

Keeping the American Indian Rancher on the Land: A Socio-Legal Analysis of the Rise and the Demise of American Indian Ranching on the Northern Great Plains

Raymond Cross

I. INTRODUCTION

A. Understanding the Distinctive Socio-Legal Character of “Indian Ranching”

Indian ranching arose on the northern Great Plains,¹ in the late nineteenth century, due to two seemingly unrelated factors that later combined to make possible its establishment in that region of Indian Country. The first factor, bio-social in character, was the early European settlers’ introduction into North America of two exotic beasts, the horse and the cow, in the early seventeenth century. The second factor, socio-legal in character, was the federal government’s overbearing “Indian civilizing” policy, during the Indian allotment era of the late nineteenth century, which required the Indian peoples of the northern Great Plains to adapt quickly to a settled and sedentary agriculturally-based way of life. These Indian peoples were expected to use their federally assigned, small individual land parcels—known as Indian allotments—as the basis for commencing their new farming-based way of life.²

* Professor of Law, University of Montana School of Law.

1. Historian Walter Webb defines the Great Plains to include:

[T]he region west of the Mississippi River, the region under consideration here, these three characteristics of a plains environment are not coextensive or coterminous. The three are not found in conjunction except in a portion of what is commonly called the Central Great Plains; that is, in the High Plains, or the Plains proper. In the High Plains the land is relatively level and unscoured, it is barren of timber, and the climate is sub-humid, semi-arid, or arid. The High Plains constitute the heart of what may be called the Great Plains, and exemplify to the highest degree the features of plane surface, a treeless region, and a sub-humid one.

WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 4 (1936).

2. Professor Peter Iverson describes the impact of Indian allotment on the northern Great Plains as follows:

Thus, allotment occurred in the northern Plains more fully than in any other location. Yet even there the reduction of the Indian estate proved incomplete. Even if they held land in divided form, tribal members still controlled significant acreages. Nonetheless, the allotment put individual Indians in an untenable position. They did not have enough land to farm or raise livestock in a manner that permitted self-sufficiency. Inheritance only complicated an already unhealthy scenario. Denying the virtue of primogeniture, Native fami-

But Indian ranching—not subsistence-level farming—ultimately triumphed as the federally sponsored means whereby some measure of civilization could be imposed on the Indian peoples of that region. This Article evaluates the phenomenon of Indian ranching from its rise in the late nineteenth century to its potential demise in the early years of the twenty-first century. Many intertwined factors—political, economic, cultural, ecological, and spiritual—account for Indian ranching’s rise, as well as its impending demise.

My overarching thesis is that Indian ranching could well have become the Indian-civilizing strategy that helped bridge the vast socio-economic gulf that existed, and still exists, between the Indian and non-Indian peoples of the northern Great Plains. Its impending demise is the direct result of significant policy-based mistakes made by the relevant decision makers—both Indian and non-Indian—at critical decisional junctures in the mid-to-late twentieth century. Its impending demise is also the indirect result of those inherent and long-standing cultural and social differences between Indian and non-Indian ranching societies on the northern Great Plains. However, and surprisingly perhaps, I conclude that its impending demise can today be avoided if the federal government and the Indian leadership could work together in crafting an effective legislatively driven settlement of two major pending Indian lawsuits.³ Such a settlement, designed perhaps with some of the ameliorative elements I will later suggest, could go some distance toward restoring Indian ranching to economic and social viability on the northern Great Plains.⁴

B. Analysis of the Socio-Legal Factors That Have Influenced American Indian Ranching

Some commentators have regarded Indian ranching as just another failed Indian assimilation initiative undertaken by the federal government in the late nineteenth century. My first goal is to challenge directly the notion that Indian ranching was a fundamentally flawed and failed Indian-civilizing initiative that should now be abandoned. My second goal is to argue that Indian ranching was, and is, likely the only way that Indian people can derive direct and significant economic and cultural benefits from the use of their lands on the northern Great

lies tended to divide meager portions into still smaller, even less adequate ones. Such division discouraged the very agrarian initiative the idealist who supported the Dawes Act had hoped to foster.

PETER IVERSON, WHEN INDIANS BECAME COWBOYS: NATIVE PEOPLES AND CATTLE RANCHING IN THE AMERICAN WEST 30-31 (1994).

3. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); see also *Keepseagle v. Venneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001).

4. See *infra* Part II.E.2 (The Major Elements of My Proposal).

Plains. I further argue that those same socio-legal factors that justified the rise of Indian ranching in the late nineteenth century also justify its legislative restoration in the early twenty-first century. These socio-legal factors are political, environmental, and socio-cultural.

1. The Political Factor

Indian ranching, according to some commentators, was the by-product of the federal government's effort, during the Indian allotment era, to transform the ostensibly nomadic Indian peoples of the northern Great Plains into subsistence-level farmers on their federally assigned small land parcels, known as Indian allotments.⁵ From this perspective, the Indian people had little say in whether they would become either ranchers or farmers; instead, that outcome would be determined by which civilizing option was chosen for them by the relevant federal authorities. These commentators contend that Indian ranching became the dominant Indian-civilizing strategy on the northern Great Plains because the local Indian agents—based on their personal experience with, and knowledge of, the climate and terrain of the northern Great Plains—concluded that it was the only development strategy that could possibly work within this environment.⁶ Furthermore, it was these Indian agents who convinced their bosses in Washington, D.C., that ranching, not farming, was the only assimilative strategy that could be successfully imposed on the Indian peoples within that region of Indian Country.⁷

5. Professor Getches argues that “[w]ell-intentioned reformers [via the allotment process] sought to transform Indians and their cultures according to Jeffersonian values of yeoman husbandry [disregarding the fact that] Indian cultural traditions, experiences, and sentiment were often opposed to a sedentary, individualized lifestyle.” DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *FEDERAL INDIAN LAW* 142 (5th ed. 2005) (alterations added). These reformers, according to Getches, also ignored the fact that the Indians’ “small plots in arid lands were inadequate to provide Indians subsistence.” *Id.*

6. Professor Iverson contends that Indian agents realized early on that the Indians’ lands were generally far better suited to ranching than to agricultural use. Despite the resistance from their bosses in Washington, D.C., Iverson argues that:

Nonetheless . . . government personnel attempted to foster the cattle industry among the Cheyennes and Arapahos on their reservation in the southwestern portion of Indian territory. They did so for the reasons the attempt was made to the north: the land was better suited for ranching than for farming, and the [Indian] men were far more interested in cattle than corn.

IVERSON, *supra* note 2, at 88. However, the judgment of these Indian agents “ran counter to the prevailing wisdom in Washington that preached corn rather than cattle; the agent[s] and the Indians received precious little help in the promotion of ranching.” *Id.* at 89.

7. However, Professor Iverson emphasizes that these federal efforts merely complemented the Indian ranching phenomenon that was already at work on the plains:

Thus, in the early nineteenth century it can be argued convincingly that livestock “did not just enter the lands of the Choctaw; it entered their culture as well and made pastoralists of many who had been hunters.” Beef and cattle entered into ceremonies and special occasions such as the birth of a child. They thus began to matter not only as a means of economic exchange but also as a means to feed one’s family. They began to become an essential, natural, integral part of events. They helped facilitate the gatherings that brought meaning to the rituals that symbolized important life events. In this manner, the Choctaws

This Article, by contrast, contends it was the Indian peoples' active and conscious decision to embrace Indian ranching that made it the right strategy for the development of successful Indian agricultural enterprises on the northern Great Plains. My emphasis on the Indian peoples' choice to embrace Indian ranching, thus, both completes and corrects what had been somewhat incomplete and one-sided accounts that overly emphasized the federal government's role in giving birth to Indian ranching. My account not only explains why Indian ranching came into being, it also explains why it became the dominant and enduring form of agricultural enterprise on the northern Great Plains. In sum, I conclude that Indian ranching arose, endured, and succeeded because it served the joint interests of both the federal government and the affected Indian peoples.⁸

2. The Environmental Factor

My account also downplays the role played by those environmental factors—such as the assuredly harsh and limiting climate and prairie ecology of the northern high plains—that arguably compelled the choice of Indian ranching as the only practicable economic development strategy for this region of Indian Country. Doubtless, the relative aridity of the northern high plains, combined with its meter-thick sod that had broken many a farmer's plow, helped persuade even resolute opponents of Indian ranching that, at least on the northern high plains, it was the only possible Indian-civilizing strategy that could be effectively implemented. However, the past emphasis on these environmental factors mistakes a mere condition, the well-known physical and climatic characteristics of this region, for the cause of Indian ranching's rise on the northern Great Plains. I argue that it was the Indian peoples' active choice to embrace ranching, while giving due consideration to the environmental conditions of the northern high plains, that most fully ex-

anticipated the kind of role that cattle would soon play elsewhere in the West. Again, one sees the significance of cattle in more than economic terms.

