hasten the process of assimilation of the Native American tribes.

"The Dawes Act was compulsory. A tribe could not elect to remain unallotted, and an individual could not refuse to accept an allotment."²⁸ The act also encumbered transfers of land, restricting when and how an allottee could lease, sell, or mortgage an allotment. Often, tribes were supposed to approve allotment agreements, but Congress had the final decision.

The reformers, however, were not concerned with what Indians wanted or what they might think about allotment. An Indian who resisted assimilation into white society was wrong, and hence his or her preferences could be disregarded. If necessary, the reformers were will-

ing to use coercion to bring about what they viewed as socially beneficial results.²⁹

Ultimately, the Dawes Act ended what remained of the Great Sioux Reservation, dividing it forever into separate reservations. These newly established reservations were: Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule, and Crow Creek. Each head of a family received an allotment of 320 acres, and the provisions of the Dawes Act, relative to the sale of surplus lands to the government, continued for four years.³⁰

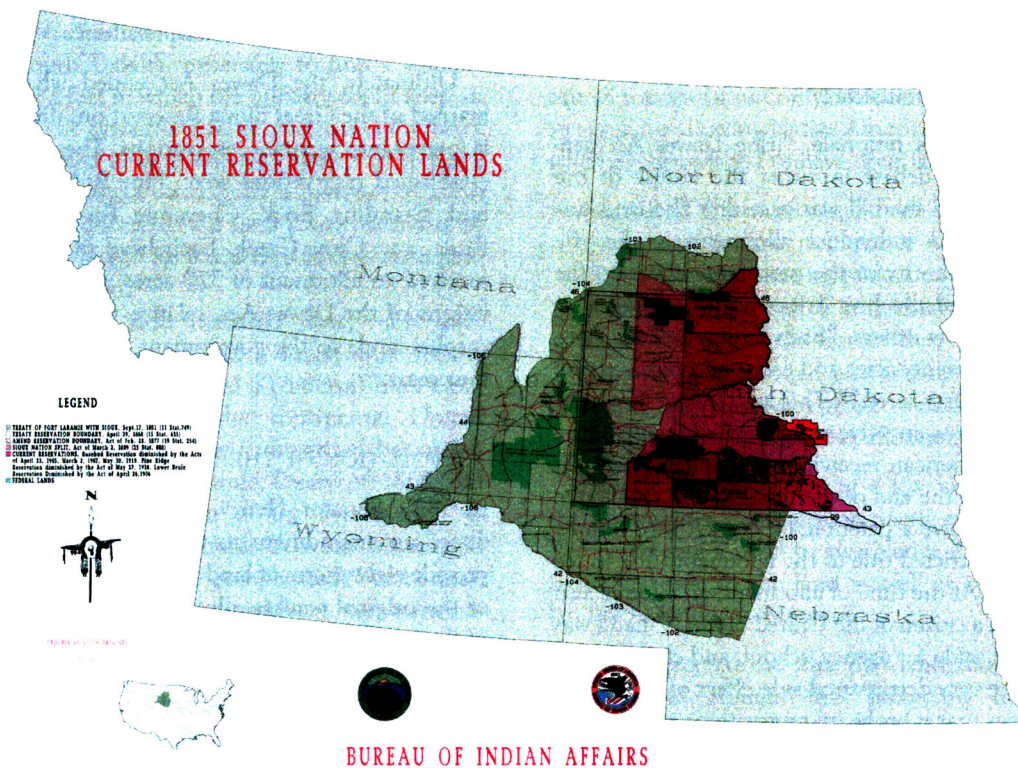
EVOLUTION OF THE DAWES ACT

In 1891, Senator Henry Dawes himself introduced an amendment to the act, which would provide eighty acres of land for each adult instead of the original acreage allotted only to the head of the household. This amendment would allow divorced women to keep land in divorce settlements. It also "stipulated that the secretary of the interior was to establish regulations for the leasing of allotments when an allottee 'by reason of age or other disability . . . could not personally and with benefit to himself occupy his allotment or any part thereof.'"³¹ Thus, Dawes created a way for Native Americans to lease out their allotments, which would be widely practiced by the turn of the century on many reservations.³²

The Sisseton and Yankton Sioux were the first to take their allotments after 1892.³³ Between 1904 and 1915, surplus lands on reservations west of the Missouri were sold, and the Standing Rock Reservation was entirely opened for allotments. "The last opening occurred in 1911 when Mellette and Bennett counties [in South Dakota] were opened."³⁴

Another major legislative change occurred in 1901 when

the secretary of the interior was given authority to sell heirship allotments. *Heirship allotments* were those allotments still under trust status when the original allottee had died. Originally, an allottee was not allowed to will his [or her] allotment, so when he died, the



MAP 2. Source: U.S. Department of the Interior, Bureau of Indian Affairs.

land was divided among the heirs according to the state law in which the land was located.³⁵

This led to allotments becoming fractionated, with some having multiple owners or with one person owning several small shares of more than one allotment.

