

## ESSAY

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# THE NATIVE AMERICAN STRUGGLE BETWEEN ECONOMIC GROWTH AND CULTURAL, RELIGIOUS, AND ENVIRONMENTAL PROTECTION: A CORPORATE SOLUTION

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### INTRODUCTION

Four days following his inauguration, President Donald Trump signed an executive order “expedit[ing]” the Dakota Access Pipeline (DAPL), otherwise known as the Bakken Oil Pipeline.<sup>1</sup> This executive order sparked new rounds of protests by the Standing Rock Sioux Tribe, the Oglala Sioux Tribe, and environmentalists, who opposed the construction of the DAPL for a variety of reasons.<sup>2</sup> The DAPL is a 1,172-mile pipeline, which carries

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<sup>1</sup> Peter Baker & Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES (Jan. 24, 2017), [https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html?\\_r=0](https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html?_r=0); see also Steven Mufson & Juliet Eilperin, *Trump Seeks to Revive Dakota Access, Keystone XL Oil Pipelines*, WASH. POST (Jan. 24, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/01/24/trump-gives-green-light-to-dakota-access-keystone-xl-oil-pipelines/?utm\\_term=.d8c4c7ec3797](https://www.washingtonpost.com/news/energy-environment/wp/2017/01/24/trump-gives-green-light-to-dakota-access-keystone-xl-oil-pipelines/?utm_term=.d8c4c7ec3797); Madison Park, *5 Things to Know About the Dakota Access Pipeline*, CNN (Aug. 31, 2016), <http://www.cnn.com/2016/08/31/us/dakota-access-pipeline-explainer/>.

<sup>2</sup> See, e.g., Sam Levin, *Last Stand: ‘Water Protectors’ Return to Standing Rock as Drilling Set to Begin*, GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/standing-rock-dakota-access-pipeline-last-stand>; Blake Nicholson, *Deadline Looms for Dakota Access Pipeline Protest Camp*, CHI. TRIB. (Feb. 20, 2017), <http://www.chicagotribune.com/news/nationworld/ct-dakota-access-pipeline-camp-deadline-20170220-story.html>.

crude oil from North Dakota to Southern Illinois.<sup>3</sup> Protests over its construction began during the summer of 2016, and they continued throughout the remainder of the year.<sup>4</sup> The protests garnered national media attention, including stories of protesters being sprayed with water in freezing temperatures.<sup>5</sup> On December 4, 2016, the Army Corps of Engineers “denied a permit for the construction of a key section of the Dakota Access Pipeline.”<sup>6</sup> This was not a permanent ban on the construction of the DAPL, but rather a temporary decision not to issue an easement to cross Lake Oahe until the Army Corps of Engineers could prepare an environmental impact statement (EIS).<sup>7</sup>

On January 24, 2017, however, President Trump ordered the Secretary of the Army to instruct the Assistant Secretary of the Army for Civil Works and the Corps to rescind the Notice of Intent (NOI) to prepare the EIS and to consider prior reviews, including the Environmental Assessment and finding of no significant impact, as fulfilling federal law.<sup>8</sup> On February 7, 2017, the Department of the Army rescinded the NOI, and on February 8, the United States Army Corps of Engineers granted the necessary easement for the DAPL to cross under Lake Oahe, without performing the EIS.<sup>9</sup> As expected, the local tribe filed a lawsuit seeking an injunction until after the Corps fulfilled its duty to conduct an EIS.<sup>10</sup>

The plaintiff in the case was the Oglala Sioux Tribe, which is a part of the Great Sioux Nation.<sup>11</sup> It claimed that there was a risk of an oil leak from

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3 See Mufson & Eilperin, *supra* note 1; Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 9, 2016), <http://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein>.

4 Mufson & Eilperin, *supra* note 1; Sammon, *supra* note 3.

5 See, e.g., Tim Stelloh et al., *Dakota Pipeline: Protesters Soaked with Water in Freezing Temperatures*, NBC NEWS (Nov. 21, 2016), <http://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-authorities-clash-temperatures-drop-n686581>.

6 Nathan Rott & Eyder Peralta, *In Victory for Protesters, Army Halts Construction of Dakota Pipeline*, NPR (Dec. 4, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/04/504354503/army-corps-denies-easement-for-dakota-access-pipeline-says-tribal-organization>.

7 See Complaint for Declaratory and Injunctive Relief at 2–3, *Oglala Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 1:17-cv-267 (D.D.C. Feb. 11, 2017) [hereinafter *Oglala Complaint*].

8 *Id.*; see also Baker & Davenport, *supra* note 1 (quoting President Trump: “I am, to a large extent, an environmentalist, I believe in it. . . . But it’s out of control, and we’re going to make it a very short process. And we’re going to either give you your permits, or we’re not going to give you your permits. But you’re going to know very quickly. And generally speaking, we’re going to be giving you your permits”).

9 See *Oglala Complaint*, *supra* note 7, at 3.

10 See *id.*

11 *Id.* at 4.

the DAPL.<sup>12</sup> Because the tribe is located, along with other Native American tribes, downstream from the easement, it was concerned that if an oil leak were to occur, it would lose access to its clean drinking water.<sup>13</sup> In addition, it was concerned that an oil leak would destroy the waters, which it considers to be sacred.<sup>14</sup> Therefore, not only were there environmental legal issues involved, but there were also cultural and religious issues that the tribe claimed were not adequately considered.<sup>15</sup>

Since the protests and lawsuits began during the 2016 summer, the media attention led to social media protests with hashtags such as “#standwithstandingrock” and “#noDAPL.”<sup>16</sup> The media attention has not, however, led to a discussion of larger issues faced by the Native American tribes across the United States and even Canada.<sup>17</sup> For example, “[t]he 2 million Natives in the U.S. have the highest rate of poverty of any racial group—almost twice the national average.”<sup>18</sup> Many scholars disagree as to

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12 *Id.* at 16 (“The Tribe is deeply concerned about the risk of a DAPL spill and the threat that the 570,000 barrels per day pipeline poses to its sacred Treaty- and statute-protected waters.”).