Id. at 19.

8. Professor Iverson explains the appeal of ranching to the Indian peoples in this manner: The raising of cattle became at this time an appropriate economic strategy, given the kind of land the Indians possessed and the kind of world in which they had lived. The love of the outdoors, of horses, and of movement all contributed to the positive chord struck by the new industry. But cattle ranching must be understood in a social as well as an economic context. By becoming an owner of a considerable number of cattle, a person could achieve status within the community. Moreover, this individual could use the animals themselves to obtain the kind of reputation generally sought. By giving cattle or beef to one's relatives, by feeding people at a celebration, and in other comparable ways, a person would be seen as generous, thoughtful, and properly mindful of the well-being of others. By becoming or continuing to be a skilled rider, one demonstrated a skill appreciated and noted. By raising cattle of good quality, one showed that Indians could participate on an equal or competitive basis in a pastime that dominated the surrounding non-Indian society.

Id. at 53-54.

plains the phenomenon of Indian ranching.⁹

3. The Socio-Cultural Factor

There is no deep mystery as to why the Indian peoples chose ranching as their preferred means of assimilating, more or less, to a non-Indian way of life. Only Indian ranching offered them the opportunity to retain significant elements of their beloved horse culture that they had earlier embraced with gusto. While it is unlikely that they embraced ranching with equal gusto, they nonetheless realized that ranching, not farming, would allow them to retain the horse as a central fixture of their new way of life.¹⁰

Of course, their well documented bias in favor of ranching, and against farming, did not blind them to those environmental realities that rendered subsistence-level farming impracticable, especially on their relatively small, individually owned allotments. Subsistence-level farming, whether on small land parcels called homesteads or on Indian allotments, was likely doomed to fail given the environmental conditions of the northern high plains. Indeed, there was at least one non-Indian who shared the Indians' view point in this regard—the fabled western adventurer and one-armed veteran of the Civil War, Major John Wesley Powell. He inveighed, as the head of the newly formed United States Geological Survey, against the extension of the homesteading program to those public lands west of the 100th meridian. Like the Indians, he knew that subdividing those western lands into under-sized, subsistence-level land parcels, would soon lead to the ecosystem-wide disruption of the natural systems of this region. He also knew that those who were naive would be homesteaders—who foolishly heeded the western boosters' scientifically unsubstantiated boast that “the rain followed the

9. Historian Webb describes the rise of the nineteenth century “cattle kingdom” as a natural response to the environmental realities of the northern Great Plains:

In this chapter an attempt will be made to show the setting for the cattle kingdom, to explain how it arose naturally out of conditions peculiar to the setting, and, if possible, to make clear that the ways of cattlemen, cowboys, and horses in the Great Plains were as logical both in their existence and in their actions as those of bankers, clerks, and steamboats in another environment.

WEBB, *supra* note 1, at 206-07.

10. Walter Prescott Webb extols the transformative influence of the horse on the Plains Indians culture:

A study of the influence of the horse on the Plains Indians brings us to the threshold of history. Some of the effects may be cited. In general, it is maintained that the horse did not introduce new qualities into Plains culture. The true Plains Indians already possessed the traits that they continued to exhibit. They were nomadic, nonagricultural, warlike people who depended primarily on the buffalo herds for sustenance. What the horse did was to intensify these traits. The Indians of the Plains became more nomadic (that is, they ranged farther), less inclined to agriculture, more warlike, and far better buffalo hunters than they had been before. It was this intensification of the traits they already possessed that became important in the history of the relation of the Indians to the white man. The horse ushered in the golden era of the Plains Indians.

