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Emulsified Property

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Abstract

The typical American Indian reservation is often described as a "checkerboard" of different real property ownership forms. Individual parcels of reservation land may be held in either a special federal Indian trust status or in fee, by either Indian or non-Indian owners. The general jurisdictional framework provides that federal and sometimes tribal law sets the rights and responsibilities of trust owners, while fee owners are subject to a peculiar mix of state and tribal law. Many scholars have analyzed the challenges created by this checkerboard pattern of property and jurisdiction. This Article, however, reveals an even more complicated issue that has thus far not been fully identified in the literature. This Article analyzes for the first time how the modern reservation is not merely a checkerboard of fee and trust parcels situated next to each other. Rather, significant numbers of reservation lands are now jointly owned by co-owners who hold undivided interests in the same property in different tenure forms. Thus, many individual tracts of land now contain a mix of trust and fee co-ownership interests in the same physical resource.

These "emulsified" properties are made up of theoretically undivided co-ownership interests; however, the fee and trust co-owners have very different rights to the same property. There is neither a single overarching set of legal rules that applies equally to all interests in emulsified properties nor any single dispute resolution tribunal through which all co-owners can reliably negotiate a fair and efficient use of the resource. This Article explores for the first time how these emulsified properties are created and analyzes the unique obstacles

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they create for landowners and for reservation governance. While others have argued for a refocus on tribal property regimes in order to support tribal sovereignty more generally, this emulsified property problem tips the scales and makes more robust tribal property systems, with clear tribal authority to govern all interests in emulsified properties, a critical next step.

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"*This regime is . . . a chimera created by federal policy*."[1]

"*When we try to pick out anything by itself, we find it hitched to everything else in the universe.*"[2]

I. INTRODUCTION

Land tenure in Indian Country is complicated. As a result of generations of shifting federal land policies, there are now three discrete land tenure statuses in most Indian reservations: (1) land held in trust by the federal government on behalf of individual Indian landowners (individual trust lands or allotments); (2) land held in trust by the federal government for the Indian nation itself (tribal trust lands); and (3) land held in a more traditional fee title (fee lands).[3] Fee lands, in turn, may be owned by any number of different individuals or entities, including non-Indians, individual Indians who may or may not be citizens of the resident Indian nation, and the Indian nation itself.[4] On top of this, because of federal laws governing the disposition of trust lands upon an Indian owner's death and limiting transfers during life, many single parcels of trust land are now shared by dozens, hundreds, or sometimes even thousands of co-owners.[5]

Each land tenure status is defined by and subject to a different set of rules and regulations imposed by different sovereign governments. There are few bright-line jurisdictional rules within reservation boundaries. In general, fee lands may be freely sold and encumbered, while lands held in trust may not be sold without federal approval involving numerous regulatory and bureaucratic hurdles.[6] States generally have jurisdiction to regulate non-Indian owners of

1. *Crow Tribe Land Restoration Act: Hearing on S. 1080, H.R. 2120, S. 2494, H.R. 2963, and S. 531 Before the S. Comm. on Indian Affairs*, 110th Cong. 6 (2008) (statement of Carl Venne, Chairman, Crow Nation).

2. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 157 (1911).

3. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 15.02–.03, at 995–99, § 15.04[5], at 1015, § 16.03[1], at 1071 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. A few reservations also include a special Indian-owned "restricted fee" status, which is roughly equivalent to Indian trust status for this purpose. *See id.* § 15.03 n.1, at 997.

4. *Id.* § 15.04[1], at 999; *see infra* Part II.B.

5. *See infra* Part II.A.3.

6. *See* COHEN'S HANDBOOK, *supra* note 3, § 15.06, at 1027–39, § 16.03[3][b], at 1077–78, § 16.04[b], at 1079–80.

fee land.[7] States lack most jurisdiction, however, over Indian owners of fee land, although states do tax many Indian-owned fee properties.[8] The federal government heavily regulates management of individual trust lands and regulates, albeit somewhat less heavily, tribal trust land.[9] The federal government disclaims most jurisdiction over fee land.[10] Tribes, meanwhile, have only limited jurisdiction over non-Indian fee land and non-Indian activities on it, and federal law severely circumscribes tribal authority over transfers and management of trust lands.[11]

Many scholars and advocates have written about the difficulties caused by these reservation land realities. They have noted that the federal bureaucracy's restrictions on the use and transfer of trust lands hamper reservation development, as does the multiplicity of co-owners needed to approve actions for single parcels.[12] The Department of the Interior recently reported that more than half of jointly owned Indian trust lands are idle or otherwise generating no income, contributing to widespread poverty in Indian Country.[13] Other scholarly work has also shown that the jurisdictional disjointedness of this land tenure "checkerboard" across reservation territories limits tribal sovereigns' abilities to advance functioning systems of governance and to implement unified, workable land use and economic development plans in such a piecemeal, and unsettled, legal landscape.[14]

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7. *See id.* § 6.03[2], at 517–30.

8. *See id.* § 6.03[1], at 511–17, § 8.03[1][c], at 702–05.

9. *E.g.*, *id.* § 15.06[2], at 1031–32, § 16.03[4][c], at 1083, § 16.03[4][f], at 1086–89.

10. *E.g.*, 25 C.F.R. § 162.004 (2015) (stating Interior's position that it will not take jurisdiction over any undivided fee interests in surface leases of trust allotments).

11. For a more detailed discussion of all of these jurisdictional issues, see *infra* Parts II.A.2, II.B.3.

12. *E.g.*, PROPERTY RIGHTS AND INDIAN ECONOMIES 1–4 (Terry L. Anderson ed., 1991); Randall Akee, *Checkerboards and Coase: The Effect of Property Institutions on Efficiency in Housing Markets*, 52 J.L. & ECON. 395, 396, 406 (2009); Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427, 428, 448–49 (1992); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1562–63 (2001); Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 445–47 (2006); Richard A. Monette, *Governing Private Property in Indian Country; the Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 40–43 (1995); Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015).

13. U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 6–7 (2012) [hereinafter BUY-BACK PLAN], https://www.iltf.org/sites/default/files/Buy-Back%20Initial-Implementation-Plan.pdf. *See generally* Shoemaker, *supra* note 12, at 395–97 (summarizing recent data on Indian communities' pressing economic and social welfare needs).

14. *E.g.*, Grant Christensen, *Creating Bright Line Rules for Tribal Court Jurisdiction over Non-*

But previous scholarship has generally missed that the problem is even more complex than it appears. This Article focuses for the first time on a new dimension of the land tenure problem. Although we have imagined reservation territories as two-dimensional checkerboards of neighboring fee and trust parcels on either side of a shared property line, this construction is wrong, or at least incomplete. The reality is that most Indian reservations are not simply checkerboards. Instead, many properties within Indian Country are now jointly owned by multiple parties, and within many of these jointly owned lands, there are co-owners who hold their undivided interests in the same property in different legal tenure types. Thus, there are both fee and trust co-owners of the same land operating as tenants in common. Their co-ownership interests are theoretically undivided from each other, but they have very different and often incongruent property rights based on their unique tenure statuses. These mixed tenure properties cannot be characterized as one tenure status or the other. Instead, they are each a unique emulsion of undivided interests of different tenure types. This is what I call "emulsified property"—distinct forms of co-ownership bound, but never completely merging, together in the same space.

Emulsified properties are not hypothetical. As early as 1958, an Office of Indian Affairs report to Congress detailing the problems of Indian land loss and the increasing fractionation of the remaining Indian land base revealed that the "heirship or multiple-ownership problem" already included many Indian-owned trust allotments that were mixed (or, in the language of this Article, emulsified) with undivided interests owned by the governing Indian tribe or by "non-Indian and alien Indians."[15] Likewise, in 1992, when the Government Accounting

Indians: The Case of Trespass to Real Property, 35 AM. INDIAN L. REV. 527, 530–32 (2010); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 193 (2001); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 824 (2014); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3–4 (1991); *see also* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219–20 (2005) (articulating related concerns about how a "checkerboard of alternating state and tribal jurisdiction" can "seriously burden" administration of government and "adversely affect landowners"); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 357–58 (1962) (allocating jurisdiction "depend[ing] upon the ownership of particular parcels of land" creates "an impractical pattern of checkerboard jurisdiction"); Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 187 (2008) ("Indian law scholars and the Supreme Court seemingly agree on at least one thing: checkerboard areas are bad. Really bad.").

15. SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 85TH CONG., INDIAN LAND TRANSACTIONS:

Office (GAO) completed a study of fractionation on twelve sample reservations, it found all twelve reservations had tracts with mixed tenure ownership.[16] In 2000, when the GAO reviewed the Bureau of Indian Affair (BIA) oversight of Indian trust assets, the GAO specifically noted that "some interests in some trust lands are not trust interests" and expressed concern that Interior had no clear, consistent mechanism of treating these mixed tenure properties.[17] More recent economic analysis from 2013 confirms that the degree of emulsification on many reservations is only getting worse with time.[18]

The resulting property and jurisdictional challenges are immense. Right now, in any given emulsified property, a strange mix of federal, state, and tribal property rules applies to individual co-ownership interests, often unevenly and unpredictably. The federal government largely attempts to quarantine the undivided fee interests in emulsified properties as outside its trust responsibility and therefore beyond its jurisdiction. State governments, meanwhile, have no parallel jurisdiction over the undivided trust interests in emulsified properties. Tribal property law authority over trust interests is currently limited, and what authority a tribe may assert over fee interests is an area of ongoing dispute. This means that, currently, co-owners of emulsified properties have different and often incongruent property rights, set by different jurisdictions, to the same shared resource. In many cases, fee and trust co-owners are left largely to sort out any jurisdictional issues and property conflicts for themselves without a clear, unified set of rules or any single governing institution through which to mediate these disputes.[19]

As just one example, consider a hypothetical emulsified property with undivided co-ownership interests held both in fee and in trust. The fee interests

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MEMORANDUM OF THE CHAIRMAN TO THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, U.S. SENATE: AN ANALYSIS OF THE PROBLEMS AND EFFECTS OF OUR DIMINISHING INDIAN LAND BASE, 1948–57, at 93–94 (Comm. Print 1958) [hereinafter 1958 SENATE REPORT] (letter of William H. Gilbert to the Honorable James E. Murray).

16. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-92-96BR, PROFILE OF LAND OWNERSHIP AT 12 RESERVATIONS 13 & tbl.2.2 (1992) [hereinafter 1992 GAO REPORT].

17. U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-00-259, INDIAN TRUST FUNDS: IMPROVEMENTS MADE IN ACQUISITION OF NEW ASSET AND ACCOUNTING SYSTEM BUT SIGNIFICANT RISKS REMAIN 18 (2000) [hereinafter 2000 GAO REPORT].

18. Jacob W. Russ & Thomas Stratmann, *Creeping Normalcy: Fractionation of Indian Land Ownership* 13 (GMU Working Paper in Econ. No. 13-28, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353711 ("Ownership Mix on Tracts with Fractionated Ownership").

19. For a detailed discussion of these and other institutional challenges in emulsified properties, *see infra* Part IV.B.

are recorded, probated, and otherwise administered through state, or perhaps tribal, property systems.[20] These fee interests are also likely subject to state property tax and state rules regarding alienation. Meanwhile, the undivided trust interests in the exact same property—although impossible to distinguish in any way within the actual physical property itself—are managed entirely through a separate federal probate and recording system and are exempt from state tax and otherwise inalienable without federal approval. The jurisdiction of any single court to resolve property-wide disputes is entirely unclear. For example, different partition rules may apply to the fee and trust interests, and even if these differences could be bridged, no single court has clear authority to force a partition sale or execute a physical partition of both the fee and trust interests.[21] Federal and tribal courts question their jurisdiction over the non-Indian fee interests, and state courts cannot affect the trust titles of Indian co-owners.[22]

Similar challenges arise whenever either a trust or a fee co-owner attempts to lease or take direct possession of an emulsified property.[23] One of the most difficult challenges of emulsified co-ownership is determining how individual co-owners' use and possession rights are defined and reconciled with each other in this ownership form, especially given the generally bifurcated jurisdictional framework between fee and trust interests types. Under typical state laws, tenants in common all have direct rights to use and possess the entirety of their jointly owned property by virtue of the unity of possession shared among undivided co-owners. However, under federal law, even Indian co-owners must get a federally approved lease before using and possessing their own jointly owned trust land. The extent to which this Interior leasing requirement impacts fee co-owners' separate possession rights in emulsified properties is unclear, and where on-the-ground conflicts arise between actual users of fee and trust ownership interests, the bifurcated jurisdictional framework precludes efficient, comprehensive solutions.[24] The ultimate results are enormous information and transaction costs for co-owners, underuse of resources despite widespread resource needs, an inequitable allocation of property rights, a wasteful duplication of government efforts, and, in almost

20. *See infra* Part IV.A.
21. *See infra* Part IV.B.2.
22. *See infra* Part II.A.2, .B.3.
23. *See infra* Part IV.B.1.
24. *See infra* Part IV.B.1–.2.

every case, severe disadvantage to Indian communities.[25]

Emulsified properties also have significant ramifications for Indian sovereignty. For example, ongoing efforts to consolidate fractionated Indian trust lands and even to modify the federal trust status itself to make trust land more usable by Indian landowners are all ineffective and incomplete to the extent they do not also account for emulsified properties and the trust owners' undivided co-ownership in fee. Likewise, although many have critiqued the checkerboard pattern of jurisdiction in Indian Country as problematic and difficult to administer, these emulsified properties tip the entire framework over into impossibility. If parcel-by-parcel jurisdictional analysis seemed difficult within original checkerboard constructions, it becomes impossible through the lens of emulsified properties. A landowner, investor, developer, or government simply cannot assess jurisdiction interest by interest in undivided tenancy in common property. Getting a full chain of title report from at least two, possibly three, different jurisdictions for each emulsified property to determine which tenure status a given parcel "mostly" is imposes impractical and impossible transaction costs.

This Article builds an analysis of this novel property and governance challenge in six parts. Part II explores the historic origins and modern mechanisms by which the different types of trust and fee properties emerged on most American Indian reservations and gives some context for the general land tenure and jurisdictional framework in Indian Country today. Part III explains how emulsified properties have been created by law and underscores the disparate impact created by the one-sided way the law automatically emulsifies only existing Indian-owned trust properties, and not other non-Indian fee properties on the reservation. Part IV then analyzes in depth why these emulsified properties present significant property law challenges, incorporating several real-world examples where these issues have emerged. This Part discusses the challenges of conflicting and incongruent co-owners' rights, the absence of many overarching and uniform default rules or controlling principles, and the extraordinary transaction costs required to make any investment in these lands. Next, Part V turns to broader consequences, discussing how emulsified properties reveal the precariousness of the property-based institutions of sovereignty in Indian Country. This phenomenon demands we deepen our dialogue about both property and sovereignty in Indian Country.

25. *See infra* Part V.

Finally, Part VI argues that, while other scholars have frequently called for greater and clearer tribal jurisdiction in tribal territories in other contexts, these emulsified properties provide a tipping point. Unified tribal jurisdiction is not only a desirable result. It is now the only real, plausible solution. Unifying jurisdiction over all interests in emulsified properties is the most efficient resolution of the property challenges created by mixed-tenure lands. Neither federal nor state governments are suited to this task. Instead, recognizing clear tribal jurisdiction over all ownership interests in emulsified properties is critical, both for emulsified property owners and for the future of land tenure and governance in Indian Country more expansively.

II. RESERVATIONS AND CHECKERBOARDS

Emulsified properties combine and magnify several existing Indian land tenure challenges: the checkerboards of fee and trust properties, the jurisdictional uncertainty, and the fractionation of many trust properties with extreme degrees of co-ownership. These challenges are all a direct result of federal interventions in indigenous land tenure systems.[26] This Part explains the genesis of the original checkerboard ownership pattern, including the fractionation of trust properties. It also briefly analyzes the jurisdictional conflicts inherent in these different tenure statuses.

A. The Special Indian Trust Statuses

1. The Genesis of the Trust

Indian-owned property has always been treated as special, and subject to its own set of unique rules, in this country. The notion of some special federal oversight and control of Indian lands dates back to foundational notions about the legal impact of European "discovery" of North America. According to the earliest Supreme Court cases, European discovery vested title in the discovering (Christian, civilized) nation and left the indigenous landowners a residual right of occupancy that could be extinguished through only federal purchase or conquest.[27] This framework split Indian property rights so that the federal government held formal title and exercised some supervisory role over

26. *See generally* Bobroff, *supra* note 12, at 1621.

27. LINDSEY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 3–4 (2005).

Indian lands, but the Indian landowners retained their original occupancy rights.[28] This bifurcation of federal legal title and Indians' beneficial-use rights in land is at the foundation of the modern federal trust status over Indian lands.[29]

Despite the dismissive and colonizing language of the discovery doctrine, however, most of the early interactions between the European and indigenous nations were executed through sovereign-to-sovereign treaty instruments in which indigenous nations sold or traded remaining claims to lands outside ever-diminishing reserved areas.[30] In exchange, the United States typically promised to protect exclusive Indian use and control of lands within the remaining reserved territories.[31] The idea was to reserve a defined territory to Indian nations in which tribes could exercise their inherent sovereignty, including controlling who might settle within the territory and how various resource rights and responsibilities were defined and allocated.[32] The federal government would have some oversight, derived in part from its treaty powers and from its construction of Indian nations as "dependent."[33] However, both because of this preemptive federal role and the retained inherent sovereignty of Indian nations, state governments were to have no rights or control in this exclusive, reserved Indian territory.[34]

In the late 1800s, the federal government departed from this original construction of reservations as territories reserved for exclusive tribal control

28. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823) (preserving Indian right of occupancy but imposing federal restraint on alienation); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 564–68 (1903) (approving federal power to reallocate tribal property rights to individual Indians without tribal consent).

29. *Johnson*, 21 U.S. (8 Wheat.) at 592; *see also* Indian Trade and Intercourse Act, ch. 33, § 4, 1 Stat. 137, 138 (1790) (codified as amended at 25 U.S.C. § 177 (2012)) (prohibiting any transfer of Indian land without federal approval).

30. COHEN'S HANDBOOK, *supra* note 3, § 2.01[1], at 109–10. *See generally* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35 (1947) (describing Indian treaties and land cessions as effectively a series of giant real estate transactions).

31. COHEN'S HANDBOOK, *supra* note 3, § 1.03[6][a]–[b], at 60–64; *see also* United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

32. *See, e.g.*, Morris v. Hitchcock, 194 U.S. 384, 389 (1904) (finding "undoubted" tribal right "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders"); Bobroff, *supra* note 12, at 1618–19.

33. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (describing Indian tribes as "domestic dependent nations").

34. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

and imposed the federal allotment policy.[35] With allotment, the federal government reached into reservation boundaries, wiped clean existing indigenous systems for allocating internal land rights, and redistributed reservation properties to individual Indians in parcels ranging, on average, from 40 to 160 acres in size.[36] Allotment had two goals: (1) assimilate, through the transformative force of western private property ownership, individual Indians into the white "yeoman farmer" ideal and (2) open "extra" Indian land within reservations to white homesteaders and settlers by forcing the sale of much of the euphemistically called "surplus" Indian lands (the lands that were not individually allotted to Indian citizens) to non-Indian homesteaders and purchasers.[37]

Once assigned to individual Indians, the new land allotments were held in the special federal trust status for the first time.[38] The individual Indian allottee owner held a beneficial interest and the federal government acted as a self-appointed trustee. This trust status was intended to protect individual Indian landowners as they transformed to American farmers, so the status included a federal restraint on alienation.[39] No individual allotments could be transferred without federal approval.[40] Although the alienation restrictions prevented Indian land loss to non-Indians during this assimilative period, allotment and its associated alienation restraints also prohibited Indian landowners from transferring their property freely to other Indians or to non-Indians under desirable, flexible terms and precluded application of many traditional tribal property customs, laws, and norms to these properties.[41]

The failures of allotment were documented early.[42] For reasons discussed

35. 2 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 661–62 (1984).

36. COHEN'S HANDBOOK, *supra* note 3, § 4.01, at 206–08; *see also* Royster, *supra* note 14, at 10–12.

37. LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 79–80 (1981).

38. *See* General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348 (2012)).

39. *See id.* (providing for original 25-year trust period); Burke Act of 1906, ch. 2348, § 6, 34 Stat. 182, 183 (codified as amended at 25 U.S.C. § 349 (2012)) (authorizing early issuance of a fee (unrestricted) patent to any Indian allottee upon determination that the individual is "competent and capable of managing his or her affairs").

40. *See* Dawes Act § 5.

41. *See* Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 493 (2001).

