



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: House Committee on Natural Resources Republican Members
From: Indian and Insular Affairs Subcommittee staff, Ken Degenfelder
(Ken.Degenfelder@mail.house.gov) and Jocelyn Broman
(Jocelyn.Broman@mail.house.gov) x6-9725
Date: Tuesday, January 30, 2024
Subject: Oversight Hearing: “*Examining the Opportunities and Challenges of Land Consolidation in Indian Country*”

The Subcommittee on Indian and Insular Affairs will hold an oversight hearing titled “*Examining the Opportunities and Challenges of Land Consolidation in Indian Country*” on **Tuesday, January 30, 2024, at 10:15 a.m. in 1324 Longworth House Office Building.**

Member offices are requested to notify Ransom Fox (Ransom.Fox@mail.house.gov) by 4:30 p.m. on Monday, January 29, 2024, if their member intends to participate in the hearing.

I. KEY MESSAGES

- Fractionation of Indian land creates significant land management and administration challenges for both tribes and individual Indian owners, resulting in barriers to economic development, land management and use.
- Congress has attempted to reduce fractionation on Indian lands through various probate reforms and the Land Buy-Back Program for Tribal Nations (LBBP).
- While the LBBP’s use of its \$1.9 billion fund to voluntarily buy back fractionated interests did show some success, long-term forecasts indicate land fractionation levels will return to pre-LBBP levels by 2038.¹
- Congress should consider potential probate reforms, self-sustaining land consolidation funds, and other creative solutions to prevent land fractionation from continuing to prevent economic development in Indian country.

II. WITNESSES

- **Mr. Darryl LaCounte**, Director, Bureau of Indian Affairs, U.S. Department of the Interior, Washington, DC
- **The Hon. Marvin Weatherwax**, Councilmember, Blackfeet Tribal Business Council, Browning, MT
- **The Hon. Ryman LeBeau**, Chairman, Cheyenne River Sioux Tribe, Eagle Butte, SD
- **Mr. Cris Stainbrook**, President, Indian Land Tenure Foundation, Little Canada, MN
- **The Hon. Victoria Kitcheyan**, Chairwoman, Winnebago Tribe of Nebraska, Winnebago NE [*Minority witness*]

¹ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023 <https://www.doi.gov/buybackprogram>.

III. BACKGROUND

Indian land fractionation is the result of land allotment policies implemented by the federal government during the Allotment and Assimilation Era. From 1887 to 1934, the main purpose of federal Indian policy was to assimilate tribes and their members into mainstream American culture.² The General Allotment Act of 1887,³ also known as the Dawes Act, allowed the federal government to divide up tribal lands into 80- or 160-acre sections and then allotted the lands in fee simple to individual tribal members.⁴ Tribal lands that were not allotted to tribal members were allowed to be distributed and sold to homesteaders and nontribal members, resulting in about 90 million acres of Indian land being taken out of Indian ownership and control, including lands within reservation boundaries.⁵

Congress formally ended the policy of allotting tribal lands in 1934 with the Indian Reorganization Act (IRA).⁶ While the IRA did not return any already allotted lands to tribal ownership, it did include provisions that indefinitely extended certain restrictions on allotments, directed the Secretary of the Interior (Secretary) to restore tribal lands declared as “surplus”, and authorized the Secretary to acquire lands and interests in lands for tribes.⁷

When the owner of an Indian allotment died, title ownership of the land was divided among all the deceased’s heirs, but the land itself was not physically divided. This resulted in multiple individuals owning a fractionated interest in the same piece of land. As each generation passes, the number of owners who have a fraction of an undivided interest grows exponentially, which leads to the highly fractionated ownership of much of the allotted lands today.⁸