Id. at 58.

plow”—and would harvest only heartbreak on their small, uneconomic homesteads on the northern high plains. But Powell, given his outspoken advocacy against the extension of the homestead policy west of the 100th meridian, provoked congressional ire and was soon removed from office and banished to obscurity.¹¹

C. Why Indian Ranching Succeeded in the Late Nineteenth Century but Faced Impending Failure in the Mid-to-Late Twentieth Century

Both Indian ranching's early success and its impending demise may be explained by analyzing those socio-legal factors mentioned earlier. A more comprehensive and thorough understanding of that complex phenomenon known as Indian ranching may aid today's non-Indian and Indian policy makers to deal better with its potential demise in the early decades of the twenty-first century.

1. The Socio-Economic Explanation of Indian Ranching's Early Success

Indian ranching succeeded because it was the only practicable means whereby the jointly held interests of the federal government and the Indian peoples could be realized. The federal Indian policy makers “bought into” Indian ranching because it was the only means whereby some measure of assimilation would be achieved by the affected Indian peoples. The Indian peoples bought into Indian ranching because it was their only adaptive strategy whereby they could preserve important elements of their fabled horse culture.

Indian ranching in its early days, given the uneasy relationship between the overbearing Indian agents and their sometimes recalcitrant Indian wards, experienced serious “growing pains.” The new would-be Indian ranchers had to learn quickly all those ranching skills—cattle breeding, livestock herding, cattle branding, and livestock marketing—that non-Indian ranchers had acquired incrementally over several generations within nurturing ranching families and family-owned livestock

11. Professor Robert Keiter notes Powell's opposition to the federal government's extension of the Homestead Act, as well as other federal land disposal laws into the semi-arid West:

Congress, using laws like the Homestead Act of 1862, the Desert Lands Act of 1877, and the General Mining Law of 1872, sought to attract prospective settlers and entrepreneurs to the western frontier with the enticement of virtually free land and minerals. The new states followed suit, employing a similar disposal technique to administer the region's scarce water resources. Even without acquiring actual title, the early settlers enjoyed largely unrestricted access to the region's abundant public timber, grass, and wildlife, usually without any charge or oversight. To be sure, the legendary explorer John Wesley Powell and a few other astute observers cautioned early on that the region's unusually dry climate and arid landscape were ill-suited to traditional agricultural practices. But the boosters ignored these warnings and wholeheartedly embraced the disposal policies that had worked so well farther eastward.

ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, & AMERICA'S PUBLIC LANDS 17 (2003).

businesses. Although the Bureau of Indian Affairs (BIA) agricultural-related education and financing initiatives, especially in Indian ranching's early days, fell woefully short of the Indians' needs, Indian ranching, nonetheless, somehow survived and many Indian-ranching families soon became established on the northern Great Plains.¹²

2. The Socio-Economic Explanation of Indian Ranching's Threatened Demise in the Later Twentieth Century

Although Indian ranching overcame virtually all of its initial financial and managerial hurdles that had threatened to derail it in the early twentieth century, it faced new threats and challenges during the mid-to-late twentieth century. But these threats derived primarily from the misguided and short-sighted federal Indian policies of that era. For example, Indian Commissioner John C. Collier's arbitrary judgment, during the "Indian New Deal" era of the 1930s, that Indian ranchers would never be capable of more than subsistence-level ranching, effectively deterred Indian ranchers from seeking to expand and improve their ranching operations. His arbitrary policy judgment left the Indian ranchers ill equipped to compete within those radically changed socio-economic circumstances of the later twentieth century that favored large, commercial-level ranching operations over the Indians' historic subsistence-level ranching operations. Collier's ranching policies meant that Indian ranchers were later unable to take full advantage of these newly devised modern ranching procedures, technologies, financing strategies, and managerial approaches. By contrast, those ranching enterprises, usually non-Indian owned, that successfully transitioned to commercial-level ranching operations were, thus, enabled to acquire more capital, more high-quality land, and more livestock.¹³

12. Professor Hurt, speaking more directly to the federal government's inadequate efforts to transform the Indian peoples into farmers, not ranchers, criticized the government's inadequate efforts to aid the Indians in their transition from so-called nomads to farmers:

In the final analysis, governmental aid and education were inadequate, and not enough time had passed by the late 1880s for the nonagricultural tribes to undergo the cultural change necessary to enable the Indians to become farmers. . . . [T]he federal government was expecting the Indians to become self-sufficient and, ultimately, commercial farmers. Semiarid and arid climates, tough prairie/plains sod, bitter winters, grasshoppers, and other obstacles presented too great a challenge for the Indians who did not have an agricultural tradition. Indian culture could not yet triumph over the environment in regard to modern farming.