13 *Id.* at 16–17 (“A crude oil spill from the DAPL into Lake Oahe would damage the ecology of the river basin, impair the Tribe’s rights, and contaminate the drinking water of the Tribe’s citizens.”); *see also* 25 U.S.C. § 1632(a) (2012) (“The Congress hereby finds and declares that . . . it is the policy of the United States, that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems . . .”).

14 *Oglala Complaint*, *supra* note 7, at 16; *see also* Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 369 (2013) (“For . . . indigenous groups—as is a common attribute of indigeneity of similarly situated groups around the world—this land was and is holy land.”).

15 *See Oglala Complaint*, *supra* note 7, at 16, 19.

16 *See, e.g., #STANDWITHSTANDINGROCK #NODAPL*, ACLU OF KENTUCKY, <http://www.aclu-ky.org/articles/standwithstandingrock-nodapl/> (last visited Apr. 5, 2017); Standing Rock Sioux Tribe, FACEBOOK (Mar. 7, 2017, 2:59 PM), <https://www.facebook.com/Standing-Rock-Sioux-Tribe-402298239798452/>.

17 *See Skiers v the Religious Rights of Canada’s Indigenous Peoples*, ECONOMIST (Nov. 24, 2016), <http://www.economist.com/news/americas/21710857-case-supreme-court-will-set-noteworthy-precedent-skiers-v-religious-rights> (“The nature of [the Ktunaxa First Nation’s] faith, which assigns sacred value to features of the landscape, poses a puzzle for the courts. The Ktunaxa maintain that skiers will drive away the grizzly-bear spirit, making their rituals meaningless. Canada’s Supreme Court must now decide whether that danger represents an infringement of the religious freedom established by the constitution, and whether that infringement is justified.”).

18 Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> (“This deprivation seems to contribute not only to higher rates of crime but also to higher rates of suicide, alcoholism, gang membership, and sexual abuse. As of 2011, the suicide rate for Native American men aged 15 to 34 was 1.5 times higher than for the general population.”).

why Native Americans have struggled to achieve economic growth.<sup>19</sup> There are, however, two specific factors that seem to be of particular concern.<sup>20</sup> First, due to the allotment system that was established in 1877 under the Dawes Act,<sup>21</sup> tribal land has been fractionated to such extreme measures that most of the land is either unused or unnecessarily costly to use effectively.<sup>22</sup> Second, due to the fact that most tribal land is held in trust by the United States, Native Americans lack the ability to build equity since they do not hold full property rights.<sup>23</sup>

One problem that Jessica Shoemaker has mentioned in her scholarship is that most studies try to simplify issues and just address either property

19 See *id.* (“Many say the federal government is not giving American Indians enough money to combat these problems. . . . Others—often researchers in the academy—argue that American culture does not give Natives enough respect, continuing to traffic in stereotypes when it comes to sports teams and mocking those who claim to have Indian heritage.”); see also Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 387 (2009) (“[T]he Presidential Commission on Indian Reservation Economies identified 2320 individual obstacles in forty major categories. Among the most frequently cited impediments to economic development are the remoteness of most reservations, few resources/poor land, burdensome federal regulations, and tribal politics.” (footnote omitted)).

20 See Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 492 (2017) (“[S]cholars frequently talk about one issue in isolation—most often fractionation, or sometimes the restrictiveness of the federal trust status. Other scholarship is focused on historic inequities in the colonial takings of Indian lands and that history’s impact on the modern race-based inequities in property distribution in the United States.” (footnote omitted)).

21 General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381 (2012)).

22 See Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 444 (2014) (“Nonetheless, some renewed recognition of the potential for reinstating informal owner’s use rights on Indian lands, in light of the expansive needs for housing, income, and development among Indian people, and the large chunks of unused land theoretically owned by these individuals, has exciting potential.”).

23 See Jacob W. Russ & Thomas Stratmann, *Missing Sticks: Property Institutions and Income Dissipation in Indian Country* 1 (Geo. Mason Univ. Dept. of Econ. Research Paper Series, Working Paper No. 15-22, 2014), <http://ssrn.com/abstract=2536597> (“Because new land owners did not receive possession of their legal titles, they could not sell, gift, mortgage, or lease their land without approval from the secretary of the interior.”); see also Shoemaker, *supra* note 22, at 383 (“This article focuses on another change in individual Indians’ property rights that has not previously been identified or studied in-depth: the gradual elimination of any presumptive right of individual Indian owners to use and possess land they jointly own with one or more co-owners. This modern Indian property rule means that Indian co-owners of land enjoy no default right to use and possess their own property.”). See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 5 (2001) (“[T]he major stumbling block that keeps the rest of the world from benefiting from capitalism is its inability to produce capital.”).

rights or issues related to fractionated land.<sup>24</sup> Obviously, trying to solve these problems in isolation is not an adequate solution, because there are so many moving factors even beyond legal and economic property rights, including the overlap of tribal, state, and federal jurisdiction.<sup>25</sup> In addition to the complex jurisdictional issues, there are also tribal issues such as cultural preservation and protection of religious land.<sup>26</sup> Therefore, this Essay recommends a flexible corporate solution that will address many of the issues mentioned above. The corporate solution proposed is very similar in nature to a corporate solution proposed by Brian Sawers, in which tribal land corporations purchase fractionated land through eminent domain.<sup>27</sup> Sawers's corporate solution is based off of the Rosebud Tribal Land Enterprise,<sup>28</sup> and includes minor changes to improve overall effectiveness. This Essay will add to Sawers's corporate solution by discussing how this solution provides the necessary flexibility to allow Native American tribes to not only address issues related to fractionated land and the ability to build equity, but also to preserve their cultural and religious identities.