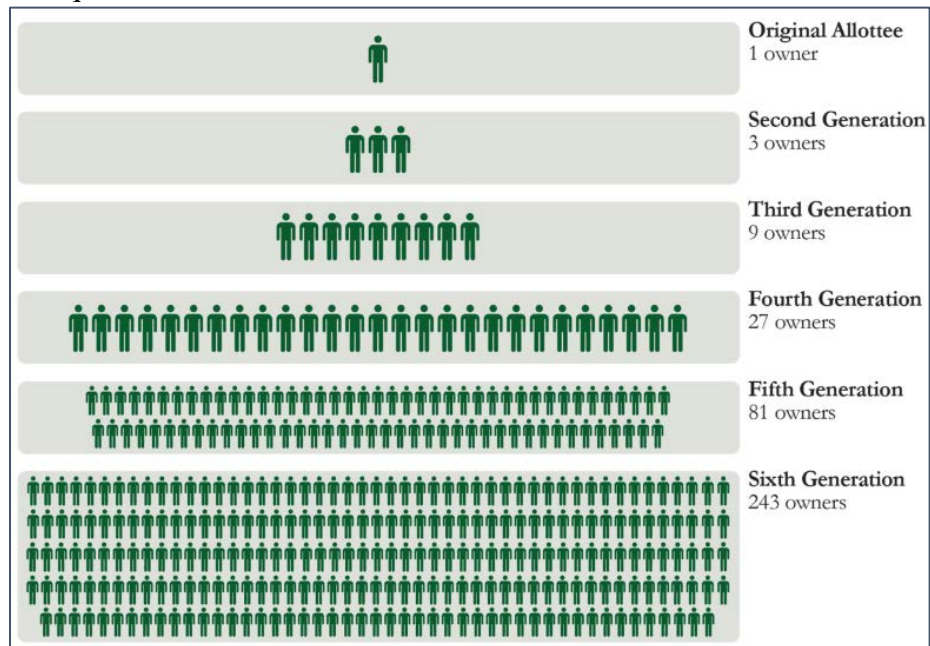


Figure 1: “What is Fractionation?” Source: BIA

² CRS. Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress. July 21, 2021. <https://crsreports.congress.gov/product/pdf/R/R46647>.

³ Act of February 8, 1887, Ch. 119, 24 Stat. 388.

⁴ CRS. Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress. July 21, 2021. <https://crsreports.congress.gov/product/pdf/R/R46647>.

⁵ Indian Land Tenure Foundation. “Fractionated Ownership.” <https://iltf.org/land-issues/issues/>.

⁶ Act of June 18, 1934, 48 Stat. 984, codified at 25 U.S.C. §§461 et seq.

⁷ Senate Report on “Amending the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land” S. Rpt. 108-264, p. 4 <https://www.congress.gov/108/crpt/srpt264/CRPT-108srpt264.pdf>.

⁸ CRS. Tribal Land and Ownership Statuses <https://crsreports.congress.gov/product/pdf/R/R46647>.

Fractionation has led to severely divided land interests within Indian reservations and on Indian lands. As of 2018, 243,000 landowners owned nearly 2.5 million interests in 100,000 fractionated tracts of trust land, equating to over 6 million acres.⁹ The vast majority of these interest owners own less than a 25 percent interest in the allotted land.¹⁰ To put that into perspective, a 100-acre tract of land may have hundreds of owners, with each owner receiving a nominal amount of money if the fractionated land has been developed or is being used for other purposes, like farming or grazing.¹¹

However, fractionated Indian land is rarely utilized for development primarily because a majority interest in the land is required to make decisions about use of the land. The Secretary may approve a lease, right-of-way, or sale of a trust allotment with 20 or more Indian owners only when a majority of them consent.¹² But when an allotment has hundreds of owners the process of obtaining consent generally is either cost or logistically prohibitive. A 2020 study of the economic viability of Indian land allotments found that land with non-transferable private property rights, like allotments, fares worse in terms of economic viability for development and use, than private land or communally held land, like tribal trust lands.¹³ Additionally, the study found that land with non-transferable private property rights was on a “significantly worse dynamic trajectory” than private land or communally held land.¹⁴ While land decisions are not always made purely for economic reasons, nor should they be required to, it is important to recognize the barrier fractionated ownership can create when a tribe or individual Indian owner wants to pursue economic development.

From 1983 to 2004, Congress sought to address highly fractionated lands through legislation. Enacted in 1983, the Indian Land Consolidation Act (ILCA)¹⁵ authorized Indian tribes to establish land consolidation plans and acquire an entire parcel of trust land with the consent of a majority of the parcel’s owners. It also authorized the Secretary to approve tribal probate codes that limited who can inherit fractionated interests and it included a provision that would require fractional interests in trust or restricted lands to go to the tribe of jurisdiction if the fractional interest was two percent or less of the total interest in the parcel and it had not produced \$100 of income in the previous year.¹⁶ These fractionated interests would then “escheat”¹⁷ to the tribe. Ultimately, the Supreme Court of the United States invalidated ILCA’s escheat section,¹⁸ and an amended version,¹⁹ as a violation of Fifth Amendment property rights. Any further proposals to escheat fractional interests to an Indian tribe to encourage land consolidation will need to overcome this issue.