R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* 134-35 (1987).

13. Professor Hurt criticizes Congress's failure to fund adequately Collier's ambitious tribal land reacquisition program that he had promised the Indians under his Indian New Deal:

Congress's failure to provide funds for a significant land-acquisition program was a major flaw in the Indian New Deal, and it prevented any possibility of making either subsistence or commercial farmers out of the tribesmen. . . . This failure stemmed largely from the opposition of western congressmen, who resisted the bureau's efforts to purchase the land of white farmers. . . . Nor did Collier pursue the matter of land acquisitions with the diligence needed to solve the problem because of the expense and administrative time re-

3. The Socio-Legal Analysis of the Limits of Judicial “Activism” in Solving the Indian-Ranching Crisis

The fate of Indian ranching today is discussed and debated, not within the BIA or at scholarly conferences called for that purpose, but within the confines of those lawsuits brought by Indian ranchers who allege that the federal government has systemically failed to provide them with the necessary financial and technical assistance to enable them to compete in the new ranching economy of the northern Great Plains. But what today’s Indian ranchers desperately want is an effective financial and managerial platform whereby at least some, but hopefully many, of their ranching operations—configured presently as small-scale, low-capitalized, family-owned and managed enterprises—could be transformed into commercial-sized, efficiently managed business enterprises. Therefore, I propose, what I believe is, a realistic and practicable legislative framework for the settlement of these Indian lawsuits against the federal government. The overall purpose of my proposal will be to muster sufficient land, capital, and managerial skill for the restoration of some, and hopefully many, Indian-ranching enterprises to long-term health and economic viability on the northern Great Plains.¹⁴

II. ANSWERING THE KEY QUESTIONS AS TO HOW INDIAN RANCHING CAN BE RESTORED TO ECONOMIC AND SOCIAL VIABILITY ON THE NORTHERN GREAT PLAINS

My working assumption is that Indian ranching may yet be restored to economic and social viability on the northern Great Plains. For that reason, my Article strives to develop an adequate understanding of this phenomenon: what created it, what sustained it, and why it now faces impending failure. My goal is to explain this phenomenon to today’s federal and Indian policy makers so that they may act in a reasonable and expedient manner to restore Indian ranching to social and economic viability on the northern Great Plains. Several significant questions, if they are adequately answered, may yield some policy-making insights into how this goal may be realistically accomplished in light of past history and experience. These questions are:

1. Why did the Indian peoples of the northern Great Plains so willingly embrace the Indian-ranching way of life and succeed in incorporating those two exotic beasts—the horse and the cow—so seamlessly into their existing societies and economies?
2. Why did the federal government and the Indian peoples seemingly join forces, in the late nineteenth century, to adopt Indian ranching as the al-

quired. As a result, white-owned land continued to checkerboard the reservations. *Id.* at 193.

14. See *infra* Part II.E.2 (The Major Elements of My Proposal).

ternative, but appropriate, Indian-civilizing policy on the northern Great Plains?

3. How, and to what extent, did Indian ranching succeed as a non-Indian acculturating mechanism that altered the traditional values and beliefs of the Mandan, Hidatsa, and Arikara people of the Fort Berthold Indian Reservation?

4. What policy misjudgments—by the federal policy-makers and the Indian peoples—undermined the future of Indian ranching during the “Indian New Deal” era of the 1930s and the so-called “termination” era of the 1950s?

5. What are the conceptual elements of a proposed legislative framework that will adequately settle two pending Indian lawsuits against the federal government and serve to restore Indian ranching to economic and social viability on the northern Great Plains?

A. Answering Question Number One: What Were the Socio-Cultural Rationales for the American Indian Peoples’ Distinctive Attitudes Toward the Horse and the Cow?

The American Indian peoples held fundamentally different attitudes toward both the horse and the cow than those held by their non-Indian livestock-raising counterparts. Furthermore, they held different attitudes toward the horse, on the one hand, and the cow, on the other.

1. The American Indian Peoples’ Attitude Toward the Horse

The Indian peoples, particularly those of the northern Great Plains, viewed that new creature, the horse, from a fundamentally different value-based perspective than did their non-Indian, horse-raising counterparts. This is because the horse came to these Indian peoples, not from the early Spanish settlers of the American Southwest, as is asserted by some non-Indian historians, but from those “holy beings” who have always served to protect and guide their Indian peoples. These holy beings took pity upon their Indian peoples’ longing for this fabulous creature—the horse—and, therefore, brought it into their lives and cultures.¹⁵

15. Professor Iverson tells the lyrical Indian tale of how the horse came to the Navajos:
 The Navajos (Diné) told instead the story of the two boys and coming of the horses. After the boys had learned the necessary ceremonial chants, the White Bead Woman said, “The Diné shall have horses.” She sang:
 From the East comes a big black mare.
 Changed into a maiden.
 She comes to me.
 From the South comes a blue mare.
 Changed into a maiden.
 She comes to me.
 From the West comes a sorrel mare.
 Changed into a maiden.
 She comes to me.
 From the North comes a white mare.

Given that the horse's arrival in Indian Country was a divine act of grace, the Indian peoples were understandably obligated to accord it a place of honor and esteem within their tribal societies. Perhaps nowhere else in Indian Country was the horse's impact felt as dramatically as among the Indian peoples of the northern Great Plains. The horse made possible the rise of those fabled buffalo-hunting tribal cultures that rose to dominance on the Great Plains during the eighteenth and nineteenth centuries.¹⁶

But non-Indians, with some exceptions, viewed the horse as predominantly a "beast of burden" that should be, when its useful economic life is at an end, disposed of as quickly and efficiently as possible. According to non-Indian historians, the Indians first obtained the horse, either by raiding from or trading with early Spanish settlers of the American Southwest, sometime during the early seventeenth century.¹⁷ But even they concede that the Indian peoples accorded the horse a much different, if not higher, social function than that accorded the horse by non-Indian livestock owners. Indeed, some commentators assert that the horse's arrival wrought profound change—economic, social, and spiritual—in the lives of the Indian peoples, particularly those of the northern Great Plains.¹⁸ The fabled mounted Indian warrior, for example, is depicted as a centaur-like being, half-horse and half-man,

Changed into a maiden.

She comes to me.

After White Bead Woman's chanting, four stone fetishes became transformed into living horses.

IVERSON, *supra* note 2, at 9-10 (footnote omitted).

16. Professor Webb describes the horse's significance within the Plains Indians' cultures:

Then came the horse; and overnight, so to speak, the whole life and economy of the Plains Indians was changed. Steam and electricity have not wrought a greater revolution in the ways of civilized life than the horse did in the savage life of the Plains. So important was the horse in the Plains culture that the anthropologists have named the period extending from 1540 to 1880 the horse-culture period. . . . It was the horse and the buffalo, but primarily the horse, that enabled them to hold out; without the horse they would have been easily disposed of, but in possession of this animal they were both uncontrollable and formidable.

WEBB, *supra* note 1, at 53 (footnotes omitted).

17. Professor Iverson, like other non-Indian historians, assumes the Indian peoples of the American Southwest somehow "acquired" horses from the early Spanish settlers of that region:

The utility for both cattle and horses naturally could be observed by local Indian communities. At some point in the early 1600s, tribes of northern New Spain such as the Apaches and the Comanches began to acquire horses. Although it would be later in the 1600s that other Indian groups in the southwestern United States became more acquainted with the possibilities of raising cattle, the horse transformed immediately the potential of these small Indian populations. In war and in peace, they never would be the same. Horses quickly became objects to be stolen, traded for, fought over, dreamed about.

IVERSON, *supra* note 2, at 9.

18. Professor Iverson candidly acknowledges the transcendent significance of the horse to the cultural reformation of tribal identities throughout America:

Over time and in due course, the horse became integral to tribal identity. [The livestock were] [w]rapped in the strