2 Context and Complexity of the Indian Trust

This chapter provides background, history, and current realities of the Indian Trust, with the objective of describing the unique challenges and complexities faced by the Department in managing the Trust.

2.1 Magnitude of the Indian Trust

The Department of the Interior has responsibility for what is perhaps the largest land trust in the world. The Indian Trust encompasses approximately 56 million acres of land – Over ten million acres belonging to individual Indians and nearly 45 million acres owned by the Indian Tribes. A 1997 DOI Report indicates that 44.3 million of the 56 million acres of land in the Trust are under lease, with the remainder reserved for other use, not of commercial value or otherwise not in production. On these lands the Department manages over 100,000 leases for individual Indians and Tribes. Leasing use permits, and sales revenues of approximately $300 million per year are collected and distributed to approximately 236,000 Individual Indian Money (IIM) accounts, and about $800 million per year is distributed to the 1,400 Tribal accounts.[1] Approximately $3 billion is retained in Indian Trust accounts, with about $348 million in individual accounts and the remainder in Tribal accounts.[2]

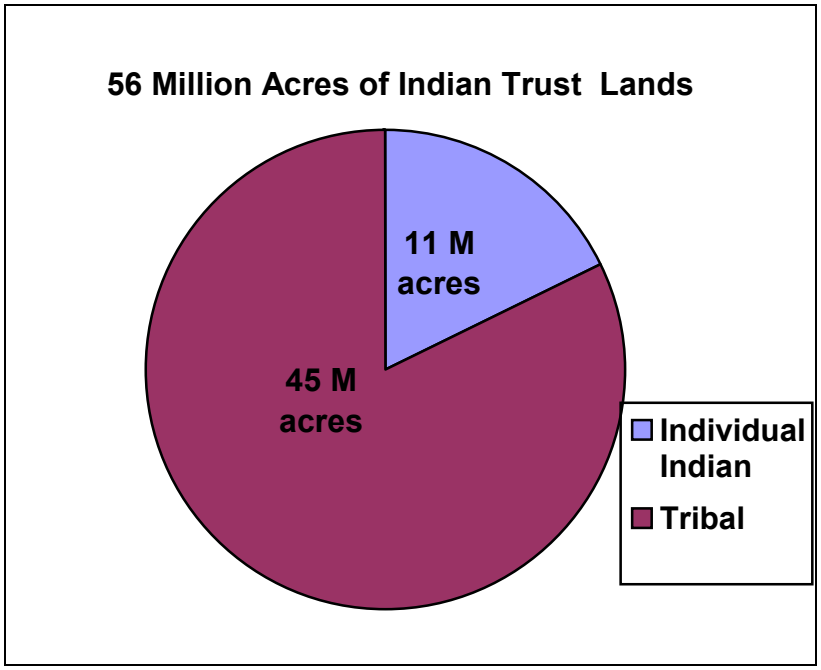

Figure 2.1- 1 The Indian Trust

[1] Secretary Norton, February 25, 2002.
[2] Office of Trust Funds Management, Brochure, May 2000, http://www.ost.doi.gov/OTFM%20brochure.htm. Also, Office of Historical Accounting, *Report to Congress on the Historical Accounting of Individual Indian Money Accounts*, July 2, 2002.

Income for individual and Tribal Trust accounts is produced through the leasing, permitting, sale or conveyance of Trust assets and compensation received from rights-of-ways over Trust lands and proceeds from other processes such as timber sale contracts. The following diagram illustrates the type of income generated for IIM accounts.

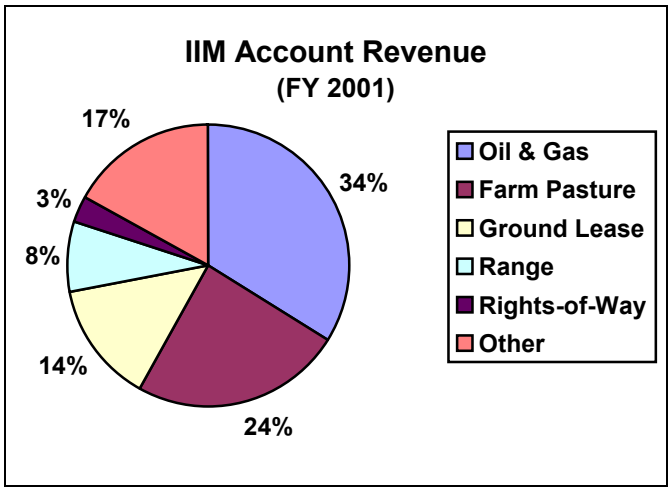

Figure 2.1- 2 IIM Account Revenue

2.2 Treaties and Reservations

Over 450 treaties were signed between the federal government and the Tribes since the settlement of the United States. Ratified treaties are equal in power to federal statute and therefore supersede state law. For the most part, these treaties represent negotiations and agreements between the United States and Indian Tribes on land settlement and use. In many cases, Indian Tribes ceded vast acreages of land in exchange for protection by the United States government for their people. Often the Treaties are referred to as "contracts among nations" and "the supreme law of the land." The federal government's Trust responsibility includes protecting these treaty rights and obligations. According to former DOI Solicitor Krulitz, "No comparable duty is owed to other United States citizens."[3] These Tribes typically are referred to as "Treaty Tribes".

As part of the treaty negotiations up until 1871, Tribes frequently reserved the right to use ceded lands and natural resources. Reserved rights are still in effect today and include hunting, fishing, gathering (of plant life such as wild rice, berries, bark etc.), and grazing. There are approximately 60 Tribes with "off reservation" reserved rights, including 43 Tribes with court-affirmed "off-reservation" reserved rights.

Reservations established after 1871, were created by executive order and statutes, rather than treaty, and usually do not have reserved rights. As with the reservations based upon treaties, these reservations are lands owned by a Tribe and held in Trust by the United States government.

[3] Letter from DOI Solicitor Leo Krulitz to Honorable James W. Moorman (Assistant Attorney General, Department of Justice), October 20, 1978.

2.3 Allotments

Through the General Allotment Act, also called the Dawes Act, large portions of Indian Tribal lands were distributed, or allotted, to individual Indians who each received 40 to 160 acres of land. The premise behind the Dawes Act was to move away from Tribal land ownership to individual land ownership.

After Indians received their allotments, non-Indian homesteaders received 90 to 100 million acres of "surplus" Tribal lands that were distributed through the Homestead Act, sold by the federal government, or incorporated into national parks or forests.[4] Individual Indians were to manage their own lands and become farmers, ranchers, etc. The lands were eventually put into Trust for individual Indians, and the U.S. government assumed responsibility for managing grazing, timber, commercial leases, removal of resources such as oil and gas, and other such income producing activities on these lands.

DOI became the trustee of these lands, and was charged with making sure Indian owners received royalties for the use of their land. Proceeds from land transactions are held in Trust for individual Indians and Tribes, and the Indian Trust is managed by DOI. Initially the Trust was to expire in 25 years, but was extended indefinitely due to continued threats to these lands. Management of the Indian Trust proved to be a massive and complex undertaking. The General Accounting Office noted difficulties with the Trust as early as 1928. Continuing difficulties in managing the increasing complexities of the Trust are evidenced by the need for the 1994 American Indian Trust Fund Management Reform Act, and by issues raised in the recent Cobell litigation.

2.4 Tribal Governments

There are more than 560 federally recognized Tribes who have a unique political and legal status within the United States. The relationship between the federal government and these Indian Tribes is characterized as Government-to-Government. As "domestic, dependent nations", Indian Tribes exercise inherent sovereign powers over their members and territory. However, Tribes cannot sell Trust land without the permission of the federal government, and cannot make treaties or agreements with other nations. While they are "domestic, dependent nations," Tribal governments possess the following attributes of sovereignty:

a) "The power to establish a form of government

b) The power to determine membership

c) The power to legislate or otherwise adopt substantive civil and criminal laws

d) The power to administer justice

e) The power to exclude persons from the territory or reservation

f) The power to charter business organizations

g) The power to sovereign immunity"[5]

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[4] The State of Native America: Genocide, Colonization, and Resistance, edited by M. Annette Jaimes, South End Press, Cambridge, MA 1992, p. 13-21.

[5] Forest Service National Resource Guide to American Indian and Alaska Native Relations, April 1997, http://www.fs.fed.us/people/tribal/.

As part of the Government-to-Government relationship, federal agencies are required to consult with Indian Tribes prior to developing or establishing policies that "have Tribal implications." Recent executive orders in 1998 and 2000 reaffirm the Government-to-Government relationship and describe the coordination and consultation process.

Some federally recognized Tribes undertake "compacts" and "contracts" with the federal government to self-manage some of the services provided to Indian Tribes by DOI and Indian Health Services. The Indian Self-Determination and Education Assistance Act of 1975, as amended, formalized the U.S. government's policy to promote self-determination and self-governance of Indian Tribes. Through this act and later amendments to it, Tribes can individually determine whether to manage a service internally or continue to receive the service from DOI or Indian Health Services. A complexity of self-determination is that while Indian Tribes are required to meet the same statutes as DOI, Tribes are not required to follow internal DOI policies and procedures for managing Trust assets unless otherwise negotiated. In some cases this results in very different land and asset management practices.

2.5 Statutory Requirements

The Indian Trust is bounded by a multitude of unique laws, original treaties, Supreme Court cases, executive orders, and other legal documents and decisions dating as far back as the 18th century. There are so many agreements and decisions guiding Indian affairs that many federal agencies have developed independent guides, policies, manuals, and training curricula for their staffs to understand how these legal doctrines apply to them. For example, the Forest Service has a guide titled, "Forest Service National Resource Guide to American Indian and Alaska Native Relations," and the Department of Energy has one titled "American Indian and Alaska Native: Tribal Government Policy." A sampling of some of the major statutory requirements affecting the Trust include:

a) The Homestead Act of 1862 – Two hundred seventy million acres of land was claimed and settled by mid-west and western homesteaders

b) General Allotment Act of 1887 (Dawes Act) – Allotted individual Indians land parcels of 40 to 160 acres, as Indians were encouraged to own land privately rather than through Tribal ownership

c) Indian Reorganization Act of 1934 – Ended allotments and allowed Tribes to reorganize, encouraging self-government

d) The Indian Claims Commission Act of 1946 (ch. 959, 60 Stat. 1049), as amended - Established the Indian Claims Commission. The Indian Claims Commission allowed Tribes to bring suit against the United States for land claims prior to 1946. Tribes would be forever barred from filing further claims. The Commission terminated on September 30, 1978.

e) The Civil and Criminal Jurisdiction Act of 1953 (Public Law 83-280) – Provided an option for transferring civil and criminal jurisdiction over Indians and their lands to the States

f) Indian Civil Rights Act of 1968 – Made Tribal governments a part of the U.S. federal system

g) Indian Self-Determination and Education Assistance Act of 1975, as amended – Tribes encouraged to assume responsibility for programs administered by DOI or Indian Health Services

h) Indian Land Consolidation Act of 1983, amended in 1991 and 2000 – Authorized buying, selling and trading of fractional land interests and established set aside funding for Land Consolidation Pilot Projects

i) American Indian Trust Fund Management Reform Act of 1994 – Created the Office of the Special Trustee to bring about more effective management of the government's Trust responsibilities with respect to Indian Trust assets.

2.6 Land Ownership Patterns

2.6.1 Fractionation

Since the Dawes Act of 1887, ownership of original Trust lands has become increasingly complex and fractionated. Lands allotted to individual Indians have been passed from generation to generation, just as any other family asset passes to heirs. Probate proceedings commonly dictated that land interests be divided equally among every eligible heir unless otherwise stated in a will. As wills were and are not commonly used by Indians, the size of land interests continually diminished as they were passed from one heir to the next. A land parcel of 160 acres once owned by a single Indian head of household may now have more than 100 owners. While the parcel of land has not changed in size, each individual beneficiary has an undivided fractional interest in the 160 acres. Individual Indians may have land interests that are less than .000002 of the whole.[6] As their interest in the land parcel is shared, no individual or Tribal beneficiary owns a specific section of the parcel – together, they all own the entire parcel. The 160 acres remain "undivided," meaning that the size and description of the land has not changed; however, instead of one owner of the land interest, there are now 100. According to Secretary Norton,

> *There are about 1.4 million fractional interests of two percent or less involving 58,000 tracts of individually owned Trust and restricted lands. Currently, Interior is bound by its Trust obligations to account for each owner's interest, regardless of size. Though these accounts might generate less than one cent in revenue each year, each is being managed, without assessment of any management fees, with the same diligence that applies to all accounts.*[7]

The following figures illustrate the extent of fractionation within the Indian Trust. Over half of all IIM accounts for allotted lands with an income value have balances of less than $15 each, with 18,605 accounts holding a balance of $1.00 or less.[8] According to former Assistant Secretary for Indian Affairs, Kevin Gover, BIA administers fractional interests of two percent or less at a cost of 50 – 75 percent of the realty budget. In 1999 this equated to $33 million.[9]

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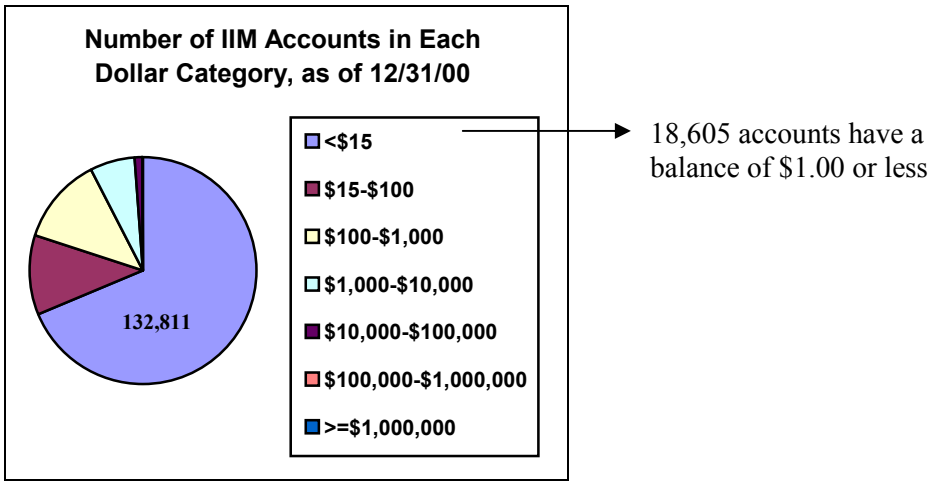
[6] Secretary Norton, 2/25/02
[7] Secretary Norton, 2/25/02
[8] Report to Congress on the Historical Accounting of Individual Indian Money Accounts, DOI, July 2, 2002.
[9] Statement of Kevin Gover, Assistant Secretary for Indian Affairs, Department of the Interior, before the Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on S.1586, the "Indian Land Consolidation Act of 1999," November 4, 1999.



Source: Report to Congress on the Historical Accounting of Individual Indian Money Accounts, DOI, July 2, 2002.

Figure 2.6- 1 Size of IIM Accounts

As of December 31, 2000, the total balance of these small dollar accounts (less than $15) was only $77,624.

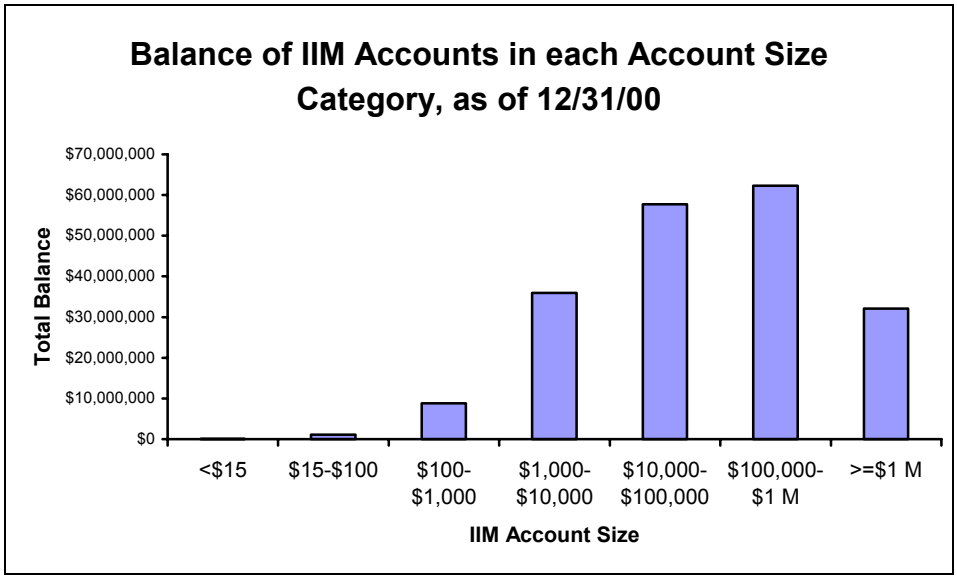


Figure 2.6- 2 Value of IIM Accounts

An example of land fractionation is the Sisseton-Wahpeton Lake Traverse Reservation of North and South Dakota. At one point land tract 1305 consisted of 40 acres of land, produced $1,080 in income monthly, and had an appraised value of $8,000. The land tract had 439 owners, one-third of whom received less than $.05 in annual rent, and two-thirds received less than $1. The largest interest holder received $82.82 annually and the smallest heir would receive $.01 every 177

years. Because of the large number of owners, the annual administrative costs amounted to approximately $17,560.[10]

Individual ownership proportions have in many cases become so diminished from their original allotment size that many Indians consider their interests worthless. Fractionation is costly, not to mention frustrating, for DOI, which has the responsibility to manage this tremendously complex situation. For example, fractionation increases the number of "whereabouts unknown" individuals adding to the complexity of delivering Trust services and increasing the time, money and effort spent to locate beneficiaries with small interests.

The Department has made efforts to reduce fractionation, primarily through the Indian Land Consolidation Act (ILCA) of 1983. ILCA introduced buying, selling, and trading of fractional land interests, but more controversially, began the practice of transferring land interests of less than 2% to the Tribes when a member died. This was later found to be unconstitutional; ILCA was amended in November of 2000. DOI and Tribes continue to buy fractional interests to consolidate title ownership. Land consolidation efforts still present a considerable cost and DOI and Tribes are unable to keep up with the growing number of interests.

2.6.2 Checkerboarding

Not only have original allotments fractionated, but in many cases the ownership patterns within contiguous areas have become very complex over time. As a result of the Dawes and Homestead Acts and subsequent actions, large masses of Tribal land were dispersed and significant numbers of individually owned parcels transferred to other owners. The result is a mixed land ownership pattern among individual Indians, Tribes, local government, state government, federal government, non-Indian citizens, and commercial businesses, commonly referred to as checkerboarding. Checkerboarding occurs both on-reservation and off-reservation. The White Earth Reservation in Minnesota and the Agua Caliente Indian Reservation in Palm Springs are examples of on-reservation checkboarding, whereas areas within the upper Great Plains Region and eastern Navajo Region near reservations are examples of off-reservation checkerboarding.

The northwest corner of New Mexico is an illustration of the checkerboarding around reservations, as shown in figure 2.6. Ownership of land in this region alternates among the Bureau of Land Management, Bureau of Reclamation, Department of Defense, Postal Service, Tribes, National Park Service, private owners, and the State of New Mexico.

[10] M. Lawson, Heirship: The Indian Amoeba, 1982.

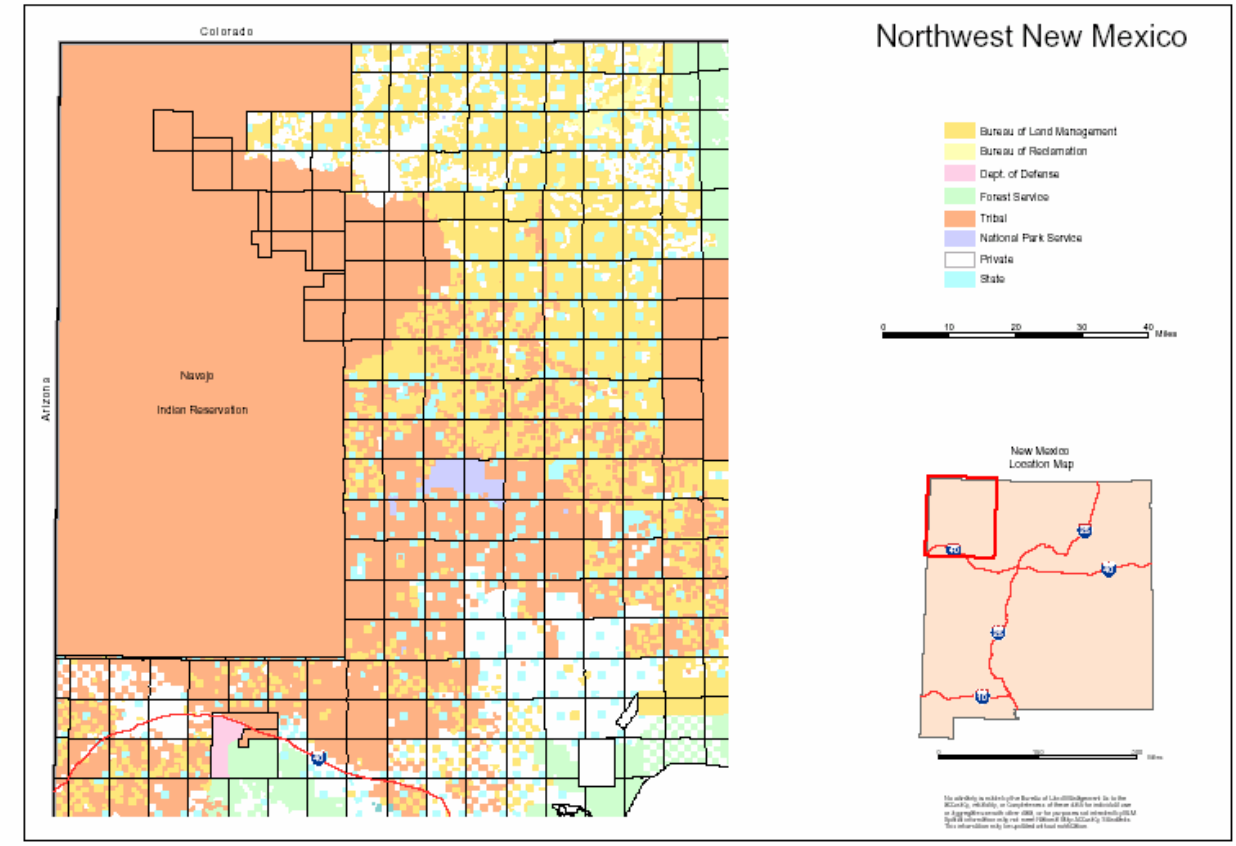


Figure 2.6- 3 Checkerboarding in New Mexico

The checkerboard land ownership pattern adds to the complexity of managing the Indian Trust, and also has a detrimental affect on the economic value of the land. Some of the difficulties in owning and managing the land are described below:

a) Often lands making up the checkerboard are too small or inaccessible to be useful for producing income. Instead, cooperation of neighboring owners and multi-tract land use planning is required.

b) As described above, to lease (or sell) a meaningful piece of property, several owners must be consulted. This is time-consuming, and the owners do not always agree on how the land should be used. For example, most real estate transactions require a simple majority of the locatable interest owners. This means that the lessor (often the BIA Realty Officer) must locate and obtain consent from many interest owners (beneficiaries). Locating the owners can be difficult, as there are approximately 61,000 *whereabouts unknown* account holders in the Trust.[11] An attempt must be made to contact all of the trust interest owners and at least 50.1 percent of the interests must agree on the use of the property. If one trust interest owner owns 60 percent interest in the property, that owner

[11] Office of Historical Accounting, *Report to Congress on the Historical Accounting of Individual Indian Money Accounts*, July 2, 2002.

may provide majority consent. As a result of these regulations, some potential customers view leasing Trust lands as cumbersome, thus lowering the competitive value of the land.

c) Obtaining Rights-of-Way (access) to Trust or fee lands (privately owned) can also be a time consuming issue. Fee lands can be intermixed with Trust lands in a checkerboarded geographic area. In order to use or access the land, it is necessary to cross fee lands to simply set foot on the Trust land. It is often difficult to obtain access to these "land locked" Trust parcels. This also can be the case in the reverse, where fee landowners must cross Trust lands to access their land. In either case, a permit must be granted to obtain "Rights-of-Way." As a result, multiple permits must be obtained, and trespassing and theft or misuse of trust property is often an issue. BIA has limited enforcement capability to prevent trespassing on Trust lands, and instead, relies on sister agencies such as the Department of Justice, to litigate Rights-of-Way issues.

d) As different federal, state, local, and Tribal governments can have responsibility for land intermixed with Trust lands, large scale land use planning is difficult to nearly impossible in a checkerboarded area. As a result, land and its natural resources cannot be put to the maximum benefit of its beneficiaries or citizens.

e) Due to jurisdictional issues, different codes and regulations apply to different landowners.[12] These different codes and regulations create obstacles to regulating pollution and protecting animal habitats.[13]

f) Increased miles of adjoining boundaries and number of monuments to maintain to protect trust assets and prevent unauthorized uses.

2.7 Cultural and Spiritual Values and Traditions

2.7.1 Relationship to the Land and Sacred Sites

American Indian and Alaska Native cultures have a special relationship with the land and natural resources of the United States. In addition to representing self-sufficiency, land has many cultural, spiritual, and religious overtones to its indigenous people.

As part of this special relationship with the land, Indian cultures hold certain geographical locations as sacred. These sacred sites are viewed as places of power, and embody many of the values, beliefs, spirits, and ceremonies of American Indian and Alaska Native people. Sacred sites take many forms, including mountains, rivers, forests, canyons, mineral deposits, rock formations, and ancestral burial grounds.[14] Executive Order 13007 defines a sacred site as, "any specific, discrete, narrowly delineated location on Federal land, identified by an Indian Tribe or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion, provided that the Tribe or individual has informed the agency of the existence of such a site."

Sacred sites pose many challenges to the management of Trust and non-Trust lands. Often these places of power are located in areas where land development projects are planned or underway.

[12] J. Wabindato, BIA Land Consolidation Project
[13] J. Wabindator, BIA Land Consolidation Project
[14] Taliman, Valerie, "Places of Power," http://www.sacredland.org/powerplaces.html.

Oil drilling, mining, water damming, or other projects have already destroyed many sites. One author compared what is happening to sacred sites to putting an oil rig through the Sistine Chapel.[15] DOI's charge to obtain the "highest and best use" for Trust lands can conflict with the sacred value of some lands. Another challenge in managing sacred sites is that spiritual presence in these locations, according to Native American and Alaska Native cultural leaders, can only exist if the natural setting remains undisturbed. Proclaimed in 1996, Executive Order 13007 is an attempt by the federal government to preserve Indian access rights to sacred sites as well as to protect the sites from destruction. Some Indian Tribes have treaty rights reserving their access to sacred sites, but others do not.

Another issue complicating the management of sacred sites is the confidential nature of the sites. Tribes are required to submit proof to the government as to the importance and sacred nature of the locations. However, many Indian Tribes do not want the location of sacred sites made public, because the identification of these sites often leads to unwanted visitation and vandalism. To protect sacred sites, the federal government needs them to be identified. Executive Order 13007 states, "Where appropriate, agencies shall maintain the confidentiality of sacred sites." As this issue is still being addressed, Secretary Norton has recently established a task force to oversee management of public lands that Indians use for ceremonial and religious purposes.

2.7.2 Heirship

Contributing to fractionation is the fact that the majority of Indians die without a will (intestate). When this occurs, probate codes usually direct any land interests to be divided among eligible heirs. The absence of wills in the Indian community is due to cultural practices. Because of these cultural practices, developing a will or passing along one's belongings after death is not common practice.

The more material assets an individual has, the more likely they are to have a will. As many individual owners do not have significant Trust assets, the preparation of a will serves no purpose to them. Not only does this add to the continual fractionation of Indian lands, it elongates the probate process and contributes to probate backlogs. For Indians with interests spanning across multiple states and reservations, administrative law judges must keep up with the probate codes and regulations of multiple states and Tribes, which, if there is no will, are more complex regardless of the location(s).

[15] Indian Country Today, April 2002.