In Part I, I will provide a brief history of Native American property rights in order to explain how the current issues have developed over time. In Part II, I will address the current issues facing Native American economic growth, in particular the lack of traditional property rights and the fractionation of their lands. In Part III, I will explain why focusing on just one of the above issues will not solve the problem, and will offer a corporate solution that allows enough flexibility to provide tribes with an efficient model for economic growth.

## I. BRIEF HISTORY OF NATIVE AMERICAN PROPERTY RIGHTS

Before discussing the history of Native American property rights, it is important to note that although the United States Constitution does in fact "contemplate[] the existence of Indian nations" and Native American

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24 Shoemaker, *supra* note 20, at 492 ("Even property law scholarship, if it addresses Indian land tenure at all, often misses the full picture of the modern Indian land tenure challenge. For example, scholars frequently talk about one issue in isolation—most often fractionation, or sometimes the restrictiveness of the federal trust status.").

25 *Id.* at 491 ("Tribal, state, and federal jurisdiction swirl together in complex and often unpredictable ways, and where they apply, federal rules for trust properties tend to be blunt, deeply bureaucratic, and insensitive to the tremendous diversity among tribal territories and on-the-ground circumstances.").

26 *Id.* at 494 ("Despite all this, however, many indigenous communities in the United States maintain fundamentally important and diverse relationships with specific physical places. These connections, many have argued, are critical and foundational to Indian identity, culture, and even survival.").

27 See Sawers, *supra* note 19.

28 See *id.* at 413–19.

sovereignty,<sup>29</sup> it does not give constitutional rights to Native American tribes.<sup>30</sup> Therefore, when the Supreme Court heard its first case regarding Native American property rights in *Johnson v. M'Intosh*,<sup>31</sup> the Court was setting precedent as to what rights Native Americans had to their land as compared to the European settlers.<sup>32</sup> The Court concluded that Native Americans had the right to occupy and use their land, but they did not have the right to transfer or dispose of their land, because “discovery gave exclusive title to those who made it.”<sup>33</sup> This decision laid the groundwork for the trust system that is currently in place today—and many of the problems associated with the trust system.<sup>34</sup>

The trust system was formally established through the General Allotment Act of 1877, otherwise known as the Dawes Act, and was only supposed to exist for twenty-five years.<sup>35</sup> Through this Act, the federal government took tribal lands and held the lands in trust.<sup>36</sup> In turn, the federal government redistributed this land in allotments to the head of Native American households.<sup>37</sup> The stated purpose of the trust was as follows:

[To] allow Indian landowners who used a “common property” approach to land to adjust to formal real estate procedures and notions of individual private property, while relying “upon the government of the United States to protect their property and personal interests . . . [from] the dubious attempts of self-seeking traffickers in Indian ignorance and credulity.”<sup>38</sup>

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29 Riley, *supra* note 14, at 383; *see also* U.S. CONST. art. 1, § 8 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

30 Riley, *supra* note 14, at 383.

31 21 U.S. (8 Wheat.) 543 (1823).

32 *See* Riley, *supra* note 14, at 372.

33 *Johnson*, 21 U.S. at 574; *see also* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988) (“Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land.”); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (“It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress.”).

34 Riley, *supra* note 14, at 372.

35 General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381 (2012)); *see also* Shoemaker, *supra* note 20, at 492–93.

36 § 5, 24 Stat. at 389.

37 § 1, 24 Stat. at 388.

38 Jacob W. Russ & Thomas Stratmann, *Divided Interests: The Increasing Detrimental Fractionation of Indian Land Ownership*, in UNLOCKING THE WEALTH OF INDIAN NATIONS 130 (Terry L. Anderson ed., 2016) (alterations in original) (quoting LEWIS MERIAM ET AL., INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 780 (1928)).

Another reason for the Dawes Act was to force Native Americans to assimilate into U.S. culture.<sup>39</sup> One way in which the government did this was by selling surplus lands—lands that were not allotted to Native Americans—to non-tribal members, and checkerboarding these surplus lands with the allotted parcels.<sup>40</sup> The sale of surplus land led to Native Americans seeing “roughly 100 million acres of reservation land unilaterally leave Indian control. . . . The 100 million acres that Indian tribes ceded to the federal government as surplus land represented roughly two-thirds of their original reservation land base.”<sup>41</sup> In addition to forfeiting the land, many argue that the federal government sold the more valuable land, leaving the Native American tribes with the less valuable land.<sup>42</sup>

In 1934, Congress passed the Indian Reorganization Act (IRA).<sup>43</sup> This act put a stop to “any further allotment projects,” “placed all individually owned Indian land and tribally owned land into the federal Indian trust,” and “indefinitely extended the trust relationship between Indians, their tribes, and the U.S. federal government.”<sup>44</sup> The Dawes Act and the IRA have had devastating effects on Native Americans and their property rights, including massive fractionation of tribal lands.<sup>45</sup> This fractionation led to the absurd reality that the Bureau of Indian Affairs (BIA) actually spends more taxpayer money per year in order to manage some of the parcels than those parcels are able to collect in payments.<sup>46</sup> Therefore, in 1983, Congress passed the Indian Land Consolidation Act (ILCA), which allowed “the secretary of the interior to acquire fractional interests in land previously allotted to individual Native Americans, consolidate them at the tribal level and hold them in trust for the

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39 Sawers, *supra* note 19, at 391 (“[T]his law [was] a mighty pulverizing engine for breaking up the tribal mass.” (quoting Merrill E. Gates, Addresses at the Lake Mohonk Conferences (1900), reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 339–40, 342 (Francis Paul Prucha ed., 1973))); *see also id.* (“Allotment was an ‘experiment in social engineering,’ ‘hop[ing] to indoctrinate Native Americans to the European concept of private ownership.’” (alteration in original) (quoting MICHAEL L. LAWSON, HEIRSHIP: THE INDIAN AMOEBA 1 (1982) (incorporated as part of S. 2480–S. 2663: Hearing on S. 2480 and S. 2663 Before the S. Comm. on Indian Affairs, 98th Cong., 76–104 (1984)))).

40 *Id.* at 388.

41 Russ & Stratmann, *supra* note 38, at 130 (citation omitted).

42 *See* Sawers, *supra* note 19, at 395–96 (“To accommodate non-Indian buyers of surplus land, the best agricultural land and timber were not allotted to Indians.”).

43 Russ & Stratmann, *supra* note 38, at 130.

44 *Id.*

45 *See infra* notes 60–70 and accompanying text (discussing how fractionation occurs and the effects of fractionated land); *see also* Hodel v. Irving, 481 U.S. 704, 718 (1987) (“There is little doubt that the extreme fractionation of Indian lands is a serious public problem.”); Shoemaker, *supra* note 20, at 493.

46 *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 686 (1998).

tribe's benefit."<sup>47</sup> The plan was to consolidate "overly fractionated parcels by providing for small allotment interests to escheat to the tribe on the owner's death."<sup>48</sup> The Supreme Court in *Hodel v. Irving*,<sup>49</sup> however, held that the regulation constituted a taking, and because the regulation did not provide for just compensation, it was unconstitutional.<sup>50</sup> While *Hodel* was pending before the Supreme Court, Congress enacted some amendments to section 207 of the ILCA,<sup>51</sup> the escheatment clause. These amendments required, among other things, that in order for the interest to escheat, it must be "incapable of earning \$100 in any one of the five years [following the] decedent's death."<sup>52</sup> In *Babbitt v. Youpee*,<sup>53</sup> the Supreme Court again found that section 207 was an unconstitutional taking without just compensation.<sup>54</sup>

## II. CURRENT ISSUES FACING NATIVE AMERICAN ECONOMIC GROWTH

As mentioned above, it is very challenging to pinpoint one reason as to why Native Americans have the highest rate of poverty of any racial group in the United States.<sup>55</sup> It is a very complex issue,<sup>56</sup> and the arguments range from inadequate funding from the federal government,<sup>57</sup> to lack of respect in American culture,<sup>58</sup> to traditional property rights.<sup>59</sup> There is no one solution, and there may be no right solution for all tribes, as will be mentioned below, but it is important to understand the detrimental effect of the current laws regulating Native American property rights, and in particular the effect these laws have had on Native American economic growth.

### A. Fractionation of Lands

One of the results of the Dawes Act and the IRA was to limit the ability of Native Americans to transfer their lands.<sup>60</sup> The trust system that resulted allowed for land transfers "only through devise or, in most cases, through

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47 David C. Smith & Dustin T. Greene, *The Current Battle Over Native American Land Allotment*, LAW360 (Apr. 1, 2016), <http://www.law360.com/articles/779503/the-current-battle-over-native-american-land-allotment>.

48 Heller, *supra* note 46, at 687.

49 *Hodel*, 481 U.S. 704.

50 *Id.* at 717–18.

51 25 U.S.C. § 2206(a) (1994), *invalidated by* Babbitt v. Youpee, 519 U.S. 234 (1997).

52 Sawers, *supra* note 19, at 401 (alteration in original) (quoting 25 U.S.C. § 2206(a)).

53 *Babbitt*, 519 U.S. 234.

54 *Id.* at 237; *see also* Sawers, *supra* note 19, at 401 ("Note the absurdity in permitting the federal government to restrict alienation severely during life, but not after death.").

55 *See supra* note 19 and accompanying text.

56 *See* Shoemaker, *supra* note 20, at 489–95.

57 *See* Riley, *supra* note 18.

58 *See id.*

59 *See id.*

60 *See* Heller, *supra* note 46, at 685.



intestacy.”<sup>61</sup> Therefore, as land was passed down over time, the parcels were split into smaller and smaller interests. Without the ability to transfer land, even amongst each other, individual Indian landowners gradually lost the presumptive right “to use and possess land they jointly own with one or more co-owners.”<sup>62</sup>

The Supreme Court in *Hodel* recognized this problem, stating: “The policy of allotment of Indian lands quickly proved disastrous for the Indians. . . . Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.”<sup>63</sup> Writing for the Court, Justice O’Connor mentioned one particular “egregious” example, Tract 1305.<sup>64</sup>

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir received \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,650 annually.<sup>65</sup>

It is interesting that the Court held that taking the smallest interests at the time of death would constitute a taking, when the value of that taking is four percent of a penny. The issue of fractionation, however, is clearly articulated by Justice O’Connor’s example.

Making the issue of fractionation worse is that allotment “disrupted Indian ranching, largely because allotments were much smaller than the size of an efficient ranch.”<sup>66</sup> Obviously, fractioning the allotments into smaller interests each generation would only make this more difficult. Therefore, organizational costs increase for Native Americans who own an interest in a parcel, and it becomes very inefficient to manage one of these parcels.<sup>67</sup> Although Congress has been attempting to solve the problem of fractionated

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61 *Id.*

62 See Shoemaker, *supra* note 22, at 383.

63 *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

64 *Heller*, *supra* note 46, at 686.

65 *Hodel*, 481 U.S. at 713; see also Sawers, *supra* note 19, at 398 n.109 (“Since the BIA will not issue a check for less than \$5, it will take 88,652 years before this heir will receive payment.”).