42. *See generally* L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 219–21 (Francis Paul Prucha ed., 2d ed. 1990).

in more detail in the next subsection, allotment resulted in significant Indian land loss and completely failed to create prosperous communities of Indian farmers.[43] In 1934, with the Indian Reorganization Act (IRA), Congress repudiated any further allotment and extended the formal federal trust status over remaining individual allotments indefinitely—preserving the restrictions on Indians' alienation of trust land and cementing the federal government's major role in Indian land management and control.[44] This trust status, with the federal government acting as trustee, is what still defines individual trust lands on reservations today.[45]

A separate, but related, trust status exists for many tribally owned lands. Tribal trust property (land which is held in trust for the tribe or Indian nation itself, rather than an individual) also has roots dating back to the Court's early decision, holding discovery vested title of land in the United States; the Indian Trade and Intercourse Acts (also called Non-Intercourse Acts), which formally prohibited any transfer of Indian property rights without federal approval; and the early Supreme Court cases describing Indian tribes as "domestic dependent nations" within the United States.[46] Although others have noted that the exact origins of this special trust status over tribal lands today is somewhat less defined (or is even suspect because there is no parallel allotment-like statute that made all remaining tribally owned land within a reservation suddenly held in federal trust status),[47] today tribally owned trust lands are classified as a distinct tenure status under Interior's Indian property regime.[48]

2. Modern Realities

Individual and tribal trust properties are now heavily restricted and regulated by the federal government. For individual Indian landowners, the

43. *See* CARLSON, *supra* note 37, at 155.

44. Indian Reorganization Act, ch. 576, § 2, 48 Stat. 984, 984 (1934) (codified as amended at 25 U.S.C. § 462 (2012)) ("The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.").

45. Indian Land Consolidation Act Amendments of 2000, Pub L. 106-462, § 101, 114 Stat. 1991, 1991 ("Congress finds that . . . (5) the trust periods for trust allotments have been extended indefinitely.").

46. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *supra* notes 28–29 and accompanying text.

47. *See* NATIVE LAND LAW: GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES § 4 (Robert T. Coulter ed., 2014) (critiquing the legitimacy of many federal assertions of trust title over tribally owned lands as without legal authority).

48. *See, e.g.*, COHEN'S HANDBOOK, *supra* note 3, § 15.03, at 997–98.

federal government as trustee oversees nearly every land management decision, including pre-approving any transfer, distributing any income from the property to the trust beneficiaries, and administering trust assets through a federal probate process.[49] Under this system, any alienation of individual Indian trust land is cumbersome, and transactions using the land as collateral, including residential mortgages, are rare.[50] These trust restrictions are also blamed for the significant fractionation problem within remaining trust allotments because co-owners are prohibited from flexibly consolidating and exchanging their fractional interests during life, which has resulted in very problematic patterns of co-ownership within trust allotments.[51]

Tribal trust property is also restrictive and bureaucratic. There is a trend to increase tribal autonomy and decision-making authority in lieu of Secretarial approval or management over a tribe's own land use decisions for tribal trust land, but land use is still subject to some federal oversight and regulation.[52] For example, although the general rule is still that tribal trust property cannot be transferred, alienated, or leased without the approval of the Secretary of the Interior,[53] some new exceptions for tribal leases of tribal lands now exist that do not apply to individually owned trust allotments.[54]

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49. *E.g.*, Act of February 28, 1891, ch. 383, § 3, 26 Stat. 794, 795 (permitting federally approved leasing of Indian allotments); Act of June 25, 1910, ch. 431, § 2, 36 Stat. 855, 856 (codified as amended at 25 U.S.C. § 373 (2012)) (permitting federally approved Indian wills). *See generally* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 91–99 (2004) (describing scope of modern BIA trustee function).

50. *See generally* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 841–42 (2001) (assessing individual Indians' frequent lack of access to credit within reservation spaces).

51. *See infra* notes 68, 101 and accompanying text.

52. *See, e.g.*, HEARTH Act, Pub. L. No. 112-151, § 2(h), 126 Stat. 1150, 1151 (2012) (codified at 25 U.S.C. § 415(h)) (permitting some tribal leasing of tribal trust lands without federal approval, provided tribal leasing regulations are pre-approved by Interior); Indian Tribal Energy Development and Self-Determination Act, Pub. L. No. 109-58, § 503, 119 Stat. 594, 769 (2005) (codified at 25 U.S.C. § 3504(a)) (permitting tribal approval of energy resource development leases without Interior interference but only on tribal lands and only where the tribe has previously entered into an approved tribal energy resource agreement with Interior); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,442 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162) (explaining in context of new BIA surface leasing regulations that, "[t]o the extent consistent with the trust responsibility, [Interior] treated tribal and individual Indian landowners differently, providing more deference to tribal landowners in the lease approval process and in the lease enforcement process").

53. *See, e.g.*, 25 C.F.R. § 152.17 (2015). One notable exception is leases of certain tribal property by qualifying tribal corporations under Section 17 of the Indian Reorganization Act where the lease term is less than 25 years. *See* 25 U.S.C. § 477.

54. *See, e.g.*, HEARTH Act § 2(h); *see also* 25 C.F.R. §§ 162.014(b)(3), 162.109(b)(4) (permitting tribal laws to govern agricultural leases of trust lands where "[t]he superseding or modifying of the

Many critics malign the cumbersome, bureaucratic, and restrictive nature of the modern Indian trust.[55] The trust status impacts not only landowner autonomy but also tribal sovereignty. For example, the Department of the Interior has increasingly recognized tribal authority to regulate land use and zoning on Indian trust lands; however, this right is typically subject to any superseding and conflicting federal authority.[56] In addition, special statutes acknowledge tribal rights to implement binding agricultural resource management plans on Indian trust lands and to pass tribal probate codes that dictate disposition of trust assets after an Indian landowner's death.[57] However, again, these rights are all limited by a threshold Interior approval process and preemption risk.[58] Core property right allocations and definitions for trust properties, including primarily the rights of landowners to possess and alienate their own property, are still largely defined at the federal level. However, these are areas in which tribes may assert more power in the future.[59]

Nonetheless, despite its limits, many tribes and Indian landowners still seek to preserve the trust status over existing Indian lands and even to have more land taken into this trust.[60] For example, the federal trust status provides

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regulation applies only to tribal land"); *id.* § 166.218(b) (allowing tribes to grant grazing leases on tribal lands without competitive bidding).

55. *See, e.g.*, Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RESOURCES L. REV. 3, 5–6 (2015) (collecting critiques of the trust doctrine from "established federal Indian law scholars"); Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability* 1, 5–7 (May 7, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447289&download=yes; Lance Morgan, *Ending the Curse of Trust*, INDIAN COUNTRY TODAY (Feb. 23, 2005), http://indiancountrytodaymedia network.com/2005/03/23/ending-curse-trust-94626; Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014), http://www.forbes.com/sites/realspin/2014/03/13 /5-ways-the-government-keeps-native-americans-in-poverty/.

56. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,446–48 (articulating Interior policy of deference to tribal law in leasing and recognizing that "tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land"); *see also* 25 C.F.R. § 162.016 ("Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.").

57. *E.g.*, 25 U.S.C. §§ 2205–06 (permitting federally approved tribal probate codes); *id*. § 3712 (permitting federally approved agricultural resource management plans).

58. *Cf.* Monette, *supra* note 12, at 58–59 (discussing proposed language in Senate Report 102-442 that would have recognized broader tribal authority to manage trust lands).

59. *See, e.g.*, Cadotte, 31 IBIA 175, 176 (1997) (suggesting in dicta that a tribe could modify a trust co-owner's rights to use his or her own trust property by eliminating federal rent requirement); COHEN'S HANDBOOK, *supra* note 3, § 4.02[3][c][i], at 230–31, § 7.04[1][b], at 618–19; *see also infra* Part VI.C.

60. *See generally* DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO

important record keeping and administrative support, especially for owners of tiny interests in fractionated allotments.[61] The trust status also clearly excludes state authority over most aspects of trust land management. States generally have no authority to define property rights of Indian trust lands.[62] States also have no rights to tax trust property[63] or, under current Interior regulations, to tax any improvements or activities authorized on Indian lands by a federally approved lease instrument, even if the lessee is non-Indian.[64] This protection from state incursions is one of the few relatively clear jurisdictional rules in Indian Country. Thus, when threats to the trust status are perceived, Indian representatives often protest and express a collective desire to preserve the trust status, primarily because of the categorical protection it provides from most state jurisdiction.[65]

LAND HELD IN FEE OR RESTRICTED FEE STATUS 5–32 (2014) [hereinafter FEE-TO-TRUST HANDBOOK], http://www.bia/gov/cs/groups/xraca/documents/text/idc1-024504.pdf (describing the different processes of taking land into trust).

61. *See infra* Part IV.A.

62. *E.g.*, Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State, 867 A.2d 1222, 1229 (N.J. Super. Ct. App. Div. 2005) (holding state courts have no jurisdiction over Indian property disputes based on "clear understanding that Congress expressly intended to preserve exclusive federal jurisdiction over claims to Indian land, which is subject to restriction against alienation"); Estate of Ducheneaux v. Ducheneaux, 861 N.W.2d 519, 527 (S.D. 2015) (finding that because "Congress has preempted state court jurisdiction over the disposition of Indian trust property, and the United States Supreme Court has made clear that adjudicating the right to possession of Indian trust lands interferes with the interests of the United States," a state court may not even indirectly "adjudicate the right to possession of Indian trust land"). *But see* Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 423–25, 428–32 (1989) (recognizing some state zoning rights over Indian trust lands located in largely open, predominantly non-Indian area of reservation). In addition, until recently, the federal government largely applied the substance of state intestacy laws when probating Indian trust property. *E.g.*, 25 U.S.C. § 348 (2000) (providing that "the law of descent and partition in force in the State or Territory where such lands are situate shall apply" to allotments); COHEN'S HANDBOOK, *supra* note 3, § 4.02[3][c][i], at 230–31, § 7.04[1][b], at 618–19. The American Indian Probate Reform Act of 2004 changes this and instead applies a uniform federal probate code or a federally approved tribal probate code to Indian trust property. American Indian Probate Reform Act, Pub. L. No. 108-374, § 3, 118 Stat. 1773, 1809 (2004) (codified at 25 U.S.C. § 2206 (2012)); *see also* 25 U.S.C. § 348 (2012).

63. *See* Cass Cty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110-11 (1998); COHEN'S HANDBOOK, *supra* note 3, § 8.03[1][e], at 714–15.

64. *See* 25 C.F.R. § 162.017 (2015); *see also* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,449 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162) (asserting that state may not tax improvements on trust leaseholds "regardless of who owns the improvements"). The validity of these regulatory measures and the attendant scope of state taxing authority are currently being tested in federal court. *See infra* notes 317–18 and accompanying text.

65. *See, e.g.*, *Indian Land Consolidation Act: Hearing Before the S. Comm. on Indian Affairs on S. 1340*, 107th Cong. 30–31, 33 (2002) [hereinafter *Statements on S. 1340*] (statements of Maurice Lyons, Chairman, Morongo Band of Mission Indians; Benjamin Speakthunder, President, Fort Belknap Community Council; Austin Nunez, Chair, Indian Land Working Group).

3. Fractionation of the Trust

One consequence of the federal trust status that is particularly noteworthy is the fractionation of Indian lands. Federal policy is blamed for the extreme numbers of co-owners who now share undivided but fractional interests in Indian allotments.[66] The extreme numbers of current co-owners in many trust properties today resulted from initial restrictions on Indian wills, formulaic application of state intestacy default rules over many generations (with properties often passing to multiple heirs as tenants in common), and the ongoing alienation restrictions that make flexible alienation and consolidation difficult, if not impossible.

This fractionation is extreme. The Department of the Interior reported in 2012 that there were 92,000 fractionated tracts of trust lands, and within these fractionated tracts, there were 2.9 million fractional ownership interests.[67] Each of these fractionated, jointly owned trust lands are shared by co-owners who own small but undivided shares of the whole parcel. On average, there are more than thirty-one co-owners with undivided trust interests in each fractionated tract, but "many allotments exceed several hundred owners."[68]

This fractionation imposes significant coordination and assembly costs that impede efficient land use in Indian Country, even where all of the co-owners hold their undivided interests in the same trust status.[69] In many cases,

66. In general, co-owners of Indian lands hold their undivided interests as tenants in common. Quiver, 92 Interior Dec. 628, at *4 (IBIA 1985).

67. BUY-BACK PLAN, *supra* note 13, at 6–7. By way of context, these 92,000 fractionated parcels make up approximately 46% of the total tracts that Interior holds in trust for Indian landowners. *Id*. Many of the non-fractionated tracts are likely wholly owned tribal trust lands. *Id.* at app. B-1.

68. Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 598 (2000) ("As a result, common denominators have reached 54 trillion, billions are not uncommon, and millions [approach the norm].").

69. Some scholars have cited these fractionated allotments as a quintessential anticommons problem. *E.g.*, Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685 (1998) (identifying risk of underutilization of resources where too many property owners have veto or exclusion rights over the same resource and discussing fractionated Indian allotments as example of the same). However, as I have noted elsewhere, the land use challenges in this Indian trust context are more complex than most appreciate. For example, most individual trust co-owners are now legally precluded from directly utilizing their resource on their own without a federally approved lease. Thus, in some sense, the challenge in Indian allotments is not the presence of too much ownership as much as it is a lack of direct ownership rights in any of the individual co-owners. *See* Shoemaker, *supra* note 12, at 387; *see also* Lee Ann Fennell, *Commons, Anticommons, and Semicommons*, *in* RESEARCH HANDBOOK ON ECONOMICS OF PROPERTY LAW 35, 41 (Kenneth Ayotte & Henry E. Smith eds., 2011) (identifying similar assembly challenges across both commons and anticommons properties).

Interior's costs to administer these many undivided fractional trust interests exceed the value of those individual tiny interests; yet, Interior's continued involvement as land manager seems increasingly important given the number of tiny, discrete, and dispersed interest holders.[70]

B. Fee Ownership Within Reservations

1. Foundations of the Fee

Allotment also caused the initial checkerboard of fee and trust tenures within tribal territories. Through the allotment policy, Indian nations lost approximately 60% of their remaining reservation lands to non-Indian fee ownership.[71] This occurred in two ways. First, allotment acts opened so-called "surplus" (un-allotted) reservation land to non-Indian settlement. When non-Indians purchased land within reservations pursuant to surplus land sale acts, they purchased their interests in fee simple status.[72] Thus, these surplus land sales, which often occurred without Indian consent, first introduced non-Indian settlers as fee land owners within reservation territories.[73]

Second, during allotment, the federal government removed the trust status on some Indian allotments and transferred fee patents to Indian allottees once they were deemed "competent" to hold property outside the protective federal trust status. These newly fee-tenured properties, owned by Indians, were presumptively subject to state property taxes upon removal of the federal trust projections, and as a result, these competency determinations often resulted in tax foreclosure losses and various other sales to non-Indians, often on unfair and predatory terms.[74] A few Indian owners may have retained their fee title to properties within the reservation following allotment, but that was the

70. Interior is, however, in the process of trying to purchase some small interests from willing Indian sellers as part of its ongoing consolidation program. *See generally* BUY-BACK PLAN, *supra* note 13, at 1. However, this consolidation program is not designed with any illusions that it will be able to eliminate the fractionation problem completely, and it will not. *See id.* ("The overall goal of the Program is to reduce the number of fractional interests through voluntary land transfers to tribes.").

71. *See* CARLSON, *supra* note 37, at 18; *see also* Guzman, *supra* note 68, at 605 n.43.

72. *E.g.*, Blake v. Arnett, 663 F.2d 906, 911 (9th Cir. 1981) ("There can be no real doubt that it was intended that non-Indian settler-purchasers would take a fee-simple in the Indian land.").

73. Sixty million acres of Indian reservation lands transferred to non-Indian fee ownership through these surplus land sales. JANET A. MCDONNELL, DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934, at 121 (1991).

74. At least twenty-seven million acres passed to non-Indian ownership as a result of these early trust status removals. Guzman, *supra* note 68, at 605; *see also* MCDONNELL, *supra* note 73, at 88–90.

exception rather than the rule. A government study from 1935 concluded that "[t]he granting of fee patents has been practically synonymous with outright alienation."[75]

2. Current Transfers and Nuances of Owner Identity

Today, parallel mechanisms result in additional Indian trust land passing out of trust and into fee by operation of law. Generally, the United States holds land in trust only for Indians to whom it owes a trust responsibility.[76] Therefore, because the United States has not accepted any parallel trust responsibility for non-Indian citizens, when Indian-owned trust land transfers to non-Indian ownership now, whether through a voluntary transfer approved by Interior or by some other method, the land comes out of trust status and a fee patent is issued in favor of the new non-Indian owner.[77] This conversion to fee status is considered automatic upon a valid transfer of trust title to a non-Indian; therefore, even before the fee patent document itself has been formally executed, Interior disclaims any trust responsibility toward the land and considers it no longer in trust.[78]

Who qualifies as Indian for whom land may be held in trust is a complex question, and distinguishing Indian and non-Indian landowners is not always easy. There is no single universal definition of Indian for purposes of federal law, and who is considered an Indian varies depending on the legal context.[79] In many instances, however, the definition of Indian requires some version of

75. OFFICE OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, *Indian Land Tenure, Economic Status, and Population Trends*, *in* SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE TO THE NATIONAL RESOURCES BOARD pt. 10, at 6 (1935). In the Indian Office's sample, only 3% to 20% of fee-patented land remained in Indian ownership. *Id.*

76. Bailess v. Paukune, 344 U.S. 171, 173 (1952) (explaining Congress holds land in trust "to protect only those toward whom it owed the duties of a guardian"); Estate of Trust, 11 IBIA 203, 207 (1983) ("The Department of the Interior owes no Indian trust responsibility to non-Indians and has no authority to hold land in Indian trust status for non-Indians."). *But see infra* Part III.D (describing one recent exception created for certain "eligible heirs" who are not Indian themselves but are closely related to an Indian from whom they receive trust property by intestacy or devise).

77. *Bailess*, 344 U.S. at 173 (holding that after devise of trust interest to a non-Indian "there remains only a ministerial act . . . namely the issuance of a fee patent"); *see also* 25 C.F.R. § 152.6 (2015) (providing for fee patent issuance to non-Indian owners "without application"); BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, PROCEDURAL HANDBOOK: LEASING AND PERMITTING 108 (2006) [hereinafter PROCEDURAL HANDBOOK] (citing Solicitor's Opinion of May 1, 1981).

78. Estate of Knight, 88 Interior Dec. 987, 990 (IBIA 1981) ("[W]hen an interest in trust property is acquired by a non-Indian, the trust is immediately terminated to the extent of that interest.").

79. COHEN'S HANDBOOK, *supra* note 3, § 3.03[1], at 171.

(1) descent from indigenous peoples who were living in what is now the United States prior to European contact and (2) recognition of the individual as an Indian by the individual's tribe.[80] Tribal recognition, often in the form of formal membership or citizenship in the tribal government, in turn typically requires demonstrated descent from identified individuals on a historic roll of tribal members at a particular point in time.[81] Some tribes require a minimum blood quantum, such as one-fourth degree of ancestry or blood from ancestors of the particular tribe in question, but other tribes permit any descendent to enroll, regardless of blood quantum.[82]

Today, fee properties within reservation boundaries may be owned by Indians and non-Indians. Indian ownership of fee property can occur in multiple ways. For example, any Indian owner of trust property may request that the trust restrictions be removed and a fee patent be issued to her directly.[83] The Secretary of the Interior then evaluates whether that Indian owner is competent, and if so, Interior generally has authority to issue a fee patent to that Indian owner.[84] Individual Indian co-owners may seek to have their land or co-ownership interests converted from trust to fee for any number of reasons, but a desire to get out from under the BIA's comprehensive regulatory regime and to acquire greater landowner autonomy in land use decisions are common incentives.[85] In addition, individual Indians and Indian tribes now often purchase fee properties (lands within reservation boundaries that have already

80. *Id.* at 171–72.

81. *Id.* at 172. Ironically, these tribal rolls were typically created for the purpose of executing allotment itself; prior to federal land reform, no such formal roster likely existed.

82. *Id.*

83. Any Indian over twenty-one years old may seek a fee patent for his trust land. 25 C.F.R. § 152.4 (2015).

84. *Id.* § 152.5(a). *But see* Comment of Nat'l Congress of Am. Indians to Michele Singer, Counsel to the Assoc. Deputy Sec'y of Interior 9 (March 12, 2007) (on file with journal) [hereinafter NCAI Comments] (objecting to any change to what NCAI referred to as "longstanding policy to require the consent of all owners before allowing a partial interest to be converted to fee status"). More specifically, the NCAI objected to a new proposed trust-to-fee rule that would have made explicit that "[a]n Indian may convey a fractional interest without the consent of co-owner(s)." *See* Indian Trust Management Reform, 71 Fed. Reg. 45,174, 45,217 (proposed Aug. 8, 2006) (to be codified at 25 C.F.R. pt. 152). Interestingly, the NCAI objected to this proposal to clarify that an individual may unilaterally convert an undivided interest to fee status on the grounds that "a tenant in common does not have the right to materially diminish the value of the co-owners' property, and putting an interest in fee would do so because the land becomes much harder to lease or sell." NCAI Comments, *supra*, at 9. Interior has not yet issued a final rule on this issue. *See* 25 C.F.R. § 152 (current rules dating back to 1999).

85. *See infra* Part III.C (discussion of possible post-ILCA trust-to-fee conversions).

been converted to fee) on the open market.[86]

Moreover, there may be a spectrum of different types of Indian owners of fee properties within a reservation. Current Indian fee owners may include (1) Indians who are citizens of the resident Indian nation; (2) the Indian nation itself; and (3) individuals who identify as Indian but are not political members of the governing tribe (collectively, non-member Indians). Thus the categories of fee properties within reservation boundaries are not merely non-Indian and Indian but really include properties belonging to (1) non-Indians; (2) Indian citizens of the governing tribe; (3) non-member Indians; and (4) the Indian nation itself. Different legal consequences may attach to each of these different fee owner types in some circumstances.[87]

3. Jurisdictional Factors

The definition and regulation of fee property rights within reservation boundaries is an area of significant ongoing debate and uncertainty within Indian Country. Who governs and defines any given aspect of reservation fee properties often turns primarily on the identity of the owner or occupant, as well as potentially the general character of the area where the property is located.[88]

This is an area of tremendous complexity, but a few relatively clear rules exist. First, the Department of the Interior repeatedly considers fee properties categorically outside of its jurisdiction.[89] Second, fee properties within

86. *See* Estate of Knight, 88 Interior Dec. 987, 994 (IBIA 1981). When an Indian purchases fee property within reservation boundaries, it remains in fee status until that owner formally requests that Interior take the land into trust and Interior acts positively on that application. *Id*.; *see also infra* Part III.B.

87. *See, e.g.*, Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 421–22 (2005). The diversity of reservation residents and Indian landowners also creates many scenarios in which an Indian landowner may seek to transfer real property to individuals deemed non-Indian by law or have non-Indian heirs and descendants. *Id.* at 421. For example, one Indian citizen may marry a non-Indian or an Indian citizen of a different tribe or otherwise have children with a further mixed blood quantum who might not qualify for membership in any single tribe. *See, e.g.*, *id*. at 410–11 (describing some AIPRA reforms intended to "account[] for the various possibilities resulting from inter-tribal and non-Indian marriages").

88. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 423–25, 428–32 (1999).

89. *See, e.g.*, Estate of Granbois, 53 IBIA 252, 254 (2011) (finding no federal jurisdiction over fractional interests in trust property once those undivided interests passed out of trust and to non-Indian heir in fee status, even where issue was whether that trust-to-fee conversion should have occurred); *see also infra* Part IV. *But see infra* note 233 (noting one very limited possible exception in the context of

reservations, regardless of the owners' identities, are typically "subject to voluntary or involuntary alienation under state law"[90] and are generally taxable under state law.[91] This is most directly because of language in the General Allotment Act deeming post-allotment fee properties "freely alienable," which the Supreme Court has determined also means taxable by the state.[92]

Beyond this, however, the exact allocation of tribal versus state authority over other aspects of fee property ownership and use may depend on whether the fee is owned by an Indian or non-Indian and where exactly on the reservation the property is located. For example, there is authority supporting the proposition that Indian tribes *do* retain the sovereign right to define property allocations, at least internally, especially for Indian-owned fee properties.[93] Demonstrating the contextual nature of these claims, the Supreme Court holds both that tribes can zone non-Indian fee land if it is in an area of sufficient Indian character[94] and that tribes categorically cannot "regulate the sale of non-Indian fee land."[95] Likewise, the scope of a tribal government's authority to condemn through eminent domain non-Indian-owned fee properties is an open issue subject to dispute,[96] as is the question of whether a tribal government can impose a property tax on fee properties within reservation boundaries.[97]

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some timber sales).

90. COHEN'S HANDBOOK, *supra* note 3, § 16.03[4][b][i], at 1080. *But see id.* § 15.06[4], at 1034–36 (outlining argument that some tribally owned fee lands should not be alienable without federal approval).

91. Cass Cty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 103 (1998); *see also* COHEN'S HANDBOOK, *supra* note 3, § 8.03[1][c], at 702–06, § 16.03[4][b][i], at 1079–80.

92. *Cass Cty.*, 524 U.S. at 115; *see also* COHEN'S HANDBOOK, *supra* note 3, § 15.04[5], at 1015 (accepting that "[t]itle to tribal lands held in fee simple is owned under the same terms as title held by non-Indians" but noting there may be some argument the Non-Intercourse Act's restriction on alienation still applies); *see also infra* notes 317–18 and accompanying text (noting modern exception for non-trust improvements on trust leaseholds).

93. *See, e.g.*, Jones v. Meehan, 175 U.S. 1, 1 (1899); United States v. Tsosie, 92 F.3d 1037, 1044 (10th Cir. 1996); Gooding v. Watkins, 142 F. 112, 113 (8th Cir. 1905); Cadotte, 31 IBIA 175, 176 (1997); *see also* Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 525 n.31 (2013) (collecting cases).

94. Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 423–25, 428–32 (1989).

95. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 332 (2008).

96. As one lawyer connected to these ongoing disputes commented, "The whole issue over tribal jurisdiction over deeded land is in flux. If you talk to any lawyer in this area, it is a nightmare right now." Brandon Ecoffey, *Oglala Sioux Tribe Moves to Seize Wounded Knee Land Through Eminent Domain*, NATIVE AM. TRIBAL NEWS (May 30, 2013), http://www.aaanativearts.com/tribal-news/2065-sioux-wounded-knee-eminent-domain.html#ixzz3KCULehG3 (quoting Rosebud Sioux Tribal member and practicing attorney Terry Pechota).

97. COHEN'S HANDBOOK, *supra* note 3, § 8.04, at 718–28; *see also* Atkinson Trading Co. v. Shirley,

State regulation and definition of Indian-owned fee properties beyond taxation and possibly some aspects of voluntary and involuntary alienation, is also complex. For example, a string of recent federal court decisions have split on whether and when a state can zone or condemn Indian-owned fee properties within reservation boundaries.[98] Other state courts have hesitated to take jurisdiction over Indian-owned fee properties within reservation boundaries, but where fee properties are co-owned by both Indian and non-Indians, the results are less predictable.[99]

In summary, property law in Indian Country is complex, even without the addition of the emulsified property problem. The federal government oversees and holds title to Indian trust lands, but it generally has no jurisdiction over property rights in fee lands. States, conversely, have no authority over the definition and allocation of property rights to trust lands but do govern some fee properties within reservations. Tribes theoretically have inherent authority over their entire territory, but their actual control over both trust and fee properties in Indian Country is less clear and still emerging as tribal governments continue to grow in capacity. These jurisdictional allocations are all made on a property-by-property basis. This is the essence of the modern checkerboard jurisdiction construction, a framework that already teeters on the verge of impossibility.

III. EMULSIFYING PROPERTY

As complex as these tenure rules in Indian Country already are in this checkerboard paradigm, the introduction of the emulsified properties phenomenon changes, and further complicates, this framework. This Part

532 U.S. 645 (2001) (applying general civil jurisdictional framework to bar tribal taxation of certain non-Indian conduct on non-Indian fee lands within reservation).

98. *See, e.g.*, Gobin v. Snohomish Cty., 304 F.3d 909, 909 (9th Cir. 2002) (holding state may not zone Indian-owned fee lands); Oneida Tribe of Indians v. Vill. of Hobart, 542 F. Supp. 2d 908, 935 (E.D. Wis. 2008) (holding state may condemn tribal fee lands); Seneca-Cayuga Tribe v. Town of Aurelius, 233 F.R.D. 278, 278 (N.D.N.Y. 2006); Cayuga Indian Nation v. Vill. of Union Springs, 390 F. Supp. 2d 203, 203 (N.D.N.Y. 2005) (holding state may zone newly acquired tribal fee lands); *see also* COHEN'S HANDBOOK, *supra* note 3, § 15.09[2], at 1061 (noting dispute about whether state may condemn tribally owned fee properties within reservation boundaries).

99. *Compare* Estate of Big Spring, 255 P.3d 121, 136–37 (Mont. 2011) (finding no state court jurisdiction over probate of Indian-owned fee property within reservation boundaries), *with* McGuire v. Aberle, 826 N.W.2d 353, 353 (S.D. 2013) (recognizing possibility of state court jurisdiction over partition of fee property within reservation boundaries where only one of eight co-owners was Indian and remanding to determine whether land was alienated under a federal allotment act). For other cases, see McGuire v. Aberle, No. CIV.10-16, 2011 WL 12565377 (S.D. Cir. May 31, 2011).

analyzes the multiple ways emulsified properties are created out of existing trust property. It also examines how one-sided this legal effect is, establishing that only Indian-owned trust properties are automatically mixed with undivided fee interests by operation of law, while fee properties cannot comparably be emulsified with new trust interests. After reviewing the inequities of this disparate impact, this Part concludes with the little data available about the scope of the current emulsified property problem and an analysis of the limits of one recent legislative change that may delay one category of emulsifying mechanisms going forward, but only for a limited period of time.

A. Creation Mechanisms

Emulsified properties are created any time a single, undivided co-ownership interest in a jointly owned trust property passes out of trust and into fee.[100] As previously noted, the amount of fractionation, or co-ownership, within many individual Indian trust allotments is already extreme.[101] Any time one of these fractional trust interests passes out of trust and into fee, an emulsified property is created—if it isn't emulsified already—with co-owners of both trust and fee interests sharing the same resource.[102]

This emulsification can occur in any of the ways that Indian trust property can otherwise pass out of trust and into fee.[103] For example, during life, an Indian co-owner of trust property might transfer her interest to a non-Indian with Interior approval.[104] This would include, for example, an Indian landowner seeking to gift trust land to a non-Indian spouse during life. In that case, the Indian landowner's undivided interests in trust land would transfer in

100. Emulsified properties can also be created whenever a single trust property landowner, with a 100% ownership interest in a given piece of property, transfers that property to multiple new co-owners and the co-owners take in a mix of trust and fee statuses.

101. *See* BUY-BACK PLAN, *supra* note 13, at 19 (describing how fractionated trust lands often have "tens or hundreds of different owners, all with varying levels of interests").

102. *See, e.g.*, Chemah v. Fodder, 259 F. Supp. 910, 912–13 (W.D. Okla. 1966). In this interesting related case, a federal court posited that a better method may be for Interior to partition out in kind the fee interests in such a circumstance, rather than creating undivided fee interests, because such a mixed tenure co-ownership form "would solve nothing and would further confound the existing problems of multiple ownership." *Id*. Nonetheless, the standard practice seems to be creating undivided fee interests—and emulsified properties—in this way. *See infra* Parts III.C, IV.B (noting numerous examples of undivided emulsified ownerships).

103. *See supra* notes 76–78, 83–84 and accompanying text.

104. *See generally* 25 C.F.R. §§ 152.17–.25 (2015) (outlining general authorities and procedures for Interior-approved sales, transfers, or gifts of Indian allotments).

fee to the new non-Indian co-owner.[105] In addition, an individual Indian co-owner could also request that her share of jointly owned trust property be removed from trust status and a fee patent be issued to herself for that partial interest in the land.[106] In either case, the owner of the new interest in the property in fee would be entering into co-ownership in a newly emulsified property with the remaining undivided trust co-owners.[107]

The National Congress of American Indians has indicated that, in its experience, Interior's internal policy has been to limit at least some of these unilateral conversions of undivided trust interests to fee status by individual co-owners in order to avoid the effect of "materially diminish[ing] the value" of an allotment's value.[108] Tellingly, NCAI argued that any additional emulsification necessarily makes an allotment "much harder to lease or sell," would "severely complicate and increase the expense of consolidation," and could "severely harm the Department's ability to manage the land as trust property and the tribe's ability to regulate and govern."[109] Nonetheless, even taking a historic internal Interior policy against this kind of unilateral *inter vivos* emulsification as a given, the statistics continue to suggest that emulsification not only exists pervasively on the ground but is becoming more common on many reservations.[110]

Until recently, trust property on many reservations could also be emulsified whenever a trust co-owner died and the decedent's undivided trust interests passed in fee to non-Indian heirs or devisees.[111] For example, on many reservations, Indian landowners' undivided trust interests would pass through

105. *See id.* §§ 152.5–.6 (issuance of fee patents); *see also* Quinault Indian Nation, 48 IBIA 186, 202 n.25 (2008) (discussing how sale of trust property to a non-Indian purchaser would result in trust land going into fee); Kent, 45 IBIA 168, 168 (2007) (discussing situation where Indian owner sought to transfer trust property via gift to non-Indian spouse in fee).

106. *See* 25 U.S.C. § 483 (2012); 25 C.F.R. §§ 152.4–.5; *see also* Oglala Sioux Tribe v. Hallett, 708 F.2d 326, 333 (8th Cir. 1983) (interpreting fee patenting authority broadly); COHEN'S HANDBOOK, *supra* note 3, § 16.03[4][b][iii], at 1080–82. *But see supra* note 84 and accompanying text.

107. *E.g.*, Clallam Cty. v. Folk, 922 P.2d 73, 75–76 (Wash. 1996) (discussing example of Indian landowner passing trust property to both non-Indian spouse and Indian child, with the non-Indian spouse taking undivided fee interest and the Indian child taking undivided trust interest in same property).

108. NCAI Comments, *supra* note 84, at 9; *see also* 25 C.F.R. § 152.2 (allowing Interior to withhold action of fee patent application if the removal of trust status "would adversely affect the best interest of other Indians" and to give "the other Indians or the tribes so affected . . . a reasonable opportunity to acquire the land from the applicant").

109. NCAI Comments, *supra* note 84, at 9.

110. *See infra* Part III.C.

111. This possibility is now somewhat limited by changes in the American Indian Probate Reform Act of 2004. *See infra* Part III.D.

intestacy as undivided fee interests to non-Indian heirs, including non-Indian spouses or "mixed blood" children who did not qualify as Indian for this purpose.[112] On these same reservations, Indian co-owners of trust lands could also create emulsified property by making a testamentary transfer to non-Indian devisees.[113]

The degree to which emulsification through intestacy or devise occurred varied based on whether the relevant tribe had elected to organize under the Indian Reorganization Act (IRA). The IRA was specifically intended to end "the widespread practice of issuing so-called 'forced-fee patents'" after allotment.[114] Thus, for tribes electing to adopt it, the IRA limited the ability of Indian trust co-owners to pass their property out of trust and into fee through intestacy or devise.[115] Instead, a decedent with trust property on an IRA reservation could only have her property distributed after death to a qualifying Indian, but this was interpreted broadly to include any lineal descendants of the decedent.[116] For non-IRA tribes, however, there was no parallel restriction on an individual being "Indian" to receive trust property after an owner's death, and land could (and often did) pass to non-Indian descendants and devisees directly out of trust and into fee upon the trust owner's death.[117] Moreover, the IRA did not prohibit Indian landowners on IRA reservations from making *inter vivos* conveyances of trust properties to non-Indians in fee, and many Indian landowners pursued such transfers before their deaths in order to avoid disinheriting non-Indian family members, especially non-Indian spouses.[118]

112. *See* 25 C.F.R. § 152.6 (authorizing Secretary of the Interior to issue a patent in fee for any land or interest that "has been acquired through inheritance or devise by a non-Indian, or by a person of Indian descent to whom the United States owes no trust responsibility"); Estate of Trust, 11 IBIA 203, 203–04, 207 (1983) (transferring fee title to non-Indian heirs of Indian decedent); *see also supra* Part II.B.2.

113. 25 C.F.R. § 152.6; *see also* Bailess v. Paukune, 344 U.S. 171, 173 (1952) (holding that non-Indian devisee must be issued fee patent to undivided interest in allotment).

114. S. REP. NO. 106-361, at 3–4 & n.14 (2000).

115. 25 U.S.C. § 464 (2012); Estate of Cladoosby, 94 Interior Dec. 199, 201 (IBIA 1987).

116. S. REP. NO. 106-361, at 3–4 & n.14 ("With respect to Indian tribes organized pursuant to the IRA, however, allotted lands descend in trust or restricted status to the lineal descendants of a member of the tribe."); *see also* 25 U.S.C. §§ 462, 464.

117. *See, e.g.*, Estate of Granbois, 53 IBIA 252, 254 (2011); *Estate of Cladoosby*, 94 Interior Dec. at 201. Under the state intestacy laws that applied until recently to trust assets through a federal probate process, distribution occurred to an Indian's heirs without regard to whether those heirs were Indian or non-Indian. *See supra* note 62. Thus, by operation of law, many trust interests passed to non-Indians in fee. *See generally* 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 90 (Michael Allan Wolf ed., 2013) (describing typical state intestacy formulas without regard to any issues of Indian identity).

118. *E.g.*, Oglala Sioux Tribe v. Hallett, 708 F.2d 326, 326 (8th Cir. 1983) (analyzing *inter vivos* fee

Thus, even with the IRA, these reservations still experienced high degrees of emulsification and trust-to-fee conversions.[119]

B. One-Way Ratchet

Emulsification of trust and fee co-ownership interests like this occurs in only one direction: by taking existing trust properties and mixing them with newly introduced undivided fee interests. Emulsification does not occur as a matter of course in the opposite direction. Existing fee properties cannot be automatically emulsified in a parallel way with the addition of new trust interests.

If an undivided interest in fee is transferred to an Indian person or Indian tribe, that interest does not automatically transfer into trust.[120] Instead, it remains in fee and, at most, becomes distinguished as an Indian-owned fee.[121] In order to transfer an undivided fee interest into trust and create a property with emulsified fee and trust co-ownership interests, an Indian landowner of an undivided fee interest would have to execute an application for Interior approval of a trust acquisition of that interest and proceed through the regulatory fee-to-trust conversion process.[122] Any trust acquisition of an undivided fee interest in an otherwise all-fee property would be permitted by

patent options under IRA); *Estate of Cladoosby*, 94 Interior Dec. at 201; *see also* S. REP. NO. 106-361, at 3 & n.14 (noting that IRA's restrictions on fee transfers after a landowner's death "did not, however, prevent land from passing out of trust . . . when an allotment owner petition[ed] the Secretary to terminate the trust status"). *But see supra* note 84 (describing NCAI comments referencing some internal BIA policies that may have prohibited undivided fee interest creating without co-owner consent).

119. *See* S. REP. NO. 106-361, at 4 (acknowledging that even after the IRA "many tribes continue[d] to see significant amounts of land lose its trust status" and increasing fractionation).

120. Estate of Knight, 88 Interior Dec. 987, 994 (IBIA 1981).

121. *See id*. at 994. For example, in *Estate of Knight*, an Indian decedent devised her trust property one-third to her non-Indian spouse and two-thirds to her two Indian sons. *Id.* at 987–88. This created an emulsified property with ownership one-third in fee and two-thirds in trust. *Id.* When the non-Indian spouse died, his one-third fee interest went to the same Indian sons who already co-owned the rest of the property in trust. *Id.* at 988. The parties argued that the sons should hold all of their mother's property in trust because the portion they inherited through their non-Indian father had never actually been issued a fee patent and because they were Indian. *Id.* Interior refused, however, holding that the lands passing through the non-Indian father were automatically in fee by operation of law and that the trust status could not be revived by subsequent Indian inheritance. *Id.* at 990 ("[W]hen an interest in trust property is acquired by a non-Indian, the trust is immediately terminated to the extent of that interest. The Department owes no trust duties of any kind to the non-Indian."). Thus, these Indian sons owned both trust and fee interests in the same property. *Id.*

122. *See* 25 C.F.R. § 151 (2015). *See generally* FEE-TO-TRUST HANDBOOK, *supra* note 60 (describing the process and procedures of fee-to-trust acquisitions).

Interior only after considering multiple factors, including: (1) the impact on state and local tax rolls; (2) "[j]urisdictional problems and potential conflicts of land use which may arise"; and (3) "whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status."[123]

In practice, almost all of Interior's fee-to-trust acquisitions are discretionary, and the process is time-consuming and often controversial.[124] Interior has proven more likely to approve fee-to-trust conversions of wholly owned tribal properties and less likely to take individual Indian interests into trust.[125] The regulatory requirements, even for making an individual application, are difficult.[126] For example, for an individual to have a fee property converted to trust status, the individual has to provide both information "addressing the degree to which the applicant needs assistance in handling their affairs" and information analyzing how infrastructure or government services will be allocated over the land.[127] Taking an undivided fee interest into trust, where the remainder of the property is also in fee, is even more difficult.[128] Any request for a fee-to-trust conversion of undivided fee interests to create a new emulsified property out of a previously all-fee property would be extraordinarily unlikely to be granted.

The bottom line is that, to the extent fee and trust emulsified properties are more difficult to manage and present significant property law challenges, they are created only out of the remaining Indian trust land base, and not from the other fee properties located across the reservation. Part IV discusses the negative consequences this has for Indian landowners and Indian communities.

123. 25 C.F.R. § 151.10(e)–(g).

124. A discretionary fee-to-trust conversion process can take more than a year. *Fee-to-Trust Transfer*, INDIAN LAND TENURE FOUND. [hereinafter ILTF Information], https://www.iltf.org/resources/fee-to-trust-transfer (last visited Mar. 22, 2016); *cf. infra* Part VI.A (discussing separate mandatory trust acquisition for Indian-owned undivided fee interests but only where other interests in property are already in trust and still only upon application by co-owner).

125. ILTF Information, *supra* note 124 ("In general, the BIA gives priority to tribal over individual fee-to-trust transfers.").

126. *Id.*

127. *See* FEE-TO-TRUST HANDBOOK, *supra* note 60, at 10–11.

128. 25 C.F.R. § 151.7; *see also* FEE-TO-TRUST HANDBOOK, *supra* note 60, at 11 (referring to further processing requirements for trust acquisition of undivided fee interests); Land Acquisitions, 45 Fed. Reg. 62,034, 62,035 (Sept. 18, 1980) (to be codified at 25 C.F.R. pt. 120a) (discussing historical concerns with undivided fee interest acquisitions); Land Acquisitions, 43 Fed. Reg. 32,311, 32,312 (proposed July 19, 1978) (to be codified at 25 C.F.R. pt. 120a).

This inequity is another reason to be concerned about the problem.[129]

C. Scope of Problem

Statistics about the true scope of emulsification on reservations today are surprisingly limited. Interior keeps records of trust interests but does not record details for any undivided fee interests in the property.[130] Fee records, presumably, are kept with the tribe or state to the extent they are documented at all.[131] Nonetheless, a handful of federal reports provide some figures about the existence of emulsified properties.

For example, a 1958 Office of Indian Affairs report to Congress identified emulsified properties in more than half of the land record offices it surveyed.[132] Specifically, of ninety-two jurisdictional units surveyed, seventeen contained individual trust interests mixed with tribally owned interests in the same tracts of land, and thirty-seven had emulsified properties co-owned by Indians and "non-Indians or Indian aliens."[133] By 1992, when the GAO studied fractionation on twelve sample reservations, it found the equivalent of emulsified ownership (as defined in this Article) on all twelve reservations.[134] Although not the subject of any significant comment in the GAO report, the reported data reveal that of more than 36,000 tracts of land studied, approximately 8,600 (almost 24%) had a mix of Indian and tribal interests; 3,800 (more than 10%) had Indian and non-Indian co-ownership; and almost 3,600 (10%) had all three tenure types mixed together where individual Indians, tribes, and non-Indians all shared undivided interests in the same land.[135] In other words, 44.4% of the allotted lands on the twelve studied reservations had

129. This is not to say a mixed ownership property with undivided Indian and non-Indian fee owners would not also create significant challenges, as it surely would under the current identity-based jurisdictional framework. *See supra* Part II.B.3.

130. *See, e.g.*, 25 U.S.C. § 5 (2012); Fenner, 29 IBIA 116, 116 nn.1 & 6 (1996); BUY-BACK PLAN, *supra* note 13, at app. B-1; *see also infra* Part IV.A.

131. *See, e.g.*, Clallam Cty. v. Folk, 922 P.2d 73, 75 (Wash. 1996) (implying that states record non-Indian undivided fee interests in allotments); *Indian Land Consolidation Act Amendments; and to Permit the Leasing of Oil and Gas Rights on Navajo Allotted Lands: Joint Hearing on S. 1586 and S. 1315, H.R. 3181 Before the S. Comm. on Indian Affairs and the H. Comm. on Res.*, 106th Cong. 57–58 (1999) [hereinafter *Joint Hearing*] (statement of Roxane J. Poupart, Director of Tribal Land Management Department, Lac du Flambeau Band of Lake Superior Chippewa Indians) (describing one tribal effort to record fee properties, apparently with some federal funding).

132. 1958 SENATE REPORT, *supra* note 15, at 93–94.

133. *Id.*

134. 1992 GAO REPORT, *supra* note 16, at 13 tbl.2.2.

135. *Id.*

some version of emulsified property, with over 20% including non-Indian-owned fee interests.[136]

Anecdotal evidence also suggests that emulsification may have increased even faster when Congress passed amendments to the Indian Land Consolidation Act (ILCA) in 2000.[137] These amendments sought to narrow the definition of who constituted an Indian and also limited the ability of Indian landowners to pass trust property after death to individuals who did not meet this more limited class of eligible Indian trust beneficiaries.[138] Concern spread through Indian Country that these amendments would effectively disinherit whole populations who previously considered themselves Indian for purposes of the trust land status.[139] One report indicated that many individuals who qualified as Indian under other federal laws, but who were not enrolled for a variety of reasons, would be cut off from trust ownership and inheritance; the same report noted that on the Standing Rock Reservation alone, the new ILCA Indian definition would exclude 4,096 potential heirs from inheriting more than 15,000 acres.[140] Thus, there were many reports of individual Indians seeking to have their trust assets converted to fee status in advance of the ICLA Amendments of 2000 taking effect in order to avoid these limits and allow for free transfer of their lands to non-Indian children, spouses, or other intended beneficiaries, albeit in fee.[141] If true, this mass transfer of land out of trust

136. *See id.*

137. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 101, 114 Stat. 1991, 1991.

138. *Id.* § 103 (narrowing definition of "Indian"); *id.* § 207(a)(1)(A)–(B) (permitting devise only to "Indian spouse or any other Indian person" or "the Indian tribe with jurisdiction over the land so devised"); *id.* § 207(b)(1)–(2) (permitting intestate distribution to spouses or first or second-degree heirs pursuant to applicable law of intestate succession but with the caveat that "a non-Indian spouse or non-Indian heirs of the first or second degree shall only receive a life estate in such land").

139. JOHN C. SLEDD, EVENTS LEADING TO THE AMERICAN INDIAN PROBATE REFORM ACT OF 2004 8 (2007), https://www.iltf.org/sites/default/files/Events%20Leading%20to%20AIPRA%20%28Sledd%29.pdf.

140. *Statements on S. 1340*, *supra* note 65, at 33–34 (statement of Austin Nunez, Chair, Indian Land Working Group) ("Termination by Definition"). For example, individuals who had multiple tribal ancestors who are not enrolled or eligible to be enrolled with any one tribe, even though they are one-half or one-quarter Indian blood from several different tribes, would be excluded. *Id.*

141. *See* SLEDD, *supra* note 139, at 8; *see also A Bill to Amend the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land: Hearing on S. 1721 Before the H. Comm. on Res.*, 108th Cong. 41, 43 (2004) [hereinafter *2004 Hearing Before the H. Comm.*] (statement of Marcella Giles, Member, Indian Land Working Group) (describing "landowner panic" following 2000 ILCA Amendments and ongoing efforts by Indian landowners to take land out of trust to ensure "full inheritance" of family members); *id.* at 46–47 (statement of Lisa C. Oshiro, Directing Attorney, California Indian Legal Services) (describing "significant stress and discomfort" of Indian elders in

would have further exacerbated emulsification of these properties in 2000, even beyond what the 1992 GAO report revealed was extreme and what would already be routine, ongoing emulsification under existing law with new generations of non-Indian transferees.

Although not speaking to the causes of this emulsification directly, recent analysis by economists Jacob Russ and Thomas Stratmann bears out this prediction.[142] Russ and Stratmann compared 2010 land ownership data on the same twelve reservations that the GAO had studied in 1992 and determined not only that fractionation had continued to increase exponentially but also that "the likelihood that ownership of a fractionated tract is now shared with a tribe, a non-Indian individual, or both, has increased considerably."[143] Russ and Stratmann's data show that from 1992 to 2010 the total number of fractionated tracts on the twelve studied reservations with some version of emulsified property had increased from 44.4% to 60% and the number of tracks including non-Indian fee interests specifically grew from 20% to more than 30% of all fractionated lands.[144]

D. One Modern Limitation

Despite the panic stirred in Indian Country by the proposed ILCA Amendments of 2000, most of those changes never actually took effect.[145] Instead, in 2004, Congress passed the American Indian Probate Reform Act (AIPRA).[146] After AIPRA, Indian is defined more broadly for trust purposes to

California because of uncertainty about ability to leave land in trust to children and grandchildren); *To Amend Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land: Hearing on S. 550 Before the S. Comm. on Indian Affairs*, 108th Cong. 74–77 (2003) [hereinafter *Hearing on S. 550*] (statement of Cris E. Stainbrook, Executive Director, Indian Land Tenure Foundation) (arguing these and other issues mean "many land owners have and will continue to remove their land from trust status"); *Statements on S. 1340*, *supra* note 65, at 29–30 (statement of Maurice Lyons, Chairman, Morongo Band of Mission Indians) (describing "widespread confusion and upset" among tribal members about potential application of more limited Indian definition); *id.* at 33–34 (statement of Austin Nunez, Chair, Indian Land Working Group) (discussing how "[p]arents of children who do not meet this restrictive interpretation will be inclined to fee patent or gift deed their land so that their property can be left to their children").

142. Russ & Stratmann, *supra* note 18, at 13 ("Ownership Mix on Tracts with Fractionated Ownership").

143. *Id.*

144. *See id.* at 13 tbl.5.

145. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 207(g)(4)–(5), 114 Stat. 1991, 1999 (describing Secretarial certification requirements, which were never completed).

146. COHEN'S HANDBOOK, *supra* note 3, § 16.05[2][c], at 1095–98; *see also* American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 3, 118 Stat. 1773, 1809 (2004) (codified at 25 U.S.C. §

include any person who is a member or eligible to be a member of an Indian tribe, any owner of a trust interest, and any person meeting the IRA definition of Indian.[147] In other words, under AIPRA, the United States can now hold land in trust for any member or person eligible for membership in an Indian tribe and also grandfathers in "all current owners of interests in trust or restricted lands as of the date of the enactment."[148] In addition, AIPRA creates a special class of individuals who are not deemed Indian per se but who are nonetheless "eligible heirs" for trust lands, and these eligible heirs include all Indians as well as their lineal descendants within two degrees of consanguinity.[149] Any eligible heir may take land in "the same trust or restricted status as such interest was held immediately prior to the decedent's death."[150] Non-Indians who are not eligible heirs generally will not take more than a life estate through intestacy, but as before AIPRA, a decedent generally may devise land to a non-Indian who is not an eligible heir in fee status if the reservation is not subject to the IRA.[151]

This new eligible heir status under AIPRA does permit a continuation of the trust status for heirs and devisees who are not technically Indian under AIPRA's broader definition, at least for the immediate future. Essentially, this change creates two generations of reprieve from some devises or intestate succession to non-Indians in fee status under AIPRA.[152] While a positive step for some purposes, this change at best postpones further emulsification through intestacy or devise to some otherwise non-Indian individuals for a defined period of time.[153] The practical effect of this rule change is unclear. This kind of emulsification through intestacy and devise was already limited to non-IRA

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147. 25 U.S.C. § 2201(2) (2012).

148. *2004 Hearing Before the H. Comm.*, *supra* note 141, at 50 (statement of Lisa C. Oshiro, Directing Attorney, California Indian Legal Services).

149. *See* 25 U.S.C. § 2206(a)(2).

150. *See id.* § 2206(a)(5).

151. *Id.* § 2206(a)(2)(A)–(B) (providing for intestate distribution of life estate only to non-Indian spouse with remainder to next eligible heir); *id*. § 2206(b)(2)(A)–(B) (limiting some testamentary devises to non-Indians who are not eligible heirs on non-IRA reservations).

152. *2004 Hearing Before the H. Comm.*, *supra* note 141, at 50 (statement of Lisa C. Oshiro, Directing Attorney, California Indian Legal Services) ("[T]hese definitions . . . allow families to protect and preserve their trust and restricted lands for at least the current and next two generations . . . .").

153. *See generally id*. One other alternative may be that, in the intervening two-generation timeframe, more tribes change their own membership definitions to make more tribal descendants eligible for enrollment and, therefore, more eligible heirs who qualify as Indian without regard to this special status. *See supra* note 147 and accompanying text.

reservations even before AIPRA, but emulsification appears to have continued to grow on all Indian reservations. IRA tribes still experienced significant amounts of land passing out of trust and into fee, despite similar restrictions on descent and devises to non-Indians.[154] Like the IRA's limits on trust-to-fee conversions after a landowner's death, AIPRA's new flexibility for eligible heirs to take land in trust does not stop further emulsification through approved *inter vivos* trust-to-fee conveyances or voluntary conversions. Further, and perhaps most importantly, AIPRA's changes do nothing to address the challenges of existing emulsified properties.

IV. PROPERTY FAILURES

The design of legal institutions for managing shared ownership rights has important social and economic consequences.[155] Ideal co-ownership rules promote fairness, cooperation, and efficient resource use consistent with individual and community values. Tested against any one of these metrics, emulsified properties fail. For the landowners themselves, emulsified properties create a nearly impossible situation. There are no clear unifying principles for allocating property rights, entitlements, and responsibilities fairly among fee and trust co-owners, and in many instances, co-owners of emulsified properties have different, conflicting rights to the same resource. In addition, there is no single dispute resolution authority with clear power over all interests in the property to facilitate co-owner cooperation, address conflicts, or simply account uniformly for any liabilities or proceeds of the property. The result is a high degree of complexity and uncertainty, which in turn increases the transaction costs for any investment in or use of the underlying property.

A. Dispersed Pockets of Ownership Information

The challenges begin with simply figuring out who has what interests in

154. *See, e.g.*, *supra* notes 118–19 and accompanying text.

155. *See, e.g.*, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 580–81 (2001) (arguing co-ownership default rules should encourage individual autonomy and self-governance while also providing an exit mechanism that maximizes cooperation); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 517–21 (2001) (discussing partition law's impact on problem of black farmer land loss); Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 739–40 (2011) (discussing relevance of co-ownership rules for families seeking to maintain certain "identity property").

emulsified properties. There is no single, unified recording system for all of the interests in emulsified property. This presents significant information costs to anyone seeking to use the property and to landowners seeking to collaborate with each other. Co-ownership arrangements present assembly and information problems anytime an individual user tries to engage a disparate group of co-owners, some of whom may be strangers to each other, in collective decision-making.[156] This is even more difficult in the context of emulsified property, where the information may be in two or even three separate recording institutions or may not be properly recorded at all.

The Department of the Interior has recording responsibility only for transactions involving Indian lands that require federal approval.[157] Specifically, the Department of the Interior must:

> [M]ake and keep a record of every deed executed by any Indian, his heirs, representatives, or assigns, which may require the approval of the President of the United States or of the Secretary of the Interior, whenever such approval shall have been given, and the deed so approved returned to said office.[158]

The Department of the Interior must examine, report, and certify titles to Indian lands within Indian Country.[159] Tribes may contract to perform these duties, but few have.[160]

The Department of the Interior has notoriously struggled to maintain these trust asset records accurately and to produce necessary title information in a timely manner. A significant land title records backlog still exists, and experts agree this hinders use and development of Indian lands.[161] In addition, after Eloise Cobell famously filed a class action lawsuit against the Department of

156. *See supra* note 69 and accompanying text.

157. 25 U.S.C. § 5 (2012) (directing Interior to "make and keep a record of every deed executed by any Indian . . . which may require [federal] approval"); 25 C.F.R. § 150.3 (2015) (designating BIA's Land Title and Records Office to fulfill federal responsibility to maintain records and documents that "affect titles to Indian land").

158. 25 U.S.C. § 5; *see also* 25 C.F.R. § 150.3 (assigning Land Titles and Records Offices within the Bureau of Indian Affairs with these recording responsibilities); BUREAU OF INDIAN AFFAIRS, INDIAN AFFAIRS MANUAL pt. 51, ch. 4, at 3, 5 (2012) [hereinafter INDIAN AFFAIRS MANUAL] (providing definitions of "Indian land" and "Chain-of-Title").

159. INDIAN AFFAIRS MANUAL, *supra* note 158, pt. 51, ch. 4, at 3, 5.

160. *See* KAREN EDWARDS, PETER MORRIS & SHARON REDTHUNDER, EXERCISING SOVEREIGNTY AND EXPANDING OPPORTUNITY THROUGH TRIBAL LAND MANAGEMENT 14 (2009).

161. *E.g.*, *id*. at 35 (discussing federal land title records backlogs); *see also* COHEN'S HANDBOOK, *supra* note 3, § 22.05[3][b], at 1439.

the Interior, the federal courts generally agreed that the government breached its trust responsibility to Native American Indians because Interior could not accurately account for billions of dollars in Indian trust assets.[162]

With respect to emulsified properties, the Department of the Interior categorically does not maintain any records of the undivided fee interests within these mixed tenure properties.[163] Instead, records for these undivided fee interests should be maintained separately by either the state or the tribe, depending in part on which jurisdiction asserts authority over which fee interests.[164] These records also depend on the current fee owners accurately maintaining their current ownership data within official record-keeping procedures, including filing the original fee patent, probating estates upon the death of an existing fee owner (in state or tribal court), and then re-recording newly distributed fee interests to the next generation of owners. In at least some cases, however, this does not occur.[165] The state recording offices, meanwhile, do not record any Indian trust interests in land.[166] Given the historic federal record-keeping responsibility and the lack of funds for providing these services, many tribes currently do not maintain any kind of record-keeping system.[167]

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162. *See* Cobell v. Salazar, 679 F.3d 909, 913–16 (D.C. Cir. 2012); Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609, 653–57 (2011). The parties ultimately settled for $3.4 billion, with $1.9 billion of this settlement allocated to purchasing small fractional interests from willing Indian sellers in order to reduce fractionation, which is seen as exacerbating Interior's accounting challenges. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–70.

163. *E.g.*, Fenner, 29 IBIA 116, 117, 122 nn.1 & 6 (1996) ("[The] BIA does not maintain records on the ownership of fee interests in Indian trust property.").

164. *See supra* note 131 and accompanying text.

165. For example, in its current draft Procedural Handbook on Agricultural and Range Management, the Department of the Interior notes:

> When a restriction on an undivided interest in an allotment is removed, a fee patent is issued to the owner. The Bureau keeps a record showing the individual to whom the original patent was issued, but does not maintain records for subsequent transfers. The patented or unrestricted interest holder is supposed to record the patent at the local recorder of deeds; *however, this does not always occur*.

U.S. DEP'T OF THE INTERIOR, PROCEDURAL HANDBOOK: AGRICULTURAL AND RANGE MANAGEMENT HANDBOOK 16 (drft. 2006) (on file with the Department of the Interior) (emphasis added); *see also* U.S. DEP'T OF THE INTERIOR, INDIAN FOREST MANAGEMENT HANDBOOK: PERMIT SALES OF FOREST PRODUCTS 64 (2005) [hereinafter FOREST PRODUCTS HANDBOOK].

166. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162).

167. *E.g.*, EDWARDS ET AL., *supra* note 160, at 22–26, 35. In addition, some Indian property interests subject to tribal law may not be recorded at all. *E.g.*, Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L.

The result is multiple different recording offices for legally undivided rights to the same physical piece of property. This can lead to confusion about who owns what in emulsified properties. In disputes among co-owners of emulsified properties, the BIA often simply accepts as stipulated who owns the fee portions of the property, without any direct method to confirm those facts in Interior's internal trust-only records.[168] In order to get a full and complete picture of this emulsified ownership, the parties would have to request a title report from Interior's land records for the trust portion of the property, from the state or local recording office for the non-Indian fee property interests, and perhaps, also from any relevant tribal recording institutions.[169] These complex, independent record-keeping systems are baffling not only for private landowners of small fractional interests in Indian property but also sometimes for the governing authorities themselves.

Finally, an added challenge is the possibility of uncertainty—not only about who owns what interest but also in determining *which* tenure status a given interest is held in. Even determining whether an ownership right is held in fee or trust tenure can be a complex question subject to dispute and uncertainty. For example, because trust interests are automatically converted to fee status when transferred to non-Indians, confusion about the tenure status of any given undivided interest can emerge whenever there is some doubt about the identity of its owner—whether that is a new owner, an unidentified or missing heir, or an unprobated estate.[170] In cases of deceased owners and unprobated estates, finding accurate, current ownership information is further complicated by the fact that fee and trust interests are probated through separate probate courts applying different probate laws. All of these structural information costs uniquely increase the expense of any transaction or investment involving emulsified properties in Indian Country.

REV. 245, 257, 263 (2005) (detailing unrecorded customary use rights recognized by Navajo Nation).

168. *E.g.*, *Fenner*, 29 IBIA at 117; *see also* Johnson, 38 IBIA 64, 65 n.2 (2002) ("[The] BIA is not responsible for maintaining records relating to interests in an allotment that have passed out of trust status. Therefore, both the Regional Director and the Board must rely on Appellants' statements as to fee ownership of interests in the tract."); FOREST PRODUCTS HANDBOOK, *supra* note 165, at 64 ("It is the responsibility of the owner of the unrestricted interest to prove his title for the purposes of receiving revenues from the permit.").

169. For example, Interior has stated that title reports for trust lands are the responsibility of the BIA but title reports for fee lands and fee interests, whether owned by Indians or non-Indians, are the responsibility of "title companies, attorneys, or professional abstractors." INDIAN AFFAIRS MANUAL, *supra* note 158, pt. 51, ch. 4, at 3, 5.

170. *See supra* notes 77–78 and accompanying text.

B. Uncertain and Incongruent Property Rights

Simply identifying who owns what in emulsified properties is only the first challenge. Determining what this means—the respective property rights of fee and trust co-owners—is even more difficult. Absent any unified jurisdiction to govern and define all interests in these emulsified properties consistently, there is tremendous uncertainty about how these co-owners relate to each other and what their respective rights actually are to the shared resource. The potential conflict between fee and trust co-owners' use and possession rights in emulsified properties is perhaps the most difficult example, but there are several challenges. For example if an emulsified property is leased, allocating the rent proceeds confidently, given uncertainty about who is entitled to what portion of the rent and under which set of property rules, is challenging; however, it is also unclear how those obligations, once defined, can be efficiently enforced. In addition, no single jurisdiction has clear authority to execute an effective partition of emulsified properties to allow for a co-owner to exit, and there are no unified waste laws or other rules to mediate co-owners' responsibilities to each other. Uncertainty about the regulatory landscape also creates unique risks for landowners seeking to use emulsified properties.

1. Use, Possession, and Leasing

One of the core attributes of co-ownership in a straightforward tenancy in common is the unity of possession among all co-owners.[171] Each co-owner, regardless of her individual fractional interest size, has an undivided right to possess the whole property without any obligation to pay rent to any of her co-owners or to get their permission prior to taking direct possession.[172] A co-owner also has a right to lease her own undivided interests in the land, without binding the other co-owners, as long as the lessee does not interfere with the other non-contracting co-owners.[173] A leasing co-owner generally does, however, have to account to any non-contracting co-owners for lease income

171. *See* 7 POWELL, *supra* note 117, § 50.01(1).

172. *Id.* §§ 50.01(1), 50.03(1)(a); W.W. Allen, Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R.2d 388 § 9 (2014); *see also* Shoemaker, *supra* note 12, at 389–94 ("Design of Co-Ownership Rules").

173. Instead, a lessee of only some fractional, but undivided, interest in the property receives just the rights of the one leasing co-owner. Thus, the lessee takes the same right to possess the whole property that the lessor co-owner had but still cannot exclude the other non-contracting co-owners. *See generally* 2 AMERICAN LAW OF PROPERTY § 6.14 (A. James Casner ed., 1952); 7 POWELL, *supra* note 117, § 50.04(1); Allen, *supra* note 172, § 9.

from third-party leases that, in effect, bind all other co-owners' interests.[174]

Historically, Indian trust co-owners had the same common law right to use and possess their jointly owned trust lands by virtue of their undivided ownership in common with other co-owners.[175] More recently, however, the Department of the Interior has largely eliminated this direct use and possession right for trust co-owners presumably in order to administratively accommodate its trustee obligation to all Indian co-owners of trust interests.[176] Now Indian co-owners of trust land must get formal permission or a lease—at least from their other *trust* co-owners—before taking possession of their jointly owned trust land.[177] They also must pay an approved fair-market-value rent amount to those co-owners for that use and possession, regardless of whether the other trust co-owners have actually asserted any interest in making use of the land themselves.[178] In this way, Indian landowners are dramatically and uniquely limited in their ability to use or possess their land directly and informally without additional bureaucratic transaction costs.[179]

The degree to which these novel rules apply to (or affect) the use and possession by non-Indian co-owners of fee interests in emulsified properties is less clear. Under state tenancy in common rules, undivided fee owners would typically retain their original undivided right to possess the whole as long as they do not interfere with their other co-owners' parallel rights. However, if fee co-owners have a direct right to possession of the whole property while trust co-owners must get federal permission and execute a federal lease and pay rent before taking the same possession, there are immediate issues of equity and potentially difficult on-the-ground conflicts where fee and trust co-owners have very different rights to the same resource.

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174. *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 173, § 6.14.

175. *E.g.*, Quiver, 92 Interior Dec. 628, *4–5 (IBIA 1985) (acknowledging Indian co-owners' "unity of possession" and "right to the use and possession of the property" regardless of fractional interest size); *see also* Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966).

176. *See generally* Shoemaker, *supra* note 12 (analyzing this development, its history, and the consequences).

177. *See id.* at 394–95.

178. *See, e.g.*, 25 C.F.R. § 162.005 (2015) (requiring lease before *Indian* co-owners of trust land may possess their co-owned property); Goodwin, 60 IBIA 46, 59–60 (2015) (holding Indian co-owner of trust interest in allotment in trespass where she failed to receive permission from co-owners or the BIA and failed to pay rent for her possession of a portion of her jointly owned allotment); Lower Peoples Creek Coop., 23 IBIA 297, 304 n.10 (1993) (requiring Indian co-owner in possession to pay rent).

179. All of a trust co-owner's rights and responsibilities to the land, under current structures, are now largely defined through formal leases approved and regulated by the BIA. *See* Shoemaker, *supra* note 12, at 394–95, 426–40.

There has also been ongoing uncertainty about the impact of a BIA lease of an emulsified property on the undivided fee interest owners—both in terms of what rights, if any, the fee owners have to the income from a BIA-approved lease and whether that lease impacts a fee co-owner's rights to direct use and possession of their jointly owned land.[180] To better illustrate these issues, consider the following historic example. In *Fenner v. Acting Billings Area Director*, the Interior Board of Indian Appeals (IBIA) considered a leasing conflict involving an emulsified property.[181] Ms. Johnson was an Indian co-owner of a one-sixtieth interest in trust in an emulsified property.[182] She also claimed that she had executed a lease for the rights to an undivided one-half fee interest in the same property.[183] The problem arose when the BIA initiated its formal leasing procedures to lease the undivided trust interests in the same property and decided to grant the lease of the trust interests not to Ms. Johnson (the co-owner of a small fractional interest in trust and the lessee of the undivided fee interests), but instead to a different Indian bidder named Mr. Fenner.[184]

If valid, these two leases (one in trust, the other in fee) to two different lessees would create certain dilemmas. In *Fenner,* the IBIA acknowledged that the trust and fee interests were fundamentally subject to different jurisdictions and, therefore, different property rules.[185] According to the IBIA, for the trust co-owners, "[i]t is not state but Federal law (and in some instances tribal law) which governs the use of Indian land and the manner in which interests in Indian land may be acquired."[186] On the other hand, regarding the fee interests, the IBIA also seemed to accept the fundamental premise that the BIA had no

180. For example, in September 2000, the GAO reported that Interior's "field offices apply different rules to this situation" of mixed fee and trust ownership properties and noted particularly that the "BIA lacks a written policy on whether income generated through BIA efforts on mixed-ownership land should be distributed to all owners (trust and fee-simple) or only to trust owners." 2000 GAO REPORT, *supra* note 17, at 18 & n.8. Likewise, in 2006, when Interior issued a Procedural Handbook for BIA's Leasing and Permitting activities, in the "general authorities and policies" section, Interior reserved a blank space for a "Leasing [o]f Undivided Fee Interests Policy" but provided no substance or guidance whatsoever. PROCEDURAL HANDBOOK, *supra* note 77, § 2.10.

181. 29 IBIA 116, 116–17 (1996).

182. *Id*. at 116.

183. Notably, the BIA, which regulated the trust portion of the property, had no way to verify that fact because it kept no records of the fee interests. *Id.* at 117, 122 & nn.1 & 6; *see also supra* Part IV.A.

184. *Fenner*, 29 IBIA at 116.

185. *Id*. at 118.

186. *Id*. ("Montana law grants Johnson no rights with respect to the trust interests in Allotment 2654-A.").

control over the fee co-owners of the property and that, under Montana law, a co-owner in fee had a default, undivided right to use the entire property without any obligation to pay any co-tenants.[187]

This could mean that Ms. Johnson had a right to possess the whole by virtue of her fee lease (and possibly her direct co-ownership interest as well), and Mr. Fenner had a simultaneous right to possess the same whole by virtue of his intended trust lease.[188] Again, were this a typical tenancy in common governed by a single jurisdiction, default property rules would have resolved the impending conflicts in a uniform way. Any conflicts between competing lessees of the same unified possession rights would be resolved through accounting actions to allocate rent incomes as needed or the laws of ouster, partition, and waste would address actual use conflicts on the ground. No such principled resolution would be possible, however, of the real dispute between Ms. Johnson and Mr. Fenner because under the IBIA's interpretation of bifurcated property authorities, the trust interests were subject to federal authority (to the exclusion of any state role) and the fee interests were wholly outside federal jurisdiction and subject to a different set of state rules.[189]

The IBIA in *Fenner* did acknowledge, on some level, the complexity created by the property's emulsified status and mixed trust and fee ownership.[190] For example, the IBIA speculated that "if the fee and trust interests are leased to different individuals, some special arrangement would have to be made to enable both to exercise their rights as lessees," and "[s]uch an arrangement would require the cooperation of both lessees."[191] Ultimately, the IBIA directed the trust lease issue back to the BIA superintendent for possible negotiation of a new lease because of an error in the decision to grant the lease to Mr. Fenner in the first place,[192] but it did not propose any unifying principle to resolve the remaining conflict.[193] Regarding the future use of the allotment, the IBIA simply noted, "It is apparent that there is no entirely

187. *Id.*; *see also supra* note 172 and accompanying text.

188. For example, in *Bowen*, an undivided owner of a one-third fee interest in otherwise trust land objected to a BIA-approved lease of the other trust interests in the land, and the IBIA advised him that the lease only covered the trust interests in the land and "in no manner restricts or prohibits the appellant's use of his undivided one-third non-trust interest." 82 Interior Dec. 19, 21 (IBIA 1975).

189. *See Fenner*, 29 IBIA at 118.

190. *Id.* at 119 n.8.

191. *Id*.

192. *Id.* at 120 n.9.

193. For example, the IBIA did not explicitly subject the fee owners or their lessee to federal jurisdiction or any unified federal leasing process, and it did not propose any other unifying principle for governance and management of this emulsified property.

satisfactory way of leasing this allotment as long as it remains in bifurcated ownership."[194] Instead, the IBIA suggested either a purchase of the fee interest so that the fee interest could be taken back into trust or for the BIA to pursue some type of partition between the fee and trust interests—although the actual authority to execute such a partition is somewhat unclear.[195]

In other historic cases, Interior has recognized the inherent difficulties of this kind of emulsified property within bifurcated jurisdictional frameworks and even taken the position that when there is mixed Indian and non-Indian co-ownership, Interior cannot realistically lease the property at all.[196] Other Interior officials have also recognized that, where the BIA does not lease the fee portions of the land along with the trust interests, the agency is "unable to give a lessee the quiet possession of land over the objections of the nontrust co-owner" and "[i]f the trust and nontrust owners disagree as to the proper management of the land, we know of no orderly means of resolving the disagreements."[197]

194. *Id.*

195. *Id.*; *see infra* Part IV.B.2.

196. In the unique case of emulsified allotments in Kansas where there was a mix of non-Indian fee ownership and Indian restricted fee ownership within one tenancy in common, Interior representatives told the Senate Committee on Indian Affairs that Interior was unable to lease the property productively: "We can lease the interest of the Indian owners but since a number of the owners are non-Indians, we—well, we could lease the Indians share but that will not do us any good. And, the non-Indian thing is so fractionated that it is just impossible to lease it." *To Provide for the Partitioning of Certain Restricted Indian Land in the State of Kansas: Hearing on S. 478 Before the S. Comm. on Indian Affairs*, 97th Cong. 5–6 (1981) (statement of James F. Canan, Acting Deputy Assistant Secretary, Bureau of Indian Affairs). In the summary of one of the senators at this hearing, Interior's position was that Interior was doing nothing to make the land income producing "because we have Indian and non-Indian ownership and we have no jurisdiction over the non-Indian ownership. Therefore, the whole tract must remain nonproductive, nonincome producing." *Id.* at 7–8; *see also* H.R. REP. NO. 97-341 (1981); Smith, 47 IBIA 259, 262 (2008). Congress ultimately passed special legislation to authorize partition in federal court of these three particular emulsified allotments in Kansas, noting such special authority was required because there was no tribe with jurisdiction over the allotments and the Indian-owned interests were in restricted fee, and not trust, status. *See* Act of Oct. 15, 1982, Pub. L. No. 97-344, 96 Stat. 1645.

197. Clausen, 19 IBIA 56, 58 (1990) (quoting the April 2, 1974 opinion of the Pacific Northwest Regional Solicitor's Office); *see also* Quapaw Tribal Remediation Auth., 61 IBIA 55, 56 (2015) (noting similar challenges in ongoing conflict over potential lease to extract mine tailings—a particular kind of gravely waste called "chat"—from a 9.4 million ton pile of the resource that is "comingled" in both restricted and unrestricted ownership). In the recent *Quapaw* case, the IBIA similarly suggested that the restricted and unrestricted co-owners of this emulsified gravel pile may need to cooperate before any extraction. *Id.* at 61–62. Although not deciding the matter, the IBIA referenced a prior BIA letter saying that each individual grain of the gravel is in both restricted and unrestricted ownership status and thus "all interest holders should enter into agreements simultaneously in order for the pile to be divided equitably." *Id.*; *see also* Gilmore v. Weatherford, 694 F.3d 1160 (10th Cir. 2012) (remanding for further consideration of whether the unrestricted fee co-owner of this same gravel pile could extract any portion

More recently, and after *Fenner* was decided, Interior promulgated new regulations that seem designed to clarify some of the uncertainty around emulsified property leasing.[198] However, these new rules may have (perhaps inadvertently) made use and possession of emulsified properties by fee co-owners themselves even more complicated and confusing. Essentially, the new leasing regulations clarify that Interior leases do not include any undivided fee interests in emulsified properties; however, the new regulations also add new uncertainty about whether undivided fee co-owners in emulsified properties must now, like their trust co-owners, also get a lease from the trust interests in the land before taking possession even of their own shared property.[199]

These new regulations make clear that the BIA's current position is that it "will not take any action on a lease of fee interests or collect rent on behalf of fee interest owners," it will not condition the lease of the trust and restricted interests in land on the lessee "having obtained a lease from the owners of any fee interests," and "the fee interests in a tract" are not included when "calculating the applicable percentage of interests required for consent to a lease document" under the BIA's trust interest leasing regulations.[200] As Interior explained in the preamble to proposed leasing regulations published in 2000:

> We recognize that the fractionation of ownership of Indian lands has made the leasing of Indian lands for trust beneficiaries more complex. Additionally, the Secretary's trust obligation to lease Indian lands does not run to the owners of undivided non-trust interests. Not only does the BIA lack statutory authority to lease or collect rental payments on behalf of such interests, but we may not know who the current owners are because we do not maintain or update non-trust ownership records after the title passes from Indian ownership. Nevertheless, there may be a non-trust obligation to account to the owners of the non-trust interests for the income from leases on the undivided land received on behalf of Indian landowners. Were the BIA to undertake this accounting, the additional workload burden could not be met with existing resources, and our ability to lease fractionated Indian lands on

of the resource without prior consent of the trust beneficiaries and the Department of the Interior).

198. *See* 25 C.F.R. § 162.004(a) (2015).

199. *See, e.g.*, *id.*; *see also* 25 C.F.R. § 162.102(c) (2012); Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 65 Fed. Reg. 43,874, 43,881 (proposed July 14, 2000) (to be codified at 25 C.F.R. pt. 162).

200. 25 C.F.R. § 162.004(a) (2015).

> behalf of the Indian owners would be severely curtailed. This would be detrimental to the Secretary's ability to meet the trust responsibility to Indian landowners.[201]

Thus, Interior is taking a hands-off approach with respect to the leasing of undivided fee interests.[202] Secretary-approved leases of Indian lands only convey rights to the undivided trust interests in emulsified properties and do not directly account to, or seek permission from, the co-owners of any undivided fee interests.[203] Thus, the federal government has no jurisdiction or responsibility over determining what those fee owners' exact income rights are or how their rights are enforced.[204] Interior has implied that it is the responsibility of the lessee to find and pay any fee co-owners, and co-owners of fee interests are implicitly left to define and enforce that right in state, or perhaps tribal, courts.[205]

Still more complicated is what use and possession rights the fee co-owners themselves currently maintain. Under truly bifurcated jurisdiction, where Interior asserts it has no jurisdiction over emulsified fee interests, a result similar to that implied in *Fenner* with the fee and trust co-owners maintaining separate and very different possession rights is at least logically consistent,

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201. Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 65 Fed. Reg. at 43,881–82. This suggestion of a possible non-trust accounting obligation is interesting. As noted above, typically a leasing co-owner only needs to account to the other co-owners for third-party lease income that effectively binds all co-owners, and yet Interior's somewhat paradoxical position is that the lease is also somehow not binding on the fee interests. *See supra* notes 173–74 and accompanying text.

202. *E.g.*, Johnson, 38 IBIA 64, 67 (1995). In *Johnson*, Interior-approved leases of emulsified property were described as covering "only the trust interests in the tract . . . . BIA did not lease the fee interests in the tract because it has no authority to lease fee interests. This is true even when the fee interests are in an Indian allotment and even when the fee owners are Indian." *Id.*

203. *Id*.

204. For example, in adopting recent 2013 leasing rules, Interior elected not to include a formal requirement that every trust lease must state it excludes fee interests because, "[a]lthough this is the case," it is "unnecessary to include in the lease." Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,454 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162).

205. *Id.* (suggesting BIA's leasing practices "place[] responsibility on the lessee to pay fee owners"). Some earlier cases, even more troubling, suggested fee co-owners should somehow seek their portion of rent proceeds directly from their Indian co-owners of trust interests. *E.g.*, Quiver, 92 Interior Dec. 628, at *4–5 (IBIA 1985) (explaining that fee and trust co-owners are tenants in common, BIA-approved leases cover only the trust interests in the properties and fee co-owners' remedy is an accounting "sought directly from the other cotenants"); *see also* Chemah v. Fodder, 259 F. Supp. 910, 914 (W.D. Okla. 1966) (directing a non-Indian co-owner of a fee interest in otherwise Indian trust property to pursue "action for an accounting in the appropriate State court" for claims involving an Indian co-owner's use of the property without providing compensation to the other co-owners).

even if it is difficult to navigate in practice.[206] However, Interior's recent surface leasing regulations add more confusion. In its most recent regulations, the Department of the Interior spells out when a person "need[s] a lease to authorize possession of Indian land."[207] These rules purport to cover leasing of a broader definition of Indian land than before, including any surface property that contains any undivided ownership interest in trust.[208] This broader definition could include the entire surface, including all interests, of emulsified properties.

Although originally proposed only to govern when "Indians who own Indian land" must obtain a lease, the final rules also seem to broaden the scope of the leasing requirements to govern any possession of Indian lands by anyone at all.[209] However, the final rule is internally inconsistent and therefore difficult to interpret. In the first subsection of the rule, it provides that a federally approved lease *is* needed *if* the possessor is a non-owner or an "Indian landowner of a fractional interest in the land."[210] Because a non-Indian co-owner of a fee interest is not included on this list of individuals who need an Interior-approved lease, this suggests non-Indian co-owners can still possess the property pursuant to their own co-ownership rights of possession, which is consistent with traditional tenancy in common unity of possession concepts and

206. *See, e.g.*, *Quiver,* 92 Interior Dec. at *5 ("By statute BIA has the authority only to regulate Indian interests in trust and restricted allotments. It has no authority to promulgate rules regulating non-trust interests in allotments."); Bowen, 82 Interior Dec. 19, 21 (IBIA 1975) (explaining that "the [BIA] and its officials are without jurisdiction or authority to determine the rights of [an undivided fee interest owner]").

207. 25 C.F.R. § 162.005 (2015).

208. The original proposed rule would have explicitly applied only to the trust interests in emulsified properties, but the final rule expanded to include all interests. *Compare* Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 65 Fed. Reg. 43,874, 43,921 (proposed July 14, 2000) (to be codified at 25 C.F.R. pt. 162) (proposing definition of "Indian land" to include "[t]he surface (non-mineral) estate of a tract of land, *or* any interest therein, which is held by the United States in trust for a tribe or an individual Indian" (emphasis added)), *with* 25 C.F.R. § 162.003 (noting current final rule defines Indian land to mean "*any tract in which any interest* in the surface estate *is owned* by a tribe or individual Indian *in trust* or restricted status and includes both individually owned Indian land and tribal land" (emphasis added)).

209. Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 65 Fed. Reg. at 43,926 (proposing rules for when "Indians who own Indian land" must "obtain a lease before using this land"), *with* 25 C.F.R. § 162.005 (defining the current final rule regarding "When do I need a lease to authorize possession of Indian land?").

210. "You need a lease under this part to possess Indian land . . . if you are . . . (1) A person . . . who is not an owner of the Indian land [or] (2) An Indian landowner of a fractional interest in the land." 25 C.F.R. § 162.005(a). A non-owner, under subsection (1), needs a lease "from the owners of the land," while an Indian co-owner, under subsection (2), needs a lease "from the owners of other trust and restricted interests in the land." *Id.*

some earlier Interior statements.[211] However, in the second subsection of this same rule, Interior also states that "[y]ou *do not need* a lease to possess Indian land *if* . . . [y]ou are an Indian landowner who owns 100 percent of the trust or restricted interests in a tract."[212] By negative implication, a non-Indian co-owner of Indian land may then need a lease because the non-Indian co-owner is not included (with sole Indian owners of trust interests) in the list of those who do not need a lease—even though in the earlier subsection, Interior explicitly states that only *Indian* co-owners need a lease.

Thus, there are two possible results: First, non-Indian co-owners of non-trust interests in allotments may maintain separate and distinct possession rights by virtue of state (or tribal) law. The trust interests would be regulated through the Interior leasing program, but the non-trust interests would be defined and regulated separately through state or tribal law. The second interpretation is that while the non-Indian co-owners' interests are not directly leased by Interior, the non-Indian co-owners themselves are also required by Interior rules to get a lease of the undivided trust interests before taking possession of their own undivided fee interest in emulsified land. This would, in effect, create a novel trust interest veto right over any fee co-owner's own use and possession.

Certainly, the first bifurcated jurisdiction framework for truly separate and distinct possession rights creates numerous practical difficulties, as illustrated above. However, the second interpretation of the current rules—that the fee co-owners must subject themselves to a trust leasing program and win a lease by being the highest bidder for use of their own property by virtue of the "trust interest veto right"—is also problematic. This position may make some practical sense from the federal trustee's perspective. The federal government thereby ensures that it can account to its Indian trust beneficiaries for any use of the trustee's property, including by fee co-owners, without an obligation to police and pursue any kind of ouster, waste, accounting, or contribution claims against the fee co-owners in possession. However, requiring fee co-owners to get a lease from their trust co-owners before taking possession of their own undivided fee interests would raise serious questions about the impact on non-Indian fee owners' property rights, including the possibility of a Fifth Amendment claim against the federal government. Trust co-owners would, in effect, be able to veto a fee owner's use of her undivided interest by refusing to agree to lease to that fee co-owner, and the fee owners would have no say in the

211. *E.g.*, *Bowen*, 82 Interior Dec. at 21.
212. 25 C.F.R. § 162.005(b)(1) (emphasis added).

trust leasing process.[213]

There are also questions about whether the federal government, if it asserts no authority or jurisdiction over the fee co-owners' property rights, can validly impose such a significant restriction on the fee owners' rights to use and possession. In addition, significant incongruences and uncertainties about the rights of fee and trust co-owners remain. Assuming Interior leases the trust interests to someone other than the fee owner—who, under Interior's rules, would not have any priority rights to the lease over non-owners—what are the fee owner's remedies? How does the fee owner go about accounting for lease income where Interior does not collect or distribute it on the fee owner's behalf? And if the fee owner is absolutely excluded from possession of her own land, assuming a lease to someone else, is she without any remedy? What if a sole owner of the Indian trust interest takes possession without a lease, which she is undoubtedly entitled to under Interior's leasing rules (even if the total trust interest in the property is a very small fraction of the whole)? What are the rights of the fee co-owners against that Indian co-owner? And in what court are those rights exercised?

Whatever the final resolution of the issue of fee and trust co-owners' respective use and possession rights is, the one clear result is that emulsified properties are a hornet's nest of legal and real-world issues. Resolving these issues often depends on and "require[s] the cooperation" of co-owners.[214] These co-owners, however, have different rights and responsibilities—which elude clear definition—and there is no unified framework in which they might reliably negotiate or cooperate. Although some opportunistic informal arrangements may emerge, in most cases the result seems to be a general lack of investment and use of these emulsified properties, especially where

213. In a somewhat parallel case, Earl Clausen, a non-Indian, owned a one-twelfth fee interest in emulsified property and claimed he had been farming this property for more than thirty years, and for the past five of those years, he had the express permission of the other trust owners to farm the property. Clausen, 19 IBIA 56, 59 (1990). The relevant Indian tribe, however, also acquired an undivided interest in the land in tribal trust status at some time during Clausen's possession, and the tribe elected to lease its undivided interest to another farmer named Hopson. *Id.* at 57. The IBIA ultimately took the case on an expedited review because both Clausen and Hopson claimed a right to be on the property. *Id.* at 59. The IBIA affirmed BIA's discretion to award the trust lease to Hopson because, essentially, the BIA could not substitute its judgment for the tribe's choice of lessee for the tribe's own trust lease, and the IBIA ignored Clausen's joint right to possess the property by virtue of his fee co-ownership. *Id.* The IBIA acknowledged a potential Fifth Amendment issue if Clausen was actually denied access to his property, but the entire issue was ultimately mooted before complete resolution because the tribe apparently proceeded with efforts to condemn Clausen's fee interest in the property while the appeal was pending. *Id.* at 61.

214. *Fenner*, 29 IBIA 116, 119 n.8 (1996).

individual owners' fractional interests are already small.[215]

It is also worth clarifying that additional doctrines that typically exist to allocate responsibilities among co-owners of tenancy in common property—including waste law and contribution for necessary repairs and maintenance—may apply unequally to fee and trust co-owners in emulsified properties. For example, the law of waste prevents co-owners from changing the property in a way that unreasonably interferes with the expectations of the other co-owners.[216] The expectations of fee and trust co-owners in emulsified properties cannot be mediated through similar rules in emulsified properties absent any single jurisdiction with authority over all potential claims.

2. Partition and Exit

Given the difficulty of making use of these emulsified properties, co-owners may to seek to exit this co-ownership expeditiously.[217] Here, the rules are also incongruent and inconsistent. Of course, fee co-owners can freely and flexibly alienate their co-ownership interests while trust co-owners cannot. Fee interests are also often subject to property tax burdens, while trust interests are often not. And non-Indian fee interests can be adversely possessed, while trust interests are more generally protected by the federal restraint on alienation.[218]

Even more confounding is the bifurcated jurisdiction between fee and trust interests in emulsified properties that makes partition a largely unavailable (or at least unreliable) remedy, at least under the current framework. Typically, partition laws give co-owners absolute and unilateral exit rights from co-ownership of property.[219] However, the jurisdictional authority of any one sovereign to partition an emulsified property, whether in kind or by sale, is also an area of uncertainty and confusion. The BIA sometimes indicates that it

215. *Cf. supra* note 13 and accompanying text.

216. CORNELIUS MOYNIHAN & SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 283 (4th ed. 2005).

217. *See, e.g*, *infra* note 273 and accompanying text.

218. For example, consider the surprising case of the emulsified property in Kansas that was partitioned in federal court by authority of special legislation from Congress. *See* Smith, 47 IBIA 259, 261–62 (2008); *see also supra* note 196 and accompanying text. In that case, no co-owner had been in actual possession for some time, and in the final partition order, the federal court determined the fee co-owners' interests had all been adversely possessed by virtue of state adverse possession law while the trust co-owners' rights remained protected by the federal alienation restraints. *See Smith*, 47 IBIA at 263.

219. *See* 7 POWELL, *supra* note 117, § 50.07(1).

cannot perform a partition of both the trust and fee co-ownership interests,[220] while other Interior statements suggest that Interior may execute an in-kind partition of emulsified properties, at least theoretically.[221] State courts, however, clearly do not have authority to execute the same transaction,[222] and the federal government would at least have to waive its sovereign immunity before a federal or tribal court could partition the federal trust interests.[223]

Recent legislation has added a special federal procedure for a new kind of unique partition sale of qualifying "highly fractionated Indian lands," which includes a multi-step application and appraisal process followed by a sale where only a limited class of eligible Indian bidders may participate.[224] However, the whole mechanism is extraordinarily complicated and has unclear application to any fee interests in emulsified allotments.[225] The result is that serious doubt and complexity remain.

3. Regulatory Risks and Development Impacts

Finally, it is worth separately noting that the mixing of fee and trust co-ownership interests within emulsified properties creates unique regulatory risks

220. *E.g.*, Bowen, 82 Interior Dec. 19, 20 (IBIA 1975) (noting BIA position that "partition . . . services . . . could not be extended to appellant since he was non-Indian"); *see also* Gray, 33 IBIA 26 (1998) (explaining that, in the case of separate checkerboarded fee and trust parcels (i.e., not emulsified co-ownership interests), Interior only has authority to partition trust parcels and fee parcels must be separately partitioned under state laws and in state courts as "[t]his is a situation of dual jurisdiction in which the Department and the appropriate court must work together").

221. *E.g.*, Quiver, 92 Interior Dec. 628, at *5 (IBIA 1985); *see also supra* note 196 and accompanying text.

222. *See, e.g.*, *supra* notes 49, 62–64 and accompanying text.

223. *E.g.*, Price v. United States, 7 F.3d 968, 970 (10th Cir. 1993) (noting that although "there is no question that plaintiff's interest is governed by state law because it has been patented in fee," there is no state or federal court jurisdiction to partition the (emulsified, mixed tenure) property as long as some undivided interest remains in trust); Haeker v. United States, No. CV-14-20-BLG-SPW-CSO, 2014 WL 4073199, at *8–9 (D. Mont. Aug. 14, 2014) (findings and recommendations of U.S. Magistrate Judge) (finding no federal court jurisdiction over partition of emulsified property, at least absent waiver of sovereign immunity by the United States), *adopted by* No. CV-14-20-BLG-SPW, 2014 WL 4388278 (D. Mont. Sept. 4, 2014); Chemah v. Fodder, 259 F. Supp. 910, 912–13 (W.D. Okla. 1966) (suggesting that the Department of the Interior could execute a partition but finding that courts would have no such authority without federal consent to the lawsuit). *But see* Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 387–89 (Wash. 1996) (en banc) (finding state court jurisdiction over partition of surface estate of land co-owned by non-Indians and an Indian tribe entirely in fee within reservation boundaries even where a separate mineral estate remained in trust).

224. 22 U.S.C. § 2204(c) (2012).

225. *Id.*; *see also* 25 U.S.C. § 2201 (defining "parcel of highly fractionated land" to include a "parcel of land" but based only on the number and size of co-ownership interests held in trust).

for co-owners, especially co-owners seeking to develop or use the underlying land. Co-owners of emulsified properties face amplified information, translation, and negotiation costs and must account for significant uncertainty risks not only in who owns what and in which tenure form within a given property but also how those rights will be defined and how disputes will be resolved, if at all, between co-owners of different tenure types.[226] All of this uncertainty multiplies the already high costs of transactions in co-ownership forms and trust property in general.

As an example, consider the case of a seventy-five-acre allotment on the Quinault Reservation reflecting classic emulsified property issues.[227] In the 1980s, the allotment was owned "entirely or nearly entirely" by one Indian landowner, but that Indian landowner herself had a mix of fee and trust interests in the same property.[228] After her death and a series of other transfers, the property was made up of an undivided trust interest, some of which was subject to life estates; an undivided fee interest owned by the owner of a trust life estate; and an undivided fee interest owned by the Quinault Indian Nation.[229] The individual fee and trust co-owners, including the trust life estate holders, were all siblings from the same family.[230]

Ultimately, the siblings sought to harvest timber from the property.[231] As a general matter, Interior exercises significant regulatory control over any harvest of forest products from trust allotments.[232] Interior, however, generally has no authority over fee land.[233] To address the fee and trust conflicts, the siblings undertook to make a series of property transfers that they believed resulted in

226. *Cf.* Bell & Parchomovsky, *supra* note 93, at 515 (identifying translation costs in transactions where informal property rights have to be communicated within more traditional state sanctioned systems, similar to the translation that must occur between trust and fee co-owners in emulsified properties).

227. Koontz, 55 IBIA 177 (2012).

228. *Id.* at 178.

229. *Id*.

230. *Id.*

231. *Id.*

232. *See generally* National Indian Forest Management Act (NIFRMA) of 1990, 25 U.S.C. §§ 3101–20 (2012). For example, the BIA takes 10% of any forest product sales exceeding $5,000. *Id.* § 3105; 25 C.F.R. § 163.25 (2015).

233. There is some unique authority in the specific context of Indian timber sales for Interior to included undivided fee interests in the contract of sale, "including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses." 25 U.S.C. § 406(c). However, Interior is only authorized to include a fee co-owner in this way only if the fee co-owner so requests, and the statute does not speak specifically to the allocation of any rights or remedies as between fee and trust co-owners in the shared timber resources. *Id.*

the tract being held exclusively in fee and then proceeded to comply with all the paperwork that they "knew of or had been informed was necessary by the County" for the timber operation.[234] Interior, however, determined a complete fee patent was never actually issued and, therefore, the trust restrictions on trust harvest continued to apply—at least to some portion of the harvest on the emulsified property.[235] Thus, even though all of the siblings, who collectively controlled five-sixths of the parcel, consented to the harvest and there was no evidence of objection from their remaining tribal co-owner, Interior still fined the trust landowner for an unapproved timber harvest, with damages exceeding $54,000 for a harvest that resulted in only $29,214 worth of sales.[236]

This is just one of many possible examples of the perils that landowners of emulsified properties (or potentially emulsified properties) face when gambling about which jurisdiction governs which property interest in Indian Country. The extraction of resources or other profits from land, including timber, also highlights how impractical it is to bifurcate jurisdiction over fee and trust rights in the same undivided physical space. Similar issues occur in the more common scenario where the Department of the Interior concludes that permanent improvements (e.g., houses, barns, and other structures) constructed on Indian trust lands are not in trust status, but rather are personal property held in fee, even if the owners of the improvements and the land are the same.[237] Holding a permanent improvement in a different tenure status than the underlying land has important consequences so long as jurisdiction is bifurcated by ownership form. Different rules control depending on the tenure selected.[238] For example, where there is land in trust but a house in fee, a tenant may need two separate leases complying with the rules of two different jurisdictions, recorded in two different places, and the owner's interests in both

234. *Koontz*, 55 IBIA at 181 (quoting Marianne Koontz's statements).

235. *Id*. at 178–79.

236. *Id.* at 182. Interior rejected Koontz's argument that he had not realized the land was in partial trust and that he only "erred administratively." *Id.* at 183.

237. *See* Indian Trust Management Reform—Implementation of Statutory Changes, 76 Fed. Reg. 7500, 7501 (Feb. 10, 2011) (describing permanent improvements on trust land as personal property in fee). This classification has been historically fraught. *E.g.*, Olson, 31 IBIA 44, 51 (1997) (showing an example of the BIA admitting it "did not know if the house was trust real property, trust personal property, or non-trust [i.e., fee] property"); *see also* Thompson, 54 IBIA 125, 130 (2011) (remanding to determine whether a house is part of trust property); Smartlowit, 50 IBIA 98, 98–99 (2009) (demonstrating confusion about whether rent is owed and, if so, who should administer that rent on a house on trust property).

238. *See, e.g.*, *supra* Parts II, IV.B.

the land and house may be probated differently in different jurisdictions.[239] Whether property is emulsified in co-ownership of undivided surface interests, or vertically from the land to its permanent improvements, the fundamental challenge is the same: a lack of clear arrangements for fee and trust co-owners to comfortably cooperate to manage these assets.

V. BROADER CONSEQUENCES

The existence of emulsified properties impacts more than just the co-owners of these assets. Emulsified properties reveal other troubling things about the status of power and property in Indian Country. For example, most of our current dialogues about the need for trust tenure reform and consolidation of fractional interests in fractionated trust properties are incomplete to the extent that they do not also account for the problem of undivided fee interests in emulsified properties—but we have largely missed this important phenomenon to date. Emulsified properties also further complicate already dizzying jurisdictional challenges in Indian Country and further tax an already stressed Indian trust system.[240] Finally, to the extent this emulsification causes resources to be underutilized, emulsification uniquely impacts reservation communities.[241] This Part explores further why emulsified properties must be accounted for more broadly in conversations about Indian land tenure, tribal sovereignty, and equity.

A. False Dialogues

Many scholars have focused on the problem of the restrictive nature of the Indian trust status and on the coordination problems created by the extreme

239. The additional multi-dimensional complexities created by this status split between permanent improvements and the underlying land, as well as other examples of similar hyper-categorizations of property and sovereignty interests within reservation boundaries, will be addressed by this author further in forthcoming work. *See* Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. (forthcoming 2017).

240. For example, the federal government recently paid a $3.4 billion settlement to Indian trust account holders after Eloise Cobell filed a major class action alleging Interior had violated its federal trust responsibility to Native Americans by failing to account for billions in Indian trust assets, including income from individual trust lands. *See* Cobell v. Salazar, 679 F.3d 909, 913–16 (D.C. Cir. 2012); Cobell v. Salazar, 573 F.3d 808, 809 (D.C. Cir. 2009); Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–70; *see also supra* note 162 (discussing same).

241. *Cf. supra* Part III.B. (discussing how the emulsification of trust and fee co-ownership interests only occurs from remaining Indian trust land base).

degree of fractionation within many of these trust properties.[242] Proposed solutions to these land tenure challenges have focused on (1) consolidating fractional trust interests to reduce the total number of co-owners per tract[243] and (2) streamlining the federal trust bureaucracy.[244] These conversations, however, have failed to address the additional challenges of emulsified properties. Emulsified properties tell us that all of our current efforts to modify or adjust the trust property framework for Indian landowners are insufficient to the extent they don't also simultaneously address the undivided fee interests incorporated into them.

Current programs and reforms focus almost exclusively on consolidating existing fractional trust interests and preventing further fractionation of the remaining trust assets, without regard to the presence of any additional, also fractionated, undivided fee interests.[245] For example, the federal government focuses significant effort on programs to convert small individual trust interests into a more cohesive tribal trust ownership through tribal exchange programs.[246] These consolidation exchanges typically allow individual co-owners to pass all of their small, undivided trust interests in multiple properties to the tribe in exchange for an equivalent tract of tribal land that over the individual can own solely.[247] In addition, other major efforts have focused on buy-back programs, which typically give Interior or the tribe an expedient

242. *See, e.g.*, Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 730, 749 (2003).

243. *See, e.g.*, Jered T. Davidson, *This Land Is Your Land, This Land Is My Land? Why the* Cobell *Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 603 (2011) (proposing termination of dormant interests); Anthony J. Franken, *Dealing with the Whip End of Someone Else's Crazy: Individual-Based Approaches to Indian Land Fractionation*, 57 S.D. L. REV. 345 (2012) (discussing estate planning solutions); Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385 (2009) (exploring incorporation models for co-owners); Shoemaker, *supra* note 242, at 764–70, 782–87 (arguing for flexible, equitable distribution of co-ownership interests at probate to promote case-by-case consolidation).

244. Leeds, *supra* note 12, at 455–61; Leeds, *supra* note 41, at 496–97; Monette, *supra* note 12, at 62–64 (arguing for tribal control of Indian property systems); *see also* PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 12.

245. *See* Indian Land Consolidation Act Amendments of 2000, Pub L. 106-462, § 101, 114 Stat. 1991, 1991; *see also* Indian Reorganization Act, ch. 576, § 2, 48 Stat. 984, 984 (1934) (codified as amended at 25 U.S.C. § 462 (2012)).

246. 25 U.S.C. § 2204 (2012); *see also* H.R. REP. NO. 97-908, at 9–10, 14 (1982) (describing how the original ILCA was intended to extend tribal land consolidation and exchange authority to all tribes after initial experiments through the IRA and other tribe-specific pieces of legislation).