According to Carlson in *Indians, Bureaucrats, and Land*, “The role of the tribes was reduced further in 1903, when the courts held that tribal approval was not necessary for the disposal of surplus lands”³⁶ Then, in 1906, the Burke Act changed the restrictions placed on Native American Indian landholdings. This act provided that each allottee would be dealt with individually, and citizenship would be withheld until the allottee was declared legally competent to manage his or her own affairs. It also provided that individuals could be declared competent before the

twenty-five-year trust period ended, or if individuals were declared incompetent the trust period could be extended. Those who were declared competent were able to sell, but became simultaneously liable for property tax, a concept most knew nothing of (12). This led to a significant problem: “The Office of Indian Affairs acknowledged that most . . . wanted to sell their land immediately” (13). Many others lost their land to unpaid property tax liens.

By 1934, the allotment plan was ended. It had been deemed a failure because “it did not improve the welfare of Indians or succeed in making them into ‘self-supporting’ citizens” (19). But by then, the damage had already been done: “at the time of allotment, ‘ . . . the Indian land base amounted to 138,000,000 acres. Between 1887 and 1934, about 60 percent of this land passed



FIG. 1. Construction of John Barse home. Sisseton Agency, approximately 1936-41. Identifier RG 75 Image no. 28, National Archives at Kansas City, Record Group 75, Records of the Bureau of Indian Affairs, 1965 ARC Identifier 185770.

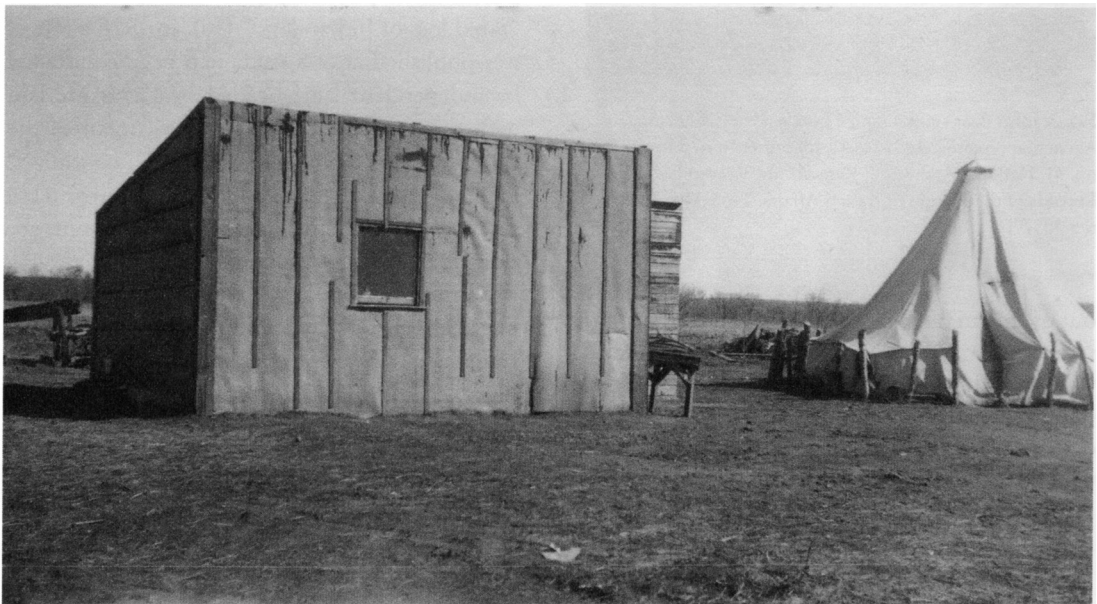


FIG. 2. Home of Moses Williams. Sisseton Agency, approximately 1936-41. Identifier RG 75 Image no. 42, National Archives at Kansas City, Record Group 75, Records of the Bureau of Indian Affairs, 1965 ARC Identifier 185770.



FIG. 3. John Bear smoking pipe beside a child. Sisseton Agency, approximately 1936–41. Identifier RG 75 Image no. 41, National Archives at Kansas City, Record Group 75, Records of the Bureau of Indian Affairs, 1965 ARC Identifier 185770.

out of Indian hands” (18). Only five reservations remained unallotted, or closed: Cheyenne River, Crow Creek, Lower Brule, Pine Ridge, and Rosebud (60–79). Although some land within the borders of these closed reservations had been sold to whites, these reservations were mainly occupied and controlled by Native Americans.

LAND TRUSTS IN THE TWENTIETH CENTURY

Additional changes occurred in the 1920s: “a system had evolved whereby individual allottees

were dealt with as individuals” (15). This did not mean that Indians who had trust status had greater freedom than those without it, because

money obtained from the lease or sale of allotted land could be controlled by the agent, and the assault by the agents on what they considered to be heathen practices continued. . . . A result of the detailed regulation of Indian policy was an increase in the administrative costs of Indian affairs. (15)

In 1917, as a result of these increased administrative costs, Commissioner Cato Sells announced another shift in federal treatment of Indians and their trust status. He stated that “the government intended to reduce the number of allottees in trust status. All individuals of greater than one-half Indian blood were immediately declared competent and given patents in fee” (16). All others of Indian descent were to be deemed competent on an individual basis through competency commissions (16).

The rules for granting fee patents would be changed again in 1920 by Commissioner Charles Burke when public opinion was spiked by the “rapid loss of Indian land” (16). In 1928 a report was published after a study had been conducted by independent staff headed by Lewis Meriam with the cooperation of the Department of the Interior. The study had “surveyed conditions among American Indians both on and off the reservations and made numerous recommendations for improving federal policy and improving its administration” (16). This report “painted a bleak picture of the economic position of most Indians. . . . [T]he commission thought the assistance given Indians in learning new occupations had been grossly inadequate” (17).

The Meriam report went on to explain that the goal of teaching Native American Indians to manage their own affairs had failed and that current policy was primarily concerned with property. It also stated:

The fundamental requirement is the task of the Indian Service to be recognized as primarily educational in the broadest sense of the



FIG. 4. Log cabin home of John Max. Sisseton Agency. Identifier RG 75 Image no. 39, National Archives at Kansas City, Record Group 75, Records of the Bureau of Indian Affairs, 1965 ARC Identifier 185770.



FIG. 5. Mr. and Mrs. Amos King, daughters and grandson. Sisseton Agency. RG 75 Image no. 122, National Archives at Kansas City, Record Group 75, Records of the Bureau of Indian Affairs, 1965 ARC Identifier 185770.

word . . . devoting its main energies to the social and economical [sic] advancement of Indians, so that they may be absorbed into the prevailing civilization, or at least be fitted to live in the presence of that civilization at least in accordance with the minimum standard of health and decency. (17)

Unfortunately, it was clear that Native Americans had not been properly protected and that conditions had actually become worse under the Allotment Act of 1887.

STEPS FORWARD AND STEPS BACKWARD

A shift in the other direction finally occurred in 1934 when Congress passed the Wheeler-Howard Act, also referred to as the Indian Reorganization Act. "In June 1934 the Wheeler-Howard Act, giving the Indians a greater degree of self-government, became a law, and the Indians voted to accept the act."³⁷ Only 192 out of 262 tribes had voted in its favor. Nevertheless, because a majority had voted in favor, the allotment process ended for all tribes.³⁸ The Indian Reorganization Act repealed the Allotment Act of 1887 and provided a number of positive changes in Native American policy.

According to George D. Watson Jr., two of the best changes were the enactment of tribal courts and enabling tribes toward self-governance.

When Congress passed the Indian Reorganization Act (IRA), the federal government abandoned its assimilation policies. Section 16 of the IRA, aimed at restoring the status and authority of tribal governing bodies and tribes, allowed them to draft their own constitutions and laws and establish their own justice system. . . . This law profoundly influenced tribal governments and tribal justice systems.³⁹

Under the IRA, the government bought back land that had been taken away from Native Americans and redistributed it to the tribes. According to Watson,

The Wheeler-Howard act authorizes appropriations of \$2,000,000 a year for the purchase of

land for Indian use, grants to Indian tribes the right to organize and obtain federal charters of incorporation, provides \$250,000 a year for educational loans, abolishes allotments of Indian tribal land to individual Indians and helps Indians to adapt themselves gradually to the ways of the white man.⁴⁰

The law also authorized a revolving credit fund of \$10 million to make loans to incorporated tribes, and it gave the secretary authorization to help Indian tribes adopt written constitutions and exercise other powers.⁴¹ It was believed that by doing so, Indians would be better able to make an adequate living and work out tribal problems on their own. The tribes were encouraged to organize and form cooperative associations to undertake farming and stock raising. They were allowed to borrow funds from the government to carry out economic projects and were encouraged to form new political organizations that would be entirely under their own control. However, these governmental concessions would not guarantee a better life for those on the reservation, and, in fact, "shortly after the close of World War I, the Indians of South Dakota entered a pitiable struggle for existence."⁴² Many of the people bartered Native American heirlooms, moved out of their homes, which had fallen into disrepair, and moved into secondhand army tents. The only jobs on the reservations at that time included working a few weeks on road crews or helping white ranchers during cattle roundups.⁴³ Their land, which was "semi-arid even in lush years," was hit hard during the drought.⁴⁴ The limited cattle that remained were slaughtered in a style reminiscent of the buffalo-hunting days.

Government work projects revived their spirits, however, and the old dances and community living eventually returned with the rains. On some reservations, the Repayment Cattle Program put many families back into ranching.⁴⁵

Cattle are issued to young men on the promise that, as the herd is increased, part of the increase will be returned, until full repayment is made in cattle. These, in turn, are issued to some other deserving young men. From 1935

to 1948, the number of cattle owned by Indians on the reservation increased from 3,144 to 17,338.⁴⁶

But in 1944, the Pick-Sloan Flood Control Act of 1944 set tribes back again. It authorized the construction of numerous dams and modifications to previously existing dams and levees across the country with the promise of benefiting both Indians and non-Indians through controlled management of the Missouri River on six fronts: recreation, hydroelectricity, water supply, navigation, flood control, and wildlife.⁴⁷ This project would once again change the face of reservation land.

The Corps of Engineers built five mainstem projects that destroyed over 550 square miles of the best tribal land in North and South Dakota and dislocated more than 900 Indian families. Most of this damage was sustained by the five Sioux reservations. . . . Standing Rock and Cheyenne River, reduced by the Oahe project; Yankton, affected by Fort Randall Dam; and Crow Creek and Lower Brule, damaged by both the Fort Randall and Big Bend projects.⁴⁸

“With much of their land within the reservoir area of the Oahe project in the Missouri River development program, the Indians demanded the right to negotiate with the Federal Government for the sale of land being flooded. In 1950, Congress made such a provision.”⁴⁹

Although the Bureau of Indian Affairs (BIA) had been told of the plan to enable severance of flooded land from the reservation, they had chosen not to resist its passage. Thus, from 1954 to 1957, Congress engaged in negotiations and awarded settlements that would provide compensation to the tribes; however, there was little recourse available for individual families. Any money claimed would come from the fund for the rest of the reservation and be paid only to the tribe.⁵⁰ More compensation, including the relocation of people and their property, as well as the rehabilitation and restoration of reservation facilities and services, would be awarded from 1958 to 1962. But this compensation would be far less

than what the Sioux had hoped for. “The Missouri River Sioux tribes have received therefore almost none of the benefits that were supposed to be provided by the Pick Sloan Plan, but they have suffered a great deal as a result of its implementation.”⁵¹

FRACTIONATION AND REACQUISITION

In the years since the Pick-Sloan Flood Control Act of 1944, several different solutions have been proposed to both reacquire lost tribal land from the reservations and consolidate land divided beyond repair. For example, with the enactment of the Indian Land Consolidation Act (ILCA), the government first attempted to force all Indians with a less than 2 percent interest in the land to sell it back to the government, which would in turn sell it back to the tribe.⁵² However, this policy was challenged in *Hodel v. Irving*, and the U.S. Supreme Court held that no matter how small the interest, a forced sale is still an unconstitutional taking.⁵³ Thereafter, land was consolidated through ILCA on a strictly voluntary basis.

Section 2205 of ILCA allows for the establishment of tribal probate codes and rules for acquisition of fractional interests by tribes. Subject to secretarial approval, any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust or restricted lands located within that tribe’s reservation or land subject to the jurisdiction of that tribe. Without these codes, and without educating tribal members of the danger posed by fractionation, Section 2205 can actually make the problem worse. For example, Sawers reports that the majority of Indians die without a will:

Absent a will, interests of less than 5% descend with a right of survivorship, leaving the entire interest to one person. Interests greater than 5%, however, descend as tenancies in common. Although the stated policy of the Act is to reduce fractionation, this provision will encourage fractionation until every interest is less than 5%.⁵⁴

Likewise, Jessica Shoemaker highlights the problems associated with fractionation, a phe-

nomenon whereby “a single tract of land is shared among multiple owners in undivided interest.”⁵⁵ Shoemaker cites comments made by the U.S. Supreme Court in 1987:

Tract 1305 [on the Sisseton-Wahpeton Lake Traverse Reservation] is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.⁵⁶

This illustrates how fractionation has not only diminished individual Indian landholdings to virtually worthless interests but also magnified the administrative costs of managing the land to the point that it far outweighs its value to the owners. This scenario benefits no one.

Sawers recommends an alternative plan to address the continued fractionation of land interests, thereby enabling “improved control by individual Indians.”⁵⁷ It would allow Indian landowners to acquire, exchange, or trade interests of the same parcel. One reservation has enacted just such a plan (albeit with great administrative burden):

[T]he Pine Ridge Reservation has organized an exchange to allow allottees to consolidate their landholdings by trading with the Tribe or other allottees. Exchanging interests require nine bureaucratic steps, involving both the Tribe and BIA. The majority of trading is not between individuals, but between individuals and the Tribe.⁵⁸

Another plan proposed by Sawers is that of partition, which allows for the dividing of property into individually owned interests. Sawers believes partition “would allow homeowners to secure

marketable title to their homes” and that “[p]artition and liberalized exchange would ameliorate the problems associated with fractionation.”⁵⁹

Reacquisition is another solution to the diminishment problem. Most recently, with the advent of the *Cobell v. Babbitt* litigation and subsequent settlement, more money than ever before has been set aside to reacquire lost land and consolidate land through ILCA.⁶⁰ But some point out that the money has been available for years with little to no progress. In other words, even with the influx of available funds from *Cobell*, the reacquisition is taking too long because tribes cannot force individuals to sell, regardless of whether they are Indian or non-Indian. Thus, the slow progress through ILCA does not seem to be keeping pace with the fractionation rate.

Another solution offered by Sawers and others is condemnation through eminent domain.⁶¹ The common example of eminent domain is where the government condemns privately owned property, called a “taking,” to build a new highway. Then the government pays the original owner fair market value of the land taken. The same could be true for the tribe. The tribe could forcibly “take” the fractions of land from its individual members, pay them the fair market value of the pieces taken, and then reacquire use of the land for tribal purposes.

Obviously, the biggest drawback of this method is that it involuntarily divests the original owner of his or her property rights. Sawers suggests three strategies for the tribe to use to placate those members affected by eminent domain. First, “[t]hose affected by eminent domain could be given priority in leasing, even over other tribal members.” Second, the tribe “might grant tribal members usufructory rights, so that those who lost land might still be able to gather berries, for example, on ‘their’ land.” And third, the tribe “should permit access for recreational or religious observance.”⁶²

While these interests may seem minimal, emotions run high, as evidenced in the pre-*Hodel* era, as well as the stalemate with the Black Hills settlement resolution.⁶³ The farther west one travels, the more traditional the tribe, and the

more highly revered are all ties to the land. The Midwest reservations are some of the most highly fractionated in the nation, but for these reasons, some speculate that no tribe would ever force its owners to sell, regardless of compensation. The tribe would be seen as no better than Congress if it did so.

Another drawback is determining where to draw the limits of such power. Can a tribe exercise its sovereign government power of eminent domain over nonmembers or even over non-Indians? Some believe it can, so long as the tribe's exercise of civil authority is exerted within the confines of the reservation and the conduct sought to be regulated "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁶⁴ For example, the *Native Sun News* reported that the Oglala Sioux Tribe is filing a lawsuit in federal court to seize land near the site of the Wounded Knee Creek massacre under its authority of eminent domain.⁶⁵ This action is of particular interest because the land at issue is not merely a fractional trust interest owned by a tribal member; it is *fee* land owned by a *non-Indian*. The disposition of this case might very well be groundbreaking for future similar efforts to reacquire lost tribal land.

Sawers offers yet another, perhaps more viable, alternative in the form of incorporation of the tribe.⁶⁶ In other words, the tribe incorporates and takes the small fractions of land owned by various members as capital contributions. The tribal members then become owners of the tribal corporation and are issued shares of stock in that corporation. The corporation's profits are then paid to its member owners in the form of dividends proportionate to each owner's investment. Ultimately, both the tribe and the member owners win. While the tribe does not reacquire lost land, it does reacquire productive use of the previously fractionated land. Likewise, the members retain their ownership interest while receiving income they otherwise would not have had.

In the decades since the Dawes Act, the allotment system and subsequent fractionation has weakened and diminished tribal lands.⁶⁷ But education for estate planning and the enactment of

ILCA have helped to stem the tide. Now to turn that tide, as suggested by Sawers and Shoemaker, tribes have several options to reacquire lost land or, at a minimum, consolidate existing land. Tribes can make progress, whether through outright purchase of land, the exercise of eminent domain, or the use of tribal incorporation. With the help of funds from *Cobel*, tribal land interests may finally start seeing some improvement.

Our goal has been to provide an overview of the important treaties, acts of Congress, legislation, and recent court cases impacting the tribal land interests of the northern Great Plains, and in particular, those of the Lakota/Dakota/Nakota. We have reviewed possible solutions for tribes to reacquire lost land or consolidate fractionated land. Beginning with the Fort Laramie Treaty of 1851 that established the Great Sioux Reservation and continuing through contemporary efforts to reacquire lost lands by outright purchase, eminent domain, and tribal incorporation, many Great Plains American Indian tribes remain committed to reestablishing, or at least preserving, what remains of reservation landholdings.

NOTES

1. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).
2. "Treaty of Fort Laramie, 1851" (September 17, 1851), pt. 4: "Treaties," in *Laws, Compiled to March 4, 1927*, vol. 4 of *Indian Affairs: Laws and Treaties*, comp. and ed. Charles J. Kappler (Washington, DC: Government Printing Office, 1929), Oklahoma State University Library, <http://digital.library.okstate.edu/Kappler/index.htm> (accessed March 4, 2012).
3. Brian Sawers, "Tribal Land Corporations: Using Incorporation to Combat Fractionation," *Nebraska Law Review* 88, no. 2 (2009): 431.
4. Joseph Marshall, *The Lakota Way: Stories and Lessons for Living* (New York, NY: Penguin Compass, 2002), 211.
5. Tom McHugh, *The Time of the Buffalo* (Edison, NJ: Castle, 2004), 85–109.
6. Marshall, *The Lakota Way*, 217.
7. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley, CA: University of California, 1995), 17.
8. "Treaty of Fort Laramie, 1851," Article 7.