⁹ Department of the Interior. What is Fractionation?. <https://www.doi.gov/buybackprogram/fractionation>.

¹⁰ BIA, “What is Fractionation?” <https://www.bia.gov/bia/ots/dtlc/fractionation>.

¹¹ CRS. Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress. July 21, 2021. <https://crsreports.congress.gov/product/pdf/R/R46647>.

¹² 25 USC 2218.

¹³ Christian Dippel, Dustin Frye & Bryan Leonard, “Property Rights without Transfer Rights: A Study of Indian Land Allotment” July 2020. p. 38, <https://www.nber.org/papers/w27479>.

¹⁴ Id.

¹⁵ P.L. 97-459 (25 USC 2201 et seq.).

¹⁶ S. Rpt. 108-264, p. 5.

¹⁷ “Escheat” is the legal terminology used to describe when there is a reversion of a property interest to the state or government, if a property owner dies without any heirs.

¹⁸ *Hodel v. Irving*, 481 U.S. 704 (1987).

¹⁹ *Babbitt v. Youpee*, 519 U.S. 234 (1997).

In 2000, Congress enacted the ILCA Amendments²⁰ to further revise probate processes and institute a uniform Indian probate code, as well as provisions to facilitate land consolidation transactions between individual Indians and their tribes.²¹ The 2000 amendments also included a new pilot program for the voluntary acquisition of fractional interests by the Secretary to be held in trust for the tribe of jurisdiction, as well as legislative direction on how to administer the acquired interests.²² This would be the first inception of a land buyback program for Indian country.

In 2004, Congress enacted the American Indian Probate Reform Act (AIPRA),²³ which again aimed to slow down the rate by which fractionation was occurring and consolidate the already highly fractionated land with the further reforms of the federal Indian probate code and provisions to facilitate land consolidation implementation. Most importantly, AIPRA established the “single heir rule,” to prevent the breaking up of interests that are 5 percent or smaller when there is no will. In the case of no eligible heir, the interest would go to the tribe of jurisdiction.²⁴ AIPRA also put in place a “purchase option at probate” for interests that are 5 percent or less, which would allow a “forced sale” at fair market value of the interest to only certain purchasers (other heirs with interests in the same parcel, co-owners of the parcel, or the tribe of jurisdiction).²⁵

The aforementioned standardizations and reforms to address fractionated land interests were further impacted by the Cobell settlement, which went into effect in 2010 and established the Land Buy Back Program for Tribal Nations (LBBP).

Land Buy Back Program History and Outcomes

The LBBP was established out of the \$3.412 billion legislative settlement of *Cobell v. Salazar* (Cobell).²⁶ In 1996, Eloise Cobell, a member of the Blackfeet Nation, filed a class action lawsuit against the United States on behalf of 300,000 individual Indians over the Department of Interior’s (DOI) management of individual Indian money (IIM) accounts, which are held for the benefit of individual tribal members.²⁷ Plaintiffs sought to compel the Secretary, who administers these individual IIM accounts, to perform a historical accounting required under a 1994 law²⁸ intended to rectify past decades of poor recordkeeping relating to these accounts.

While DOI was prepared to perform the court-ordered accounting,²⁹ the Obama administration negotiated and entered into the \$3.412 billion settlement soon after a U.S. Appeals Court vacated

²⁰ Public Law 106-462.

²¹ S. Rpt. 108-264, p. 11.

²² ILCA Sec. 213 and 214 (25 U.S.C. 2212 and 2213).

²³ P.L. 108-374.

²⁴ CRS. Tribal Land and Ownership Statuses. <https://crsreports.congress.gov/product/pdf/R/R46647>

²⁵ 24 USC 2206(o).

²⁶ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023 <https://www.doi.gov/buybackprogram>.

²⁷ CRS. Tribal Land and Ownership Statuses. <https://crsreports.congress.gov/product/pdf/R/R46647>.

²⁸ American Indian Trust Fund Management Reform Act of 1994 (P.L. 103-412, 108 Stat. 4239 (25 U.S.C. 4001 et seq.)).