247. *See, e.g.*, *Hearing on S. 550*, *supra* note 141, at 75–78 (statement of Cris E. Stainbrook, Executive Director, Indian Land Tenure Foundation); *Statement on S. 1340*, *supra* note 65, at 33–34 (statement of Austin Nunez, Chair, Indian Land Working Group).

purchase option to buy undivided individual trust interests and consolidate them into tribal ownership.[248] Most importantly currently, $1.9 billion of the federal settlement funds from the *Cobell* trust accounting litigation are earmarked for a major federal buy-back program, currently being implemented, that also results in individual fractional trust interests returning to ownership by the governing tribe.[249]

These federal programs target fractionated trust interests only, leaving any undivided fee interests untouched.[250] At best, these efforts result in a new co-ownership between fee owners and a trust on behalf of the tribe itself. However, because very few, if any, consolidation efforts in heavily fractionated trust lands will be complete,[251] the more likely result is an even more complicated mix of co-ownership among individual trust, tribal trust, and fee co-owners. In this sense, these fractionated trust "solutions" are actually creating more complex emulsions by default. Adding a co-ownership relationship with the tribe introduces a host of new challenges to the emulsion mix.[252]

Although not as different as individual trust and fee co-owners, tribes and individuals do have some different property rights, and this makes use,

248. *E.g.*, 25 U.S.C. § 2212. There are also several recent authorities giving tribes special, more expedient purchase options in particular settings. *Id.* § 2206(o) (tribal purchase at probate); *id.* § 2216(b) (appraisal options for tribal purchase); *id.* § 2216(f) (tribal first refusal purchase option before trust-to-fee conversion).

249. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064; BUY-BACK PLAN, *supra* note 13, at 9; *see also supra* notes 162, 240 and accompanying text (discussing *Cobell* litigation).

250. *E.g.*, BUY-BACK PLAN, *supra* note 13, at 6, app. B-1 (describing plan to buy back "purchasable interests," including undivided trust interests but not undivided fee interests that are outside Interior's jurisdiction); *see also* U.S. DEP'T OF THE INTERIOR, 2015 STATUS REPORT ON LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 40, app. A-15 (2015) [hereinafter 2015 STATUS REPORT] (identifying undivided fee interests in fractionated reservation properties expressly as "*not* eligible" for buy back through the federal program). Some tribes, however, may be making smaller local efforts to buy back fee properties. *E.g.*, *Joint Hearing*, *supra* note 131, at 58 (statement of Roxane J. Poupart, Director of Tribal Land Management Department, Lac du Flambeau Band of Lake Superior Chippewa Indians) (mentioning one tribe's fee buy-back efforts).

251. *See* BUY-BACK PLAN, *supra* note 13, at 5. For example, even the significant buy-back amount from the *Cobell* settlement is unlikely to be sufficient to purchase all of the fractional trust interests across Indian Country. *See id*. at 9.

252. *E.g.*, *Statement on S. 1340*, *supra* note 65, at 33–34 (statement of Austin Nunez, Chair, Indian Land Working Group) (critiquing emphasis on consolidating lands in tribal ownership because of risk of disenfranchising individual landowners from land use decision-making); Land Acquisitions, 43 Fed. Reg. 32,311, 32,312 (proposed July 19, 1978) (to be codified at 25 C.F.R. pt. 120a) (asserting that individual and tribal trust co-ownership should be limited "because once an Indian tribe acquires an undivided interest in a parcel of trust land, the rights of the individual fractional interest owners to use and dispose of the property are substantially impaired or eliminated").

coordination, and investment in these properties more complicated. For example, the tribe as a co-owner may have the authority to lease the tribal interests independently of the individual trust interests and without BIA involvement.[253] In addition, the tribe also has certain special rights—including, for example, the right to veto some otherwise permissible land transactions and the right in certain cases to purchase the other co-owners' interests, sometimes without those co-owners' consent but outside any formal eminent domain process.[254] Moreover, to the extent there are conflicts among individual and tribal co-owners, tribes are protected by a strong anti-alienation rule[255] and by sovereign immunity,[256] making enforcing cooperation among co-owners even more difficult. Most critically, however, the undivided fee interests remain untouched by these consolidation, exchange, and buy-back programs, leaving a tremendous cost and vulnerability throughout emulsified land tenure systems.

B. Sovereignty Risks

It is hard to measure exactly how emulsified properties, within current frameworks, impact tribal sovereignty in tribal territories. However, given that emulsified properties occur automatically, only to erode the remaining Indian trust land base, and not elsewhere within the reservation, the issue must be addressed.[257]

Jurisdictional issues in Indian Country, as noted above, are extraordinarily complex. These challenges relate not only to which sovereign defines a landowner's core property rights, entitlements, and obligations with regard to a given resource but also how other conduct in that physical space, and in the reservation more generally, is regulated and adjudicated. There are at least two battling tensions in assessing these jurisdictional dynamics in Indian Country: the inherent tribal authority over the entire reservation territory versus non-Indian individuals' rights to be governed by a sovereign of which they are an enfranchised constituent.[258] Consent-based jurisdictional concerns stem from

253. *See, e.g.*, *supra* note 52 and accompanying text; *see also* Clausen, 19 IBIA 56, 60 (1990) ("BIA does not have authority to negotiate a lease of tribal land.").

254. *See, e.g.*, 25 U.S.C. § 2204(a)(2) (2012); *supra* note 248 and accompanying text.

255. *See, e.g.*, 25 U.S.C. § 157; Neb. Public Power Dist. v. Acres of Land, 719 F.2d 956, 961 (8th Cir. 1983) (analyzing statute permitting state condemnation of undivided individual trust property interests but not any interests of a co-owner tribe).

256. *See* Shoemaker, *supra* note 242, at 756–57.

257. *See supra* Part III.B.

258. Fletcher, *supra* note 14, at 800–02. A third relevant jurisdictional factor is the federal plenary

the fact that tribal governments, operating out of their own inherent and pre-existing authority, are not parties to the Constitution but rather are subject to tribal laws.[259] Although states historically were completely excluded from exerting authority within tribes' reserved territorial boundaries, the presence of new non-Indian state citizens as fee property owners, where those same state citizens were not correspondingly naturalized in any way into tribal governments (because of federal rules to the contrary), led to expanding and encroaching roles for state laws as related to these non-Indians and their properties.[260]

Whether legitimate or not, modern rules for tribal civil jurisdiction have emerged from these frameworks and in light of these concerns. For example, Indian nations now retain broad (and often exclusive) criminal, regulatory, and adjudicatory jurisdiction over their own citizens, especially within their reserved territories.[261] Indian nations, however, have more uncertain jurisdiction over non-Indians conduct within tribal territories, and state authorities sometimes encroach over these domains.[262] In the context of civil regulatory and adjudicatory jurisdiction, the relevant test for tribal jurisdiction over non-members requires analysis of many factors, including the identity of the regulated parties, the status of the land subject to regulation, and where the conduct occurred.[263] In the leading case *Montana v. United States*, the Court

power, by which Congress asserts extraordinarily broad and exclusive authority to regulate Indian affairs. *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 553 (1903) (outlining extremely broad congressional plenary power over Indian affairs); *see also* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 418 (1988).

259. *E.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (describing how Indian nations are "outside the basic structure of the Constitution" and "nonmembers have no part in tribal government" so "those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions"); Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (noting perceived difficulty of outsiders being able "to sort out" the law applicable to tribal court, which may include unwritten "values, mores, and norms of a tribe"). Tribal governments are subject to the federal Indian Civil Rights Act, which incorporates many of the same protections of the Bill of Rights but is not enforceable in federal court except through habeas corpus. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 (1978).

260. Fletcher, *supra* note 14, at 823 (referring to this problem as a "democratic deficit").

261. *See, e.g.*, Fisher v. Dist. Court of the Sixteenth Judicial Dist., 424 U.S. 382, 389 (1976) (concluding there is exclusive tribal court jurisdiction over Indian adoption proceeding arising on Indian reservation); Williams v. Lee, 358 U.S. 217, 220 (1959) (holding Indian nations have the right "to make their own laws and be ruled by them").

262. *See Hicks*, 533 U.S. at 381–83 (Souter, J., concurring); *see also infra* note 266 and accompanying text.

263. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

held that a tribe does not retain civil regulatory authority over non-Indians on non-Indian fee lands unless one of two exceptions are met: (1) there exists a consensual relationship between the non-Indian and the tribe or its members or (2) the non-Indian "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[264] These exceptions have been interpreted narrowly.[265]

Subsequent cases have cast some confusion on precisely how relevant the tenure status of property is in determining the scope of a tribe's civil regulatory or adjudicatory jurisdiction over that space or conduct in that space.[266] In 2001, in *Nevada v. Hicks*, a majority of justices seemed to agree that the *Montana* presumption against tribal civil jurisdiction over non-members would also apply to tribal actions on tribal or trust lands.[267] The significance of *Hicks*, however, is hard to measure because it raised unique issues involving tribal court jurisdiction over state police officers.[268]

When Indian property becomes an emulsified mix of joint ownership between Indian trust and non-Indian fee interests, the calculations regarding the relevance of land status are even more difficult. Emulsified properties, like the elastic definitions of who is an Indian, make already complex jurisdictional determinations even more difficult. For example, in one case in Oklahoma, a criminal defendant argued that an emulsified property was really Indian Country for criminal jurisdictional purposes because, even though the surface was entirely in fee status, one-twelfth of the mineral estate remained in trust or restricted status.[269] The state appellate court concluded this mixed, but predominantly fee, property was not subject to tribal jurisdiction based on the case's unique facts.[270] But the example suggests how difficult these kinds of property-based jurisdictional determinations can become. What if the entire

264. *Id*. at 564–65.

265. *See* Krakoff, *supra* note 14, at 1210.

266. In *Montana*, the Court expressly based its finding of no tribal regulatory jurisdiction on the fact that the conduct at issue occurred on non-Indian fee lands, explaining that the tribe lost its right to exclude access to those lands when they were converted to non-Indian fee. 450 U.S. at 558–59. In contrast, the *Montana* Court said it could "readily agree" that the tribe could still prohibit non-Indian hunting and fishing "on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id.* at 557.

267. *Hicks*, 533 U.S. at 355; *see also* Krakoff, *supra* note 14, at 1218.

268. *See Hicks*, 533 U.S. at 358–59, 386 (Ginsburg, J., concurring). The relevance of land status may also be addressed in a case currently pending before the Supreme Court as of this writing. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833, 2833 (2015).

269. Murphy v. State, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005).

270. *Id.*

mineral estate were in trust but the surface in fee? Or what if the one-twelfth trust interest had been on the surface estate rather than below ground?

Similarly, on the related (but not identical) issue of where and when the state might have jurisdiction in Indian Country, the Supreme Court has often used an interest-balancing or preemption test to decide whether the state has a sufficient interest in the given conduct or space to warrant an exercise of state authority within reservation territories.[271] In this regard, it is worth noting that to the extent there are trust properties with undivided fee interests in Indian Country, there is precedent supporting the state government's authority to foreclose on just that fee interest if the fee owner is not paying state property tax.[272] These foreclosures result in the already emulsified properties becoming differently emulsified, with the remaining (tax-exempt) trust property owners now in co-ownership with new fee purchasers or, absent a purchaser after foreclosure, the state government itself, which raises additional trust versus state property emulsion concerns.[273] State or local property ownership within reservation boundaries may also tilt the jurisdictional balance toward a greater state interest in the land and, therefore, greater state jurisdiction within these properties and over these physical spaces. This, in turn, negatively impacts tribal government efforts to increase tribal authority over tribal territories and to build sustainable tribal government institutions without the challenges of more piecemeal jurisdiction.

C. Important Inequities

Finally, emulsified properties reveal another important lesson about the continuing inequities of the reservation land tenure system for Indian people. Undoubtedly, both Indian and non-Indian co-owners face unfortunate

271. *E.g.*, New Mexico v. Mescalaro Apache Tribe, 462 U.S. 324, 333–34 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–44 (1980).

272. *E.g.*, Clallam Cty. v. Folk, 922 P.2d 73, 76 (Wash. 1996) (describing how one county became a co-owner, in fee, of emulsified trust property after the county foreclosed on that undivided fee interest and no one bid at an auction).

273. In one interesting example, a non-Indian who "invest[s] in delinquent ad valorem tax debt in various counties of Montana" found himself the owner of an undivided fee interest in otherwise trust property within the Crow reservation after one such tax delinquency foreclosure. *See* Complaint at 1–2, Haeker v. United States, No. CV 14-20-BLG-SPW, 2014 WL 4388278 (D. Mont. Sept. 4, 2014). Finding himself in this emulsified property situation, Haeker asserted that "[t]his complex ownership structure is not profitable for me." *Id.* at 2. Haeker brought a partition action in federal court, but his action was dismissed for lack of jurisdiction over the partition, at least absent a sovereign immunity waiver from the U.S. as trustee. *See supra* note 223 and accompanying text.

consequences from emulsified ownership. It is hard to qualify one set of fee or trust rights and responsibilities as better or worse when the entire institution is unworkable. For example, the non-Indian co-owners in fee may have more autonomy and flexibility under default state law tenancy in common rules, to the extent the rules still apply, but they do not benefit from the administrative record-keeping service of the federal trust bureaucracy and bear a state tax burden. On the other hand, the trust co-owners are certainly heavily restricted and limited by the trust oversight process, but there is no direct cost to them for continued co-ownership of the property and no requirement of any action on their part to maintain title. In any analysis of emulsified properties, both fee and trust co-owners suffer the central expense and risk of uncertainty.[274]

Beyond just comparing immediate property entitlements, however, these properties have other disparate negative impacts for Indian landowners and Indian communities. Only Indian landowners can effectuate this emulsification by making a transfer of trust interests to a non-Indian in fee, and that Indian transferor may or may not appreciate all of the consequences of that fee conversion. Emulsified properties exist only within Indian reservations, which are important and often sacred places for indigenous cultures and nations. Within reservations, emulsified properties can only emerge automatically from remaining Indian trust lands. Emulsified properties are more difficult for Indian landowners to use than even remaining stand-alone trust lands,[275] and in an environment where more than half of jointly owned reservation allotments are already standing idle or otherwise generating no income,[276] this consequence is compelling in light of pressing Indian poverty and housing, jobs, and healthcare shortages.[277] Indeed, simply the risk of creating new emulsified properties—or any more land passing out of trust—increases the expense of any kind of economic development on any trust property because investors have to account for scenarios in which jurisdiction may shift from trust-based to fee property regimes. In these and other ways, the emulsification

274. For example, a fee co-owner taking direct possession of her undivided fee interest pursuant to state-recognized rights to the land might still worry about being pursued for trespass on the same, undivided possession rights to the land held in trust. 25 C.F.R. § 162.003 (2015) (defining trespass on trust lands as "any unauthorized occupancy, use of, or action on any Indian land or Government land"). Such a trespass action might contradict Interior's general hands-off approach with respect to the undivided fee interests in trust property; however, the possibility and general uncertainty about rights allocations may still have a chilling effect on fee owners' use. *See also supra* notes 197, 208 and accompanying text.

275. *E.g.*, *supra* note 109 and accompanying text; *see also supra* Part IV.

276. *See supra* note 13 and accompanying text.

277. *See also* Shoemaker, *supra* note 12, at 394–97.

process uniquely imposes its negative effects on Indian property, Indian sovereignty, and Indian prosperity in the particular place that matters most to Indian people.

In addition, we must acknowledge the significance of the fact that this emulsification phenomenon has gone so long unrecognized—or at least unacknowledged and unanalyzed—in the literature. Indian property, especially its more intricate nuances, often gets tossed aside as too complicated, too specialized, or simply too problematic to understand.[278] This is itself an injustice to Indian landowners who suffer from this system foisted on them.[279] A deep understanding of these emulsified properties can inform our debates going forward about the status of land and power in reservation communities. This understanding, in turn, may lead to positive results. Emulsified properties ultimately present an important new opportunity for tribes to redeploy tribal property regimes across all interests in emulsified properties and thereby continue to reestablish important sovereign authorities in a more sustainable way in Indian territories.

VI. STABILIZING AMERICAN INDIAN LAND TENURE AND GOVERNANCE

It is tempting to respond to these emulsified property problems with more solutions in the model of further modest tinkering with land reforms around the edges—buying back and consolidating undivided fee interests, creating incentives for fee owners to sell their interests to Indian owners, preserving more Indian land in trust, or otherwise consolidating land ownership into one tenure form or the other. This Part will begin with a brief discussion of such proposals, including the one new legal vehicle recently adopted to address at least some of these existing emulsified properties. However, these types of reforms are dramatically limited by the extensive transaction costs for any consolidation effort on an interest-by-interest basis and are therefore unlikely ever to be completely successful.[280] Likewise, owner-to-owner or sovereign-to-

278. As Professor Joseph Singer has argued, there remains "a fundamental disjunction between legal treatment of Indian and non-Indian property" to the detriment of American Indian peoples. Singer, *supra* note 14, at 3.

279. Imprecision about Indian land tenure issues exists both in government and in the academy. For example, in the leading case on the relevancy of land status to determining the scope of tribal civil jurisdiction in particular physical space, the Supreme Court miscategorized the land at issue. *See* Krakoff, *supra* note 14, at 1189 n.9, 1217 n.175. *Compare* Nevada v. Hicks, 533 U.S. 353, 357, 359 (2001) (describing land at issue as "tribe-owned"), *with* State v. Hicks, 196 F.3d 1020, 1022 (9th Cir. 1999) (describing land as individually owned trust allotment).

280. For example, consider the difficulty and uncertainty surrounding even the authority of any single

sovereign negotiated solutions are an option, but based on past experience, the realities of low incentives (for small fractional interest owners), and entrenched jurisdictional disputes (for sovereign governments), this too is unlikely to provide a complete solution.

Instead, and more importantly, this Part lays the foundation for a larger future argument that emulsified properties really suggest a tipping point that compels us to engage in a more seismic review and redesign of the foundational property and sovereignty institutions in Indian Country. Emulsified properties fail co-owners themselves, waste resources, and impact all of us as taxpayers and as citizens concerned for justice. This Part ends with some exploration of this theme and the potential ramifications of a more unified jurisdictional and institutional solution to these property issues. Ultimately, emulsified properties present a unique and valuable opportunity for a renaissance of more robust tribal property regimes to unify all interests in emulsified properties under a single jurisdictional system. Although a complete framework and proposal for the re-implementation of tribal property regimes in this way is necessarily saved for future work, this Part establishes the critical predicate. While others have argued for a tribal property law renaissance as a desirable result for tribal self-determination generally, emulsified properties make this an essential next step.

A. Acquisition Tools

To date, the only significant federal reforms aimed at emulsified properties are: (1) the new Interior regulations clarifying that the BIA will not participate in the leasing of any undivided fee interests in emulsified properties (which really just further illuminates and perhaps exacerbates some of the problems with these emulsified properties)[281] and (2) congressional action to provide an expedited vehicle for undivided fee interests that are owned by Indian owners to be taken into trust status.[282] Since 2000, federal law has required that whenever an individual Indian or tribe comes into ownership of an undivided fee interest in a parcel that is otherwise at least partially in trust, the Secretary of the Interior *must* put that interest into trust upon request by the tribe or the individual Indian owner.[283] This is a mandatory trust acquisition, also

court or agency to partition these properties. *See supra* Part IV.B.2.

281. *See* 25 C.F.R. § 162.004(a) (2015).

282. *See, e.g.*, 25 U.S.C. § 2216(c) (2012).

283. *Id.* ("[T]he Secretary shall *forthwith* take such interest into trust." (emphasis added)); *see also*

sometimes referred to colloquially as the "forthwith" process.[284]

The intent of this provision was to facilitate the consolidation of a tract of land "comprised of undivided trust and fee interests into sole management as a trust tract."[285] However, to work, the undivided fee interest must first be owned by the tribe or an individual Indian and, to eliminate all emulsified properties, must be applied to each and every undivided fee interest in trust properties.[286] Nonetheless, as a first step, tribal governments may be able to better exploit this mandatory fee-to-trust provision by making intentional efforts to reacquire undivided fee interests in trust properties. This, however, has significant costs—both information costs because it is unclear who, if anyone, is keeping records of who owns these undivided fee interests and also actual costs in the form of purchase prices for these interests.[287] Once reacquired in tribal ownership, an application for trust acquisition can be pursued.[288] But again this would result in a tribal and individual trust co-ownership arrangement, which has its own complexities.[289]

FEE-TO-TRUST HANDBOOK, *supra* note 60, at 27–32 (providing agency interpretation and instructions for this mandatory trust acquisition process). This is different than the more typical discretionary fee-to-trust conversions discussed elsewhere. *Cf. supra* Part III.B.

284. *See* FEE-TO-TRUST HANDBOOK, *supra* note 60, at 27–28.

285. *See American Indian Probate Reform Act: Empowering Indian Land Owners: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 29 (2011) (statement of Majel Russell, General Counsel, Coalition of Large Tribes); *see also* S. REP. NO. 106-361, at 22 (2000) (describing congressional intent to "facilitate greater consolidation and assist in the administration of interests in trust and restricted lands" because "having on-reservation parcels that are only partially held in trust interferes with a tribe's ability to consolidate such interests and each Indian owner's ability to exchange interests in order to consolidate their holdings").

286. *See, e.g.*, FEE-TO-TRUST HANDBOOK, *supra* note 60, at 28–29 (describing the requirement that Indian ownership of the undivided fee interest be documented and confirmed before Interior proceeds with the trust acquisition).

287. PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 12, at 155. If true tribal property authority were recognized over all interests in these emulsified properties, tribal property law could also be expanded to help facilitate these transfers to tribal ownership (and then into tribal trust via this forthwith authority), especially where there are absentee or even forgotten fee co-owners who are not actively maintaining these small fee ownership interests. For example, a tribal registration requirement or even a tribal property tax on these undivided fee interests could result in tribal foreclosure of unregistered interests or interests with unpaid tribal property taxes. After foreclosure, tribes could use the forthwith authority to return these interests to tribal trust expeditiously. This author intends to explore these and other ideas in future work, but all such proposals require as a prerequisite greater recognition of tribal property jurisdiction over these interests, as argued for, at least preliminarily, in Part VI.C.

288. *See, e.g.*, FEE-TO-TRUST HANDBOOK, *supra* note 60, at 28–29 (describing the requirement that Indian ownership of the undivided fee interest be documented and confirmed before Interior proceeds with the trust acquisition).

289. *See supra* notes 252–56 and accompanying text.

However, even if it were possible and realistic to (1) re-purchase all undivided fee interests into Indian hands and (2) completely transfer all of those undivided fee interests back into trust status, this would only be a patch to a larger problem. It perpetuates the reliance on the broken federal trust system and impossible property-based systems of jurisdiction in Indian Country, and given ever-increasing diversity in Indian families, continued emulsification over time can be expected as long as jurisdiction is dependent on tenure status and tenure status is dependent on Indian identity.

B. Negotiated Solutions

Another possible solution might be reached through negotiations between individual co-owners or the relevant tribal, state, and federal governments. However, these negotiated remedies also face practical difficulties.

For individual landowners to negotiate co-ownership responsibilities and arrangements amongst themselves, absent any uniform authority, is extraordinarily complex and unlikely. Many of these individual fractional ownership interests are small, making any return on the investment for the risk or cost of negotiation minimal, and many individual trust co-owners own interests in not one but several different fractionated trust properties, sometimes on many different reservations. There are limited analogous cases where dueling jurisdictions simultaneously define different undivided entitlements to a shared resource. Where they exist, however, the resource in question is of such a different value and size that negotiating resource-by-resource allocation arrangements between sophisticated stakeholders may be possible.[290] However, this is not the case with relatively small Indian properties, which are fractured across owners near and far and where each individual owner may have only a small, even miniscule, interest in the whole tract.

In comparison to the relatively small economic value from an individual landowner's perspective, the transaction costs for achieving any kind of negotiated relationship are extraordinarily high. For example, as described above, it may often be difficult even to locate who the co-owners are, ascertain

290. *E.g.*, Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 53 (2002) (describing sample multilateral agreements for marine fisheries); Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813, 814 (1997) (discussing cross-jurisdictional resource management issues); Kelly M. Zullo, *The Need to Clarify the Status of Property Rights in International Space Law*, 90 GEO. L.J. 2413, 2413–16, 2420–21 (2002) (describing property rights to international space station).

their tenure status, and determine what that tenure designation means.[291] The fact that so many interests in trust allotments are not generating any income at all coincides with what is seen anecdotally across Indian Country: many of these lands are not used to their full potential and the incentive to make any further investment is too small in light of these high costs.

Another hope may be for a negotiated solution not between co-owners of the land themselves on a property-by-property basis but rather for the allocation of authority among state, tribal, and federal governments on a reservation-by-reservation basis in some kind of inter-governmental compact. There are some exceptional examples of cooperation between tribal and state jurisdictions to plan cooperatively across jurisdictional divides.[292] However, this is still often the exception and not the rule. In practice, these kinds of negotiated solutions can be hard to achieve, especially regarding land use.[293] On the ground, the checkerboard property patterns in Indian Country have created particularly difficult jurisdictional issues in land use planning, and all sides of jurisdictional disputes are unlikely to budge for fear of conceding any authority.[294] It is difficult to imagine negotiating real, effective, and lasting solutions to these emulsified property challenges within these existing relationships on a reservation-by-reservation basis.

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291. *Cf. supra* Part IV.A (discussing landowner challenges merely in assessing the current state of title to emulsified properties).

292. *E.g.*, Nicholas C. Zaferatos, *Tribal Nations, Local Governments, and Regional Pluralism in Washington State: The Swinomish Approach in the Skagit Valley*, 70 J. AM. PLAN. ASS'N 81 (2004) (analyzing successful experience of Swinomish Nation and Skagit County cooperating to develop a series of intergovernmental agreements and joint land use plans); *see also* Alexis Applegate, Note, *Tribal Authority to Zone Nonmember Fee Land Using the First* Montana *Exception: A Game of Checkers Tribes Can Win*, 40 B.C. ENVTL. AFF. L. REV. 159, 191 (2013) (discussing sample intergovernmental agreements).

293. For an interesting narrative of the challenges and opportunities for tribal, local, and state governments entering into such agreements in the context of land use planning, see Rebecca M. Webster, *This Land Can Sustain Us: Land Use Planning on the Oneida Reservation*, 17 PLAN. THEORY & PRAC. 9 (2016). *See also* R.T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country*, 87 WASH. L. REV. 915, 955 (2012).

294. Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57, 61 (2006) (engaging in debate with Professor Fletcher about the wisdom of tribes engaging in intergovernmental negotiation with state governments at all); *see also* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal–State Relations*, 43 TULSA L. REV. 73, 81–82 (2007). For a recent window into some of these ongoing tensions between local, state, and tribal interests, see the recent amicus brief filed in the Supreme Court by the Village of Hobart in Wisconsin, a predominantly non-Indian enclave surrounded by the Oneida Nation, in a dispute involving tribal reservation boundaries in northeast Nebraska. Brief for Vill. of Hobart, et al. as Amicus Curiae Supporting Petitioners, Nebraska v. Parker, 136 S. Ct. 27 (2016) (No. 14-1406), 2015 WL 7450416.

C. Facing Instability Head-on

Emulsified properties call for a more radical solution. Although many have critiqued the checkerboard pattern of jurisdiction in Indian Country as problematic and difficult to administer, these emulsified properties reveal that the system is exponentially worse than previously conceived. Emulsified properties expose that jurisdiction within reservation territories is not only a checkerboard but, in fact, is virtually indecipherable on any kind of map and instead exists as a marbleized swirl of horizontal and vertical property and sovereignty emulsions. The clearest solution to the emulsified property problem is not to try to consolidate all of the ownership interests to a single tenure status, but rather to consolidate jurisdiction over all interests in the property, regardless of tenure, to a single sovereign. The tribal government with jurisdiction over the tribal territory is the best, and really only, sovereign poised to assert this authority.

Unified jurisdiction over emulsified properties within tribal territories, regardless of the tenure status of any given fractional interest or the identity of any individual co-owner, addresses both the institutional failures of current emulsified property frameworks and the broader consequences for Indian Country. For the landowners themselves, a unified regime of evenly distributed default property rules through which all co-owners of emulsified properties operate provides a level playing field for negotiation and land use. Co-owners can invest in productive use of the property after factoring in a single set of clear, certain rules. A single forum would be available to resolve disputes locally, and conflicts about use, maintenance, repair, or the future of the property could all be addressed with the backstop of a single set of over-arching legal doctrines (such as ouster, waste, partition, or local law equivalents).

Of course, even with a unified jurisdiction, these jointly owned properties will still have problems inherent in co-ownership, including the transaction costs of collecting, coordinating, and assembling co-owners.[295] In addition, discussion of this jurisdictional solution should not underestimate the supreme challenge of designing and implementing a new, unified property system that effectively ensures fairness to existing co-owners while also achieving optimal resource use and governance going forward. However, at least within a unified jurisdictional framework, there is a forum to begin to have these important conversations and start this critical work.

Among the three sovereigns in Indian Country, tribal governments are best

295. *Cf. supra* note 69.

suited to exercise this unified authority. The federal government has already categorically disclaimed most jurisdiction over fee interests within reservation territories, and as a general matter, the federal government's unequivocal goal seems to be to reduce its land management responsibilities (and attendant administrative costs) in Indian Country.[296] Moreover, the federal government has little expertise in developing localized property regimes, and its efforts to tinker with property rights in a top-down way in the Indian context over time have been uniformly terrible failures.[297] In addition, the official federal policy toward Indian nations for the last thirty-five years has been to promote Indian self-determination,[298] and the federal trust responsibility requires support of tribal governments as functioning government entities within the federalist system.[299]

State governments are also not well suited to this task. Structurally, states are largely excluded from any jurisdiction over Indian trust interests in land—by federal law, by the preemptive effect of the federal trust title, by the sovereign immunity of the federal trust title holder, and by the inherent sovereignty of Indian nations over their remaining land bases.[300] State governments also have no incentive to craft specialized property regimes within reservation communities to address the unique needs of mixed trust and fee properties—especially where those properties are highly fractionated—and would have no reason or capacity to be especially sensitive to the important social, cultural, spiritual, and historical needs of Indian communities in reservation spaces.[301] Instead, states have historically been considered tribes'

296. *See supra* notes 70, 89, 245–49 and accompanying text.

297. *See supra* Part II.

298. Current federal policy seeks "to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), http://www.presidency.ucsb.edu/ws/?pid=2573.

299. *See, e.g.*, Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, 2005 ROCKY MTN. MIN. L. FOUND. 7–9.

300. *See, e.g.*, *supra* Part II.A.1–.2.

301. To the contrary, when general state substantive laws have been applied by the federal government to Indian properties in areas such as intestacy, the results have often had negative impacts for Indian people. For example, general state intestacy laws, historically applied to Indian trust lands in lieu of any federal or tribal probate code, created extreme degrees of fractionation over generations in the unique trust tenure status and also caused significant transfers of undivided trust interests passing by default to non-Indians in fee (thereby creating more emulsified properties). *See, e.g.*, *supra* notes 62, 117 and accompanying text. State law, of course, is not crafted with any of these specialized issues in mind.

"deadliest enemy."[302] While many tribal–state relationships are not nearly as adversarial today, it is not an exaggeration to say that recognizing state property law authority over all interests in emulsified properties, including Indian trust interests, within tribal territories would be a reversal of every foundational premise of Indian law and abhorrent to the federal policy of tribal self-determination.

Instead, emulsified properties provide a unique opportunity for recognizing, clarifying, and redeveloping tribal authority over all property issues within these particular co-ownership forms. Many scholars have consistently argued for a stronger recognition and focus on tribal property regimes within reservation territories more broadly as part of a renewed recognition of tribes' inherent sovereignty and as the most practical, workable, and beneficial system of land governance in Indian Country.[303] Broader and clearer recognition of tribes' retained sovereign authority has repeatedly been found to be the best and most effective way to address social and economic challenges in Indian Country.[304] Supporting and encouraging robust, functioning, and responsive local tribal government institutions works where every other federal reform has failed.[305] These emulsified properties provide an ideal opportunity to further this important work.

Tribal governments are particularly well suited to address the particular needs of emulsified property owners and reservation communities. They know and understand local needs and will be most directly impacted by the success or failure of any reform effort. Moreover, unified tribal jurisdiction most effectively addresses the broader concerns about emulsified properties. For

302. *E.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Indian nations] owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.").

303. *E.g.*, *supra* note 244 and accompanying text; *see also* Bobroff, *supra* note 12, at 1622–23; Davidson, *supra* note 243, at 605–12; Guzman, *supra* note 68, at 658–61; John C. Hoelle, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 594 (2011); Sawers, *supra* note 243, at 426–31.

304. *E.g.*, Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harvard Univ. John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series No. 04-016, 2004).

305. The federal government has recognized as much. For example, in recent leasing regulations, Interior concluded that "economically and culturally, sovereignty is a key lever that provides American Indian communities with institutions and practices that can protect and promote their citizens [sic] interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable . . . ." Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162) (quoting Kalt & Singer, *supra* note 304).

example, with unified tribal jurisdiction over emulsified properties, existing efforts to consolidate fractionated trust interests (to the exclusion of any undivided fee interests in the same properties) are effective again. Reducing the number of trust interests in a given tract still has significant practical value in reducing overall administration costs and facilitating co-owner agreement by reducing the total number of co-owners who must negotiate. However, these consolidation programs would no longer be set up for failure, even if consolidation is currently only on one side of the trust versus fee equation, because the fee owners would be included in a workable property institution again. Tribes may be able to use tax foreclosures or dormant interest provisions to clear disinterested, absentee owners and re-consolidate Indian lands into the hands of active landowners.[306] Moreover, a unified tribal property jurisdiction solution also addresses the worry that the one-way erosion of the trust land base through further emulsification further limits tribal governments' sovereignty to the detriment of Indian people and eliminates the equitable concerns of ineffective top-down federal property regimes unfairly applying to Indian communities only.

Certainly there may be concerns about whether tribes will be able to fairly exercise jurisdiction over reservation landowners who are not enfranchised citizens of the tribal government. This issue would arise in some form, no matter which sovereign exercised unified jurisdiction, and it can be addressed fairly and carefully with tribal control. Putting aside the historic unfairness to Indian nations similarly subjected to the control of an external sovereign and the empirical evidence that tribal governments are often fair and impartial to non-Indian interests, more protections could be explored in a full reform proposal. For example, federal legislation could craft more due process guarantees for non-Indian landowners (even beyond what already exists in tribal law and the Indian Civil Rights Act) or tribes could implement other property-specific political engagement opportunities within tribal governments for non-citizen landowners. Non-Indian co-owners should also remain free to alienate their interests if dissatisfied with tribal governance, and unified jurisdiction may actually increase the value of these interests by facilitating resource access and use.[307]

306. *See supra* note 287 and accompanying text.

307. To the extent any solution to emulsified properties is construed as changing the definition of a co-owner's actual rights to that undivided interest, there may be a takings challenge. However, the mere change of jurisdiction over land—as, for example, in the annexation of a given space into a new city or village boundary—is not typically a taking, even if that change in jurisdiction dramatically changes the

Asserting tribal jurisdiction over all emulsified property interests also makes legal sense. Unlike either state or federal governments, tribal governments arguably already possess at least some jurisdiction or potential jurisdiction over both fee and trust co-ownership interests in emulsified properties.[308] Moreover, to the extent non-Indian fee owners on reservation properties may object to clearer and more comprehensive tribal jurisdiction over their fee ownership interests, these arguments carry much less force with respect to the undivided fee interests at issue here. States first began to encroach on tribal territories over non-Indian properties that were acquired entirely in fee during the historic period of allotment.[309] Many of these initial non-Indian acquisitions of fee property were arguably executed with an assumption that tribes would disappear over time as allotment had its intended effect of assimilating individual Indians and dismantling tribes.[310] In addition, the Dawes Act itself authorized at least some state jurisdiction over these particular former trust, now fee, alienated properties.[311]

Undivided fee interests in emulsified properties have emerged in a different context, and tribal governments arguably already retain broad, inherent authority over them. This is consistent with tribal authority in tribal territories,[312] but even under the more restrictive *Montana* test, tribes retain jurisdiction over non-Indians on non-Indian fee property if one of two exceptions is met: (1) there is a consensual relationship or (2) important tribal government interests are at stake.[313] Although construed narrowly, the consensual relationship exception may be met where an undivided fee owner is

land use allowed on that space. *E.g.*, Pearson's Fireworks, Inc. v. City of Hattiesburg, No. 2013-CA-00834-SCT, 2014 WL 3891637 (Miss. Sup. Ct. Aug. 7, 2014) (holding that annexation did not cause a taking even when it eliminated the business owner's ability to continue in operation). Moreover, all tribal governments must provide some due process guarantees comparable to Fifth Amendment protections pursuant to the Indian Civil Rights Act. *See supra* note 259. This result might be different, however, if any emulsified property reforms resulted in more state jurisdiction (and state tax) over Indian property—the *opposite* of what is argued for here. *See* Choate v. Trapp, 224 U.S. 665, 679 (1912) (finding an unconstitutional taking when trust property was unilaterally converted to fee and made subject to state tax).

308. *See supra* Part II.A.2, II.B.3; *see also* Christensen, *supra* note 14 (making case for inherent tribal authority over all real property trespass actions in Indian Country, regardless of tenure status).

309. *Cf.* Royster, *supra* note 14.

310. *See id.* at 41.

311. *Cf.* General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348 (2012)).

312. Worcester v. Georgia, 31 U.S. 515, 522 (1832).

313. Montana v. United States, 450 U.S. 544, 565 (1981).

a co-owner with Indian citizens in Indian trust allotments.[314] This close co-ownership relationship also distinguishes emulsified property owners from the non-Indian bank in *Plains Commerce*, where the Court limited tribal authority to control the alienation of non-Indian fee properties between non-Indians.[315]

In addition, any doubt about tribal authority in existing Supreme Court jurisprudence, including the applicability of the *Plains Commerce* limitation on some tribal authority, could be overcome by new federal legislation. Federal action could—and should for the sake of certainty—be used to clarify these tribal rights. Federal statutes can recognize pre-existing tribal authority, even where the Supreme Court has previously cast doubt on the persistence of that very tribal authority (or held that it was extinguished).[316] This may also work through federal regulation in some cases. For example, Interior recently used its trust property surface leasing regulations to articulate that states shall not have any right to tax (1) permanent improvements on leased trust land, (2) trust lease activities, or (3) the trust leasehold itself, even if these rights are owned or exercised by non-Indians; instead, this taxing authority resides with tribes.[317] So far, the one major federal decision addressing these new rules has largely affirmed that, as articulated by Interior, states lack authority to tax this conduct, but a petition for certiorari to the U.S. Supreme Court is pending as of this writing.[318] Similar federal action to acknowledge clear tribal jurisdiction over

314. *See also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed . . . have a nexus to the consensual relationship itself." (citing *Montana*, 450 U.S. at 565)).

315. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 340 (2008).

316. *E.g.*, United States v. Lara, 541 U.S. 193 (2004) (accepting congressional determination that tribes retained inherent sovereignty to prosecute non-member Indians' crimes within reservation territories, despite prior Supreme Court decision to contrary); Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization, 724 F.3d 1153 (9th Cir. 2013) (holding no state power to tax non-Indian owned permanent improvements on Indian trust land, even where that trust land is outside reservation boundaries, pursuant to 25 U.S.C. § 465 (2012)).

317. *See* 25 C.F.R. § 162.017 (2015). In addition to regulatory language to this effect, Interior concluded in the preamble, after a detailed evaluation of the relevant authorities, that "[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation [of Indian leases]" in a preemption-type analysis. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447–48 (Dec. 5, 2012) (to be codified at 25 C.F.R. pt. 162).

318. *See* Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324 (11th Cir. 2015) (affirming tax rules but with exception for utility tax), *petition for cert. filed*, No. 15-1064 (U.S. Feb. 19, 2016). Other pending cases will likely continue to test this result. *See, e.g.*, Agua Caliente Band of Cahuilla Indians v. Riverside Cty., No. 5:14-CV-00007-DMG-DTB, 2014 WL 2969712 (C.D. Cal. May 30, 2014). An earlier case challenging the regulation, as applied to certain water charges, was dismissed for lack of standing and ripeness. *See* Desert Water Agency v. U.S. Dep't of the Interior, No. 5:13-CV-00606-

all interests of emulsified properties within tribal reservation boundaries would dramatically improve the playing field for all co-owners of these emulsified properties. Emulsified properties are so dysfunctional already that there is tremendous growth potential simply from unifying and making the default property institutions for those co-owners more coherent.

Again, the challenge of designing any innovations in existing property institutions should never be underestimated—and thus will be the subject of future work—but emulsified properties are as good a place as any to start in a culturally congruent and locally palatable way. In this way, emulsified properties provide a tremendous opportunity to build tribal capacity and credibility as tribes continue to expand their jurisdiction and clarify governance in Indian Country going forward. By demonstrating capacity to govern in this defined way, tribal governments will only further solidify the strength of their inherent rights in their territories.[319] And emulsified properties present the unique case where tribal jurisdiction is not only desirable from a tribal justice and tribal sovereignty perspective, but also, as is the case here, tribal jurisdiction is perhaps the only truly workable, lasting solution to the current emulsified property problem.

VII. CONCLUSION

Emulsified properties fail property owners by creating an unworkable system of conflicting entitlements, disjointed responsibilities, and uncertain playing fields. Reservation communities suffer from underdeveloped resources, while resources are constrained by these unworkable tenure systems. The results are inequitable for indigenous people, and our existing discussions of American Indian land reform largely fail to account for stabilizing these emulsified properties. This further cripples the already teetering Indian Country governance institutions. However, emulsified properties also present a unique opportunity. In a chorus of voices seeking to reclaim more robust tribal property systems generally, emulsified properties provide a small window through which tribes may—and really must—begin to make this happen.

DMG(OPx) (C.D. Cal. Jan. 21, 2014).

319. Fletcher, *supra* note 14, at 814; *see also* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1189–98 (2004) (arguing for focus on "experiential sovereignty").

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