9. Sawers, "Tribal Land Corporations," 388.
10. Kerry R. Oman, "The Beginning of the End: The Indian Peace Commission of 1867-1868," *Great Plains Quarterly* 22 (Winter 2002): 35.
11. Nathaniel Philbrick, *The Last Stand: Custer, Sitting Bull, and the Battle of the Little Bighorn* (New York: Viking, 2010), 55.
12. Oman, "The Beginning of the End," 42.
13. Edward Lazarus, *Black Hills, White Justice: The Sioux Nation versus the United States, 1775 to the Present* (New York: HarperCollins, 1991), 50-54.
14. Sawers, "Tribal Land Corporations," 388.
15. "Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, 1868" (April 29, 1868), in *Treaties, 1772-1883*, vol. 2 of *Indian Affairs: Laws and Treaties*, comp. and ed. Charles J. Kappler (Washington, DC: Government Printing Office, 1904), Oklahoma State University Library. <http://digital.library.okstate.edu/kappler/index.htm> (accessed March 4, 2012).
16. Philbrick, *The Last Stand*, 4; Lazarus, *Black Hills, White Justice*, 72.
17. Philbrick, *The Last Stand*, 4.
18. Doreen Chaky, *Terrible Justice: Sioux Chiefs and U.S. Soldiers on the Upper Missouri, 1854-1868* (Norman, OK: Clark, 2012), 355.
19. "Acts of Forty-Fourth Congress—Second Session, 1877" (February 28, 1877) in *Laws (Compiled to December 1, 1902)*, vol. 1 of *Indian Affairs: Laws and Treaties*, comp. and ed. Charles J. Kappler (Washington, DC: Government Printing Office, 1904), Oklahoma State University Library, <http://digital.library.okstate.edu/kappler/index.htm> (accessed March 4, 2012).
20. Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport, CT: Greenwood Press, 1981), 8.
21. *Ibid.*, 8.
22. *Ibid.*, 9.
23. *Ibid.*, 9.
24. Jill E. Martin, "'The Greatest Evil': Interpretations of Indian Prohibition Laws, 1832-1953," *Great Plains Quarterly* 23, no. 1 (Winter 2003): 44.
25. Carlson, *Indians, Bureaucrats, and Land*, 9.
26. Matilda Tarleton Barker, *Our State* (Mitchell, SD: Educator Supply Company, 1937), 189; Carlson, *Indians, Bureaucrats, and Land*, 9.
27. Carlson, *Indians, Bureaucrats, and Land*, 10.
28. *Ibid.*, 10.
29. *Ibid.*, 60-70.
30. "Acts of Fiftieth Congress—Second Session, 1889" (March 2, 1839) in *Laws (Compiled to December 1, 1902)*, vol. 1 of *Indian Affairs: Laws and Treaties*, comp. and ed. Charles J. Kappler (Washington, DC: Government Printing Office, 1904), Oklahoma State University Library, <http://digital.library.okstate.edu/kappler/index.htm> (accessed February 12, 2012).
31. Carlson, *Indians, Bureaucrats, and Land*, 12.
32. *Ibid.*, 13.
33. *Ibid.*, 79.
34. Barker, *Our State*, 190.
35. Carlson, *Indians, Bureaucrats, and Land*, 13.
36. Carlson, *Indians, Bureaucrats, and Land*, 10. Further citations to *Indians, Bureaucrats, and Land* are given in parentheses in the text.
37. M. Lisle Reese, *South Dakota Guide* (1937; Pierre: South Dakota State Historical Society Press, 1952), 301.
38. Carlson, *Indians, Bureaucrats, and Land*, 18.
39. George D. Watson Jr., "The Oglala Sioux Tribal Court: From Termination to Self-Determination," *Great Plains Research* 3, no. 1 (February 1993): 73.
40. "Referendum to Be Studied by High Officers: South Dakota's 'Native Americans' Vote in Favor of Wheeler-Howard Act," *Aberdeen Evening News*. October 29, 1934, 2.
41. Carlson, *Indians, Bureaucrats, and Land*, 17.
42. Reese, *South Dakota Guide*, 25.
43. *Ibid.*
44. *Ibid.*
45. *Ibid.*, 25-26.
46. *Ibid.*, 26.
47. Michael L. Lawson, *Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* (Norman: University of Oklahoma Press, 1994), 4.
48. Reese, *South Dakota Guide*, 223.
49. Lawson, *Dammed Indians*, 27.
50. *Ibid.*, 97.
51. *Ibid.*, 193.
52. Indian Land Consolidation Act Amendments of 2000, Public Law 106-462, Sec. 213, <http://www.gpo.gov/fdsys/pkg/PLAW-106publ462> (accessed March 24, 2012).
53. *Hodel v. Irving*, 481 U.S. 704 (1987).
54. Jessica A. Shoemaker, "Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land

Tenure Problem," *Wisconsin Law Review*, 2003 Wis. L. Rev. 729, 1.

55. Sawers, "Tribal Land Corporations," 402.

56. Shoemaker, "Like Snow in the Spring Time," 6.

57. Sawers, "Tribal Land Corporations," 407.

58. *Ibid.*, 407.

59. *Ibid.*, 407.

60. *Cobell v. Babbitt*, 52 F. Supp. 2d 11 (1999).

61. Sawers, "Tribal Land Corporations," 421.

62. *Ibid.*, 425.

63. *United States v. Sioux Nation of Indians*, 488 U.S. 371 (1980).

64. *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245.

65. Brandon Ecoffey, "Tribe Moves to Seize Wounded Knee Site," *Native Sun News*, May 30, 2013.

66. Sawers, "Tribal Land Corporations," 409.

67. *Ibid.*, 431.