²⁹ In 2006, DOI informed the House Committee on Natural Resources it had performed an accounting of the IIM accounts for all of the named plaintiffs and 31 of their predecessors and found that, to date, “the accounting has not provided any evidence that billions of dollars collected for beneficiaries were not distributed to them as the plaintiffs claim.” (Letter to House Resources Committee Chairman Pombo, from Associate Deputy Secretary Jim Cason and Special Trustee for American Indians Ross Swimmer, March 22, 2006.).

monetary relief awarded by a district court. The Cobell settlement then became a legislative resolution to the lawsuit, rather than a judicial one. Because the court had removed the prospect of any money awards, the settlement had to be ratified and funded by Congress. It was authorized and funded under Title I of the Claims Resolution Act of 2010.³⁰

The LBBP was formally established through Secretarial Order No. 3325 on December 17, 2012. Applying \$1.9 billion from the Cobell settlement to establish the Trust Land Consolidation Fund (Consolidation Fund). The Consolidation Fund was to be expended within a 10-year period which ended in November 2022. The goal of the program was to work towards resolving the Indian land fractionation problem through voluntary sales from individual interest owners. Purchased interests would be put into trust for the tribe of jurisdiction.³¹

The LBBP began land consolidation purchases in December 2013. At the time of its conclusion in 2022, the program had made purchase offers to 163,763 individuals at a total of 53 locations.³² Not all of these offers were accepted, however \$1.69 billion was paid out to landowners that accepted offers. This increased or created tribal trust ownership in over 51,000 tracts of land with 1,916 of those tracts reaching 100 percent tribal trust ownership.³³ Approximately 3 million equivalent acres of land came under tribal control, in which tribes held a majority of ownership interest in a tract.³⁴ At its conclusion, the program consolidated land at 53 locations and combined ownership interests in a total of 85,068 fractionated tracts.³⁵

While this is progress in reducing fractionation, it is not a solution. DOI’s own final report on the program states: “At the outset of the Program, more than 2.9 million purchasable fractional interests were identified and now there are 2.4 million remaining.”³⁶ DOI also acknowledged that without sustained purchasing efforts, the growth of fractionation is predicted to exceed pre-LBBP levels in just 15 years.³⁷

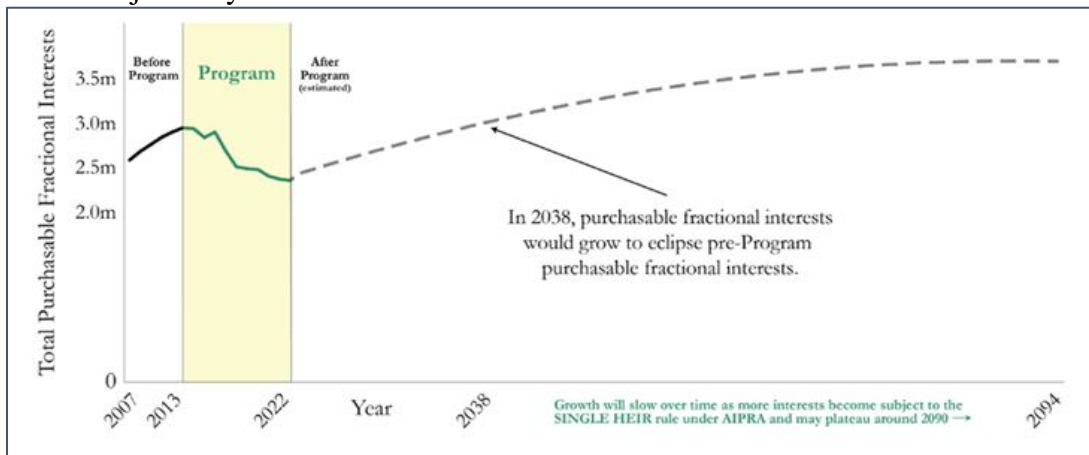


Figure 2: Land Buy-Back Program for Tribal Nations Report, Dec. 2023. Source: DOI

³⁰ P.L. 111-291.

³¹ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023, p.1 <https://www.doi.gov/sites/default/files/doi-lbb.pdf>.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id. at 2.

³⁶ Id.

³⁷ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023, p. 2 <https://www.doi.gov/sites/default/files/doi-lbb.pdf>.

DOI has highlighted the systems created for the LBBP that could continue to be used for future land consolidation efforts and land use decisions. The outreach efforts done by DOI and partner organizations, including the Indian Land Tenure Foundation (ILTF), to implement the LBBP laid groundwork for any future outreach and increased knowledge capacity within tribal communities.³⁸ GIS maps of allotted and reservation lands and data associated with those parcels were used throughout the program and put into a useable and accessible database. That database continues to be accessible to both DOI and tribes as they work through land use priorities and further plans for land consolidation. DOI also used a mass appraisal system to determine fair market value for owners of fractional interests, working with the Appraisal Foundation to ensure the appraisal methods were viable and credible.³⁹ While these mass appraisals are currently only able to be used for voluntary fractional interest purchases, there is a possibility that a similar method could be applied to probate land appraisals, to streamline those processes.⁴⁰

Concerns about the Land Buy Back Program

Throughout the existence of the LBBP, several criticisms emerged that are worth considering to inform the development of future land consolidation efforts or programs.

First, the large amount of money expended led to a minimal reduction of outstanding fractionated interests throughout Indian country.⁴¹ The DOI consistently stated that the \$1.9 billion set aside for the LBBP would not be sufficient to resolve Indian land fractionation. In 2009, former Deputy Secretary David J. Hayes testified before the Senate Committee on Indian Affairs that to “truly resolve this entire problem, we estimate it would cost \$6 billion to \$8 billion” and then continued, “we think that \$2 billion has the potential to clear out as much as 80 percent of the number of interests overall held.”⁴² The final numbers show that to be an over estimation. In the Land Buy Back Program’s 2016 Status Report, former Secretary Sally Jewel wrote that, “When the Program fully utilizes all available funding, which we expect to occur by the statutory date of 2022, the value of the remaining fractionated land will likely still be several billion dollars.”⁴³ In 2017, then former Acting Deputy Secretary James Cason testified that DOI had made “relatively little progress” in resolving fractionation and stated that in 2016 the LBBP had estimated that the estimated costs of remaining fractional interests would be more than \$20 billion.⁴⁴ Future land consolidation efforts centering on a voluntary purchase model should be realistic about the needed resources and what is feasible to spend given the United States’s fiscal picture. Given the scope of the issue, it is unlikely that even significant funding increases to the Bureau of Indian Affairs’s (BIA) Indian Land Consolidation Program would meaningfully reduce fractionation without also considering policy changes to the program.

³⁸ Id. at 12-13 and DOI Briefing of IIA Staff, Jan. 11, 2024.

³⁹ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023. p. 13 <https://www.doi.gov/sites/default/files/doi-lbb.pdf>.

⁴⁰ DOI Briefing of IIA Staff, Jan. 11, 2024; and Id. at 12-13.

⁴¹ DOI. Land Buy-Back Program for Tribal Nations. Dec. 2023. P.50. <https://www.doi.gov/sites/default/files/doi-lbb.pdf>.

⁴² Hearing before the Senate Committee on Indian Affairs, S. Hrg. 111-550, Dec. 17, 2009. <https://www.govinfo.gov/content/pkg/CHRG-111shrg57482/html/CHRG-111shrg57482.htm>.

⁴³ DOI. Land Buy Back Program for Tribal Nations. 2016 Status Report. https://www.doi.gov/sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf.

⁴⁴ Statement of James Cason before the United States House Subcommittee on Indian, Insular, and Alaska Native Affairs. May 2017. https://naturalresources.house.gov/uploadedfiles/testimony_cason.pdf.

Second, the LBBP lacked a mechanism for revolving funds that could create sustainable funding for land consolidation efforts. ILCA provided that when a fractionated tract is sold to DOI, the Department immediately transfers title from the individuals to the tribe (in trust) in whose reservation the tract is located, and that a lien is placed on the tract. The lien is paid off as revenues from development of the land occurs, enabling the Department to utilize the moneys as a revolving fund for additional purchases.⁴⁵ In 2014, DOI declared that the lien requirement of ILCA does not apply to the land buy-back program.⁴⁶ The Obama administration also further returned lien proceeds to tribes in 2016 after the ILCA land acquisition program stopped operating.⁴⁷

Third, the program was criticized for the relatively short amount of time for the program to stand up, do outreach, send offers, and conduct sales. While 10 years may seem like a long time for a program to operate, the fractionation of Indian lands began in 1887 with allotment and has occurred over several successive generations. 137 years of fractionation is unlikely to be completely solved within a 10-year program window. Policy makers should conduct long-term planning to provide solutions and programs that will reduce fractionation.

Finally, there have been specific criticisms of certain consolidations that may have not been the best use of funds, given the goals of the LBBP. In the early years of LBBP, the program pursued opportunities to include less fractionated locations in early implementation efforts, when funds could possibly have been leveraged better elsewhere.⁴⁸ Further land consolidation efforts should be clear on how lands and interests should be prioritized from the outset.

Potential Solutions for Land Consolidation

Any solutions for reducing land fractionation and encouraging land consolidation within Indian reservations should seek to prevent further fractionation of interests in land, encourage consolidation where necessary or desired, and incentivize informed land management.