66 Sawers, *supra* note 19, at 394 (“In contrast to the expectations of many non-Indians about allotment, Indian fears were prescient: allotment ultimately permitted ‘white settlers . . . [to] monopolize the grazing.’” (alterations in original) (quoting W. H. Clapp, *Report of Pine Ridge Agency*, in 1898 ANN. REP. OF THE COMMISSIONER OF INDIAN AFFAIRS 276 (1898))).

67 See *id.* at 393–99.

land since 1983, the efforts have been largely unsuccessful.<sup>68</sup> In 2010, “there were 154,443 individually owned land parcels on Indian reservations, [and] because of fractionation the ownership of these parcels [was] split into millions of shared claims.”<sup>69</sup> In an empirical study in 2014, Jacob Ross and Thomas Stratmann found “that increased ownership fractionation has reduced the incomes of American Indians on reservations and is associated with lower agricultural lease income, a measure of land productivity.”<sup>70</sup>

### B. *Lack of Traditional Property Rights*

In discussing why fractionation has had a negative impact on the economic growth of Native Americans, Ross and Stratmann stated that “[f]ragmented ownership is not a problem as long as property rights are well defined and enforced, and transaction costs are sufficiently low.”<sup>71</sup> Therefore, it is clear that property rights and fractionated land are both important when discussing current issues facing Native Americans and economic growth. But what are the fundamental property rights that Native Americans are currently lacking?

There are two main traditional property rights that Native Americans lack, either because of the trust system or due to the fractionated parcels. First, because the land is actually owned by the federal government in a trust, Native Americans cannot transfer their interests in the land, except by devise or inheritance.<sup>72</sup> Second, unless an individual owns one hundred percent of a parcel, they are not able to occupy or use any portion of that parcel, unless “that individual . . . first receive[s] permission from the other co-owners or obtain[s] a lease approval from the BIA.”<sup>73</sup> With the increase in fractionated parcels into ever-smaller fractions, receiving the permission from the other co-owners can obviously be very costly, if not impossible.

Regarding my first point, Hernando de Soto demonstrated in his book, *The Mystery of Capital*, “that the major stumbling block that keeps the rest of the world from benefiting from capitalism is its inability to produce capital.”<sup>74</sup> In addition, even when poorer nations have the necessary assets, “they hold these resources in defective forms: *houses built on land whose ownership rights are not adequately recorded*, unincorporated businesses

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68 *See id.* at 399–402.

69 Russ & Stratmann, *supra* note 23, at 1.

70 *Id.* at Abstract.

71 *Id.* at 1.

72 *Id.* at 4.

73 *Id.* at 12.

74 DE SOTO, *supra* note 23, at 5 (“Capital is the force that raises the productivity of labour and creates the wealth of nations.”); *see also* Riley, *supra* note 18 (“Indians have long suffered from what the Nobel Prize-winning economist Hernando de Soto has called ‘dead capital.’”).

with undefined liability, industries located where financiers and investors cannot see them.”<sup>75</sup> Therefore, these assets “cannot readily be turned into capital.”<sup>76</sup> For example, these assets cannot be used to obtain a mortgage, to leverage investments, or as collateral for a loan.<sup>77</sup>

In particular for Native Americans, landowners are not the sole owners of their land, because the land is technically held as a trust by the federal government.<sup>78</sup> In most cases, this is even more complicated because the fractionated land parcels have led to landowners not even owning the right to occupy or possess the land, as discussed below, but rather they own an interest in the proceeds received from the land.<sup>79</sup> Therefore, these landowners, or interest owners, cannot “perform ordinary real estate transactions.”<sup>80</sup> This has resulted in Native American landowners, or interest holders, suffering from the inability to acquire capital—“the major stumbling block that keeps the rest of the world from benefiting from capitalism.”<sup>81</sup>

In order to fix these problems, some scholars recommend the best solution would be to give the land to the Native Americans.<sup>82</sup> The federal government could easily transfer the property out of the trust and to the Native Americans.<sup>83</sup> At this point, Native Americans would have the right to transfer the land to anyone they choose, including non-Native Americans.<sup>84</sup> In this scenario, the Native American tribes would retain autonomy over the land, similar to how a city such as New York City retains autonomy over its land.<sup>85</sup>

The problem, however, is that this ignores many of the other issues facing Native Americans.<sup>86</sup> As mentioned above, many indigenous people

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75 DE SOTO, *supra* note 23, at 6 (emphasis added).

76 *Id.*

77 *Id.*

78 Russ & Stratmann, *supra* note 23, at 4.

79 See Shoemaker, *supra* note 20, at 520.

80 Russ & Stratmann, *supra* note 23, at 4 (“They could not sell, gift, mortgage, or lease their parcels without approval from the secretary of the interior. Inheritance, the only mechanism available to alienate an ownership claim, was also limited by allotment policy.”).

81 See DE SOTO, *supra* note 23, at 5; see also Riley, *supra* note 18 (“Almost no one on the reservation can afford to build a home, because no one can get a mortgage. And no one can get a mortgage because the property on the reservation is held in trust by the federal government; most of it also is ‘owned’ communally by the tribe. No bank could ever foreclose on a property, because the bank can’t own reservation land.”).

82 See Riley, *supra* note 18.

83 See *id.*

84 See *id.*

85 *Id.* (“[The land] would remain part of the city, just as no one can sell a part of New York City to Newark.”).

86 See *id.* (“There are some First Nations leaders in Canada who are skeptical of this plan. They worry that it will lead to greater assimilation, which they see as damaging to

view the land as sacred and religious ground.<sup>87</sup> The city could regulate through zoning what non-Native Americans do on the land, but they would still be selling away their sacred land. It could be argued that they do not have to sell the land; however, this argument is flawed because with the fractionated parcels many Native Americans would be forced to sell as they would not have enough land to use effectively.<sup>88</sup> Therefore, it would open up the tribal land to the highest bidder, which would likely not be the Native American tribes, considering Native Americans currently have the highest rate of poverty of any racial group.<sup>89</sup> In addition, if the land was just given to the tribe from the federal government, as seen in *Hodel v. Irving*,<sup>90</sup> this would constitute an unconstitutional taking, unless just compensation was provided.<sup>91</sup>

As to my second point, in order for a co-owner of a parcel to use or possess part of that parcel, they are required to obtain permission from the other co-owners or to obtain a lease from the BIA.<sup>92</sup> The reason for this is because “[t]he federal Indian trust prevents reservation land from being subdivided, which means all inherited ownership claims are for an ‘undivided’ interest (i.e. percentage interest) in the entire tract,”<sup>93</sup> rather than in a specific acreage or portion of the parcel. Therefore, Native Americans lack the most basic rights of co-tenants: to possess and use the property.<sup>94</sup>

The fact that Native Americans do not have a right to possess and use their property presents a difficulty for the previously mentioned argument—that if the federal government just returned the land to the Native Americans, they would instantly have access to more capital.<sup>95</sup> This is a problem because it is not clear as to what land individual landowners would be entitled to receive. If a current owner of two percent of a parcel were to receive two percent of the acreage in the parcel, would this make up for their interest? Additionally, would all acreage be considered of equal quality? More

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Native culture. They would be sorry to see a plot of land long occupied by one family sold to outsiders. Some worry that non-Natives will simply take the land illegally.”). *But see id.* (“Moreover, tribes would retain autonomous rule over the land, even if a particular plot passed into the hands of a non-Native.”).

87 Riley, *supra* note 14, at 369.

88 See *supra* notes 66–70 and accompanying text.

89 Riley, *supra* note 18.

90 481 U.S. 704 (1987).

91 See *id.* at 707; see also *infra* notes 132–41 and accompanying text.

92 Russ & Stratmann, *supra* note 23, at 12.

93 Russ & Stratmann, *supra* note 38, at 131.

94 See Shoemaker, *supra* note 22, at 384 (“A defining characteristic of common law co-ownership forms is the rule that all co-owners of land have an equal and undivided right to possess the entire estate, concurrently and presumptively, without the prior consent of their co-owners and typically without any obligation to pay rent for that possession.”).

95 See generally Riley, *supra* note 18.

importantly, would two percent of a parcel be enough land to be able to efficiently use the land to make a profit?<sup>96</sup>

At the time of allotment, “the poorest off-reservation ranches ran fifty or more cattle on at least 1000 acres.”<sup>97</sup> The parcels, however, were 160 acres for individuals and 320 acres for heads of a household.<sup>98</sup> On a 160-acre parcel, an individual could “run seven or eight cattle . . . much too small a herd to compete with non-Indian ranchers.”<sup>99</sup> In addition, the undercapitalization, mentioned above, decreased the returns on Native American farming activities because they did not have the resources to irrigate the land.<sup>100</sup> Therefore, even by providing Native Americans with the traditional co-tenant rights of possession and use, it is very unlikely that Native Americans would be able to use their land effectively. In addition, fractionated land parcels make all of this more challenging and create an anticommons problem, assuming all of the individual owners were given an “undivided right to possess the whole property.”<sup>101</sup> For example, if all 439 owners of Tract 1305<sup>102</sup> had an undivided right to possess the entire 40 acres, it would be impossible for any one of them to effectively use the land.<sup>103</sup>

### III. THE CORPORATE SOLUTION

Native Americans should be empowered to make their own decisions on how best to find a solution that fits all of their concerns. This solution should include giving Native Americans and Native American tribes more autonomy over their lands and more control over how that land is allotted and used. Jessica Shoemaker recommends “grassroots experimentation and local flexibility” to create “more radical, reservation-by-reservation transformations of local property systems into the future.”<sup>104</sup> It is very important that solutions be looked at on a reservation-by-reservation basis because not all tribes suffer from the same problems. The corporate solution proposed by Brian Sawers provides this flexibility. This solution allows for

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96 See Sawers, *supra* note 19, at 398 (“In a study of twelve of the eighteen reservations affected by allotment, the GAO found that 20% of parcels had at least one owner with less than a 2% interest. Interests of 2% or less constitute two-thirds of the interests recorded and increased from 305,000 to 620,000 between 1984 and 1992.”).

97 *Id.* at 394.

98 Heller, *supra* note 46, at 685.

99 Sawers, *supra* note 19, at 394.

100 *Id.*

101 See Shoemaker, *supra* note 22, at 390; see also Heller, *supra* note 46, at 687 (“It is difficult to imagine how Congress or the Native American tribes can overcome the tragedy of the allotment anticommons. One must wonder how these resources will be returned to productive use.” (footnote omitted)).

102 See *supra* notes 64–65 and accompanying text.

103 Note that this would be 0.09 acres per person, if divided equally.

104 Shoemaker, *supra* note 20, at 487.

a tribal land corporation to purchase fractionated parcels through eminent domain. Therefore, the corporate solution would solve the issues related to the current trust system—transferability of land and collateral in the land—and the issues related to the fractionated land parcels—use and possession of the land. In addition, the corporate solution gives Native Americans autonomous control over the land.

#### A. Examples of Tribal Land Corporations

In order to solve the problem of fractionated lands, former Commissioner of the BIA John Collier created a test case for a tribal land corporation.<sup>105</sup> The Rosebud Reservation was home to the Sicangu Oyate Tribe.<sup>106</sup> The reservation received a corporate charter in 1937, and the Rosebud Tribal Land Enterprise (TLE) was created in 1943.<sup>107</sup> At this time, sixty percent of the allotted lands were already fractionated.<sup>108</sup> The goal of the TLE was to: “reduc[e] fractionation and help[] Indians acquire economically-sized units of land.”<sup>109</sup> Individuals who owned an interest in a parcel could tender their interest to the TLE in return for shares.<sup>110</sup> These interests were then conveyed to the tribe, but managed by the TLE, in order to further consolidate the management of the land.<sup>111</sup> At the insistence of the tribe, the shares in the TLE were transferable.<sup>112</sup> Members of the tribe received Class A shares, which were entitled to a vote, as long as they remained in possession of a tribal member, and non-tribal holders received Class B shares, which did not include voting rights.<sup>113</sup>

The Rosebud TLE has only been a moderate success, at best. Some criticize the high costs, claiming that “the TLE has been a ‘black hole for the financial interests of individual certificate holders.’”<sup>114</sup> Proponents of the TLE, however, point out that, by 2005 “the TLE had acquired 570,000 acres of land for the tribe. Each year, the TLE generates \$3 million in gross revenue, of which \$2 million is profit. Between \$40,000 and \$70,000 is spent each month to acquire fractionated interests.”<sup>115</sup>

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105 Sawers, *supra* note 19, at 414.

106 *Id.* at 413.

107 *Id.* at 414.

108 *Id.*

109 *Id.*

110 *See id.* at 415.

111 *Id.* at 414.

112 *Id.* at 414–15.

113 *Id.* at 415.

114 *Id.* at 418 (quoting *Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of Funds and Natural Resources, Might Be Reformed: Hearing Before the S. Comm. On Indian Affairs*, 109th Cong. 16 (2005) (statement of Hon. Charles C. Colombe, President, Rosebud Sioux Tribe of South Dakota)).

115 *Id.* (footnote omitted).

The more recent results stem from the ability of the TLE to economize larger portions of the land.<sup>116</sup> The TLE relies on voluntary transfers, which originally led to more checkerboarded interests in the land, and inefficient use of the land.<sup>117</sup> Over time, however, they have been able to acquire more interests, which allows the TLE to be more effective and enables it to continue to buy more interests.<sup>118</sup> In addition, the shares have a fixed price.<sup>119</sup> Originally, it was \$1 per share, and the landowners who tendered their interests would receive one share per \$1 of appraised value of land.<sup>120</sup> Over the years, that value was increased, and today, that value is updated on an annual basis.<sup>121</sup> Therefore, shareholders cannot receive capital gains as easily, since it is only valued once a year.<sup>122</sup>

### B. *The Cobell Settlement and Federal Buy Backs*

The recent success of the TLE shows that an incorporated solution can benefit Native American tribes by consolidating the land. The federal government could also assist in this process by returning land to tribes. The federal government would have to pay just compensation, and when the land is returned to the tribe, the tribe would then have the ability to incorporate under the Indian Reorganization Act.<sup>123</sup> First, for tracts such as Tract 1305, where the cost of administration is greater than the value and the income of the tract, the federal government can and should buy back the land and return it to the tribe. For example, Tract 1305 cost \$17,650 annually of taxpayer money, when the land is only valued at \$8000.<sup>124</sup> The federal government should buy back the land, at twice the value, and return it to the tribe. This would help return the land to tribal control, while simultaneously saving taxpayer money.<sup>125</sup>

In addition, the Cobell settlement in 2009 awarded \$1.9 billion to buy back Native American land and return it to the tribes.<sup>126</sup> This was due to the

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116 *See id.* at 419.

117 *See id.* at 418.

118 *See id.*

119 *Id.* at 415.

120 *Id.*

121 *Id.*

122 *See id.*

123 Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79 (2012)).

124 *See Hodel v. Irving*, 481 U.S. 704, 713 (1987); *see also supra* notes 64–65.

125 *See Riley*, *supra* note 18.

126 Tanya H. Lee, *Cobell Land Buy-Back Fund Four Million Acres and Billions of Dollars Short*, INDIAN COUNTRY MEDIA NETWORK (Nov. 14, 2016), <https://indiancountrymedianetwork.com/news/politics/cobell-land-buy-back-fund-four-million-acres-and-billions-of-dollars-short/>.

BIA's mismanagement of Native American trust funds.<sup>127</sup> This is obviously a large step in the right direction. It will, however, still leave four million acres of Native American land in a federal government trust.<sup>128</sup> Based on the BIA's past performances in managing this land, it is now time to look for a solution premised on returning the remaining four million acres to tribal control and autonomy, while keeping in mind many of the cultural, religious, and environmental concerns.

### C. *The Flexibility of the Corporate Solution Moving Forward*

The Rosebud TLE was more effective with the more land that it was able to consolidate. Therefore, the key to a corporate solution is to acquire as much adjacent land as possible to solve many of the issues related to fractionated parcels.<sup>129</sup> In addition, the shares of a tribal land corporation should be transferable, similar to the Rosebud TLE, but they should also not be governed by a fixed price.<sup>130</sup> Furthermore, the tribal land corporation should retain voting and non-voting shares, to ensure that tribal lands continue to protect the interests of the individual tribes. As previously mentioned, the Indian Reorganization Act allows tribes to incorporate.<sup>131</sup> Tribes, however, have been reluctant to incorporate, which according to Sawers could be due to political disputes among the different tribes.<sup>132</sup>

In order to effectively consolidate as much land as possible, tribal land corporations should use eminent domain.<sup>133</sup> In *Hodel v. Irving*, the Supreme Court held that the escheatment clause in the ILCA was an unconstitutional taking without just compensation.<sup>134</sup> Therefore, the tribal land corporation would need to prove that the taking was for a public purpose and provide just compensation to the individuals.<sup>135</sup> The first hurdle, taking for a public purpose, should be an easy hurdle to overcome. In particular, in *Hawaii Housing Authority v. Midkiff*,<sup>136</sup> the Supreme Court held that a program in

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127 *Id.*

128 *Id.*

129 *See* Sawers, *supra* note 19, at 422.

130 *See id.* at 421.

131 *Id.* at 409.

132 *See id.* at 410.

133 *See id.* at 421–25.

134 *Id.* at 400; *see also id.* at 423 (“Tribes are subject, however, to the Indian Civil Rights Act; Section 1302(5)(8) mirrors the language of the Fifth Amendment.” (footnote omitted)).

135 *Id.* at 423.

136 467 U.S. 229 (1984); *see also* *Kelo v. City of New London*, 545 U.S. 469, 481–82 (2005) (“In [*Midkiff*], the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit’s view that it was ‘a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B’s private use and benefit.’” (quoting *Midkiff*, 467 U.S. at 235)).



which land was taken from lessors and given to lessees to solve a concentrated land tenure problem constituted a valid public purpose.<sup>137</sup> Similar problems arise from the fractionation of land, leading to “environmental degradation, poverty, and unemployment.”<sup>138</sup> Therefore, it appears the Supreme Court would uphold the taking of tribal land as a public purpose.

Proof of just compensation presents a separate hurdle. Brian Sawers, however, presents an interesting solution to this problem.<sup>139</sup> As previously mentioned, tribes lack the capital to buy back the land themselves, and it is important that tribes keep control and autonomy over the land. Therefore, tribes should offer shares in consideration of interests in land, similar to the Rosebud TLE. For any individual who does not wish to receive shares, they should be paid-in-kind.<sup>140</sup> In particular, they should receive a similar interest in another parcel.<sup>141</sup> This will allow the corporation to take full control over the majority of parcels,<sup>142</sup> while leaving a few parcels in trust for the individuals who do not wish to tender.

The benefits of putting the land in a corporation is to allow for a more efficient use of the leasing of property, while retaining the control and autonomy of the land for the tribes. In addition, the transferability of the shares allows the individual interest holders to acquire additional capital as collateral, and the floating price allows for additional capital gains to interest holders. By providing just compensation as like-kind property, this solves the holdout problem, because it allows the few holdouts to keep their fractionated interest, just in a parcel not controlled by the corporation. In addition, it would decrease the fractionated parcels, and place the fractionated parcels near each other, while allowing the remainder of the land to be used effectively. Additionally, instead of using traditional fiduciary responsibilities, such as increasing shareholder value, it could be added to the bylaws or the charter that the fiduciary duties extend to the tribe as a whole.<sup>143</sup> Therefore, the voting members, only tribal members, can still elect to consider environmental issues, religious issues, and cultural issues throughout the corporate decision-making process. Additionally, this should help with the concern of assimilation and preserving Native American culture, because the corporation will have control over decisions such as land use.

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137 See *Midkiff*, 467 U.S. at 229–30; see also Sawers, *supra* note 19, at 423.

138 Sawers, *supra* note 19, at 423.

139 See *id.* at 409.

140 *Id.*

141 *Id.*

142 *Id.* at 403 (“Seventy percent of heirs contacted by the test program volunteered to sell their interests, indicating that fractionation could be significantly reduced through voluntary purchase.”).

143 See *id.* at 410.

The corporate solution presented in this section is similar to the tribal land corporation discussed by Brian Sawers.<sup>144</sup> The key benefits of this solution is it fixes the two main problems that have resulted in the lack of economic growth by Native American tribes: issues related to the current trust system—transferability of land and collateral in the land—and the issues related to the fractionated land parcels—use and possession of the land. In addition, the corporate solution gives Native Americans autonomous control over the land. It allows for flexibility amongst tribes, and allows tribes to maintain their religious and cultural identities.

#### CONCLUSION

While the easy solution to Native American property rights would be to just return the land to the Native Americans and give them the “full bundle” of property rights, this does not solve the entire problem. Native Americans view their land as sacred and they are also very interested in preserving their cultural identity. Historically, the federal government attempted to force Native American assimilation. The result, however, was fractionated lands that the Supreme Court has deemed a disaster.<sup>145</sup> Therefore, there needs to be a more flexible solution to the property rights issue and fractionation issues. For example, by returning the property to individuals with interests in the land, this would not solve the problem of fractionation, when so many individuals own two percent or smaller fractions of a parcel. This would lead to many individuals selling their interests to non-tribal members and the tribe would lose much of its autonomy.

The corporate solution protects this autonomy, while still giving Native American tribes the control of the land. It allows for tribes to make their own decisions on what factors are most important to the tribe. In addition, it would provide a strong, united backing to help fight against what they see as dangers to their sacred land. A tribal land corporation would be able to use the resources and capital that it has gained through the consolidated land interests to fight back against a proposed pipeline, such as the DAPL, that might threaten their access to clean water and might damage their sacred land. The original route of the DAPL was to go through Bismarck, North Dakota, a wealthier city than the Native American reservations, but was later rerouted by the Corps due to environmental concerns.<sup>146</sup> As previously mentioned, the Corps has not conducted an EIS on the new route, and it would be interesting to see if a consolidated, capital rich tribal corporation

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144 *See id.*

145 *See Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“The policy of allotment of Indian lands quickly proved disastrous for the Indians.”).

146 *See Catherine Thorbecke, Why a Previously Proposed Route for the Dakota Access Pipeline Was Rejected*, ABC NEWS (Nov. 3, 2016), <http://abcnews.go.com/US/previously-proposed-route-dakota-access-pipeline-rejected/story?id=43274356>.

could have prevented the Corps from granting an easement for the DAPL under Lake Oahe.