The ILCA and the AIPRA provided several reforms to help further prevent fractionation, however, there are areas where procedures should be revisited and possibly amended to make them more accessible to tribes and individual Indian owners seeking to consolidate land that they already have an interest in.

First, returning to ILCA's land acquisition program and explicitly prioritizing land acquisitions that are being consolidated for the purpose of economic development within a set timeline will ensure that liens placed on acquired interests in lands would be repaid more quickly and set up a

⁴⁵25 U.S.C. 2213.

⁴⁶ See Frequently Asked Questions – Land Buy Back Program for Tribal Nations. Updated Sept. 27, 2021. https://www.doi.gov/sites/doi.gov/files/frequently-asked-questions-land-buy-back-program-for-tribal-nations-u.s.-department-of-the-interior_1.pdf.

⁴⁷ DOI Press Release, Nov. 17, 2016. <https://www.bia.gov/as-ia/opa/online-press-release/interior-department-officials-remove-liens-tribal-lands-returning>.

⁴⁸ For example, LBBP expended \$1,635,169 for two offers for two individuals for interests totaling three (3) acres for a tribe in southern California. Compare that with numbers from a similar expenditure of \$1,593,155 of offers extended to 655 individuals on the Squaxin Island Reservation, though only 208 individuals (46 percent) accepted the offers. https://web.archive.org/web/20170910205659/https://www.doi.gov/sites/doi.gov/files/uploads/table_lbbtn_transactions_through_may_12_2017.pdf.

revolving fund for further land consolidation. Under the current statutory process, DOI must implement ILCA's land acquisition program according to stated policy of generally preventing fractionation and promoting tribal self-determination.⁴⁹ DOI may give priority to smaller fractional interests that would have escheated to a tribe prior to the U.S. Supreme Court invalidating that provision.⁵⁰ Changing the program to also target lands that have a high economic value for a tribe could bolster the lien process and create some sustainability in funding outside of the appropriations process.

Second, continuing to expand access to estate planning for tribes and Indian landowners can reduce the complexity of Indian estates that go through the probate process, improving the speed of settling estates. The Indian Land Tenure Foundation (ILTF) has provided more than 3,500 landowners with direct legal service and will writing assistance and has also trained more than 7,500 people through estate planning programs.⁵¹ Other programs also exist to equip law students and serve the estate planning needs of tribal communities. The Oklahoma City University School of Law has an American Indian Wills Clinic, which offers will and estate planning services from law students.⁵² The Sturm College of Law in Colorado offers a practical experience for law students known as the Tribal Wills Project, where students can spend a week traveling to various tribal reservations to provide wills, living wills, etc. to tribal members.⁵³ Congress could direct DOI agencies to explore partnering with these types of programs to increase accessibility and capacity while also building the knowledge base among estate planning practitioners, tribes, and individual Indians.

Congress could also revisit the incomplete pilot project included in AIPRA for the creation of legal entities and facilitate in managing of interests in trust or restricted lands or funds owned by Indian family members and relatives.⁵⁴ Placing interests in private or family trusts, partnerships, corporations, or other organizations, as would be allowed under DOI regulations, would prevent further fractionation of interests, but could still allow all heirs to benefit from monetary proceeds from fractionated interests. A report to Congress was to be required on the completion of this pilot program,⁵⁵ but no such report was transmitted to Congress.

Congress should continue oversight of DOI to ensure that outreach on current land consolidation opportunities and estate planning options continue; that data collected and maps created by DOI for the purposes of trust administration of land are consistently available to tribes and individual Indian landowners making land consolidation and land use decisions; and that available avenues for co-owners and tribes to consolidate fractionated interests through purchase are effective and easily accessible.

⁴⁹ 25 U.S.C. 2212(b)(1) and 25 U.S.C. 2201 note.

⁵⁰ 25 U.S.C. 2212(b)(2).

⁵¹ Indian Land Tenure Foundation. Estate Planning. <https://iltf.org/special-initiatives/estate-planning/>

⁵² Oklahoma City University School of Law. Clinics. American Indian Wills Clinic.

<https://law.okcu.edu/academics/curriculum/experiential-learning/clinics/>

⁵³ Sturm College of Law. Practical Experience. Tribal Wills Project. <https://www.law.du.edu/academics/practical-experience/clinical-programs/tribal-wills-project>.

⁵⁴ 25 U.S.C. 2206(l).

⁵⁵ 25 U.S.C. 2205(l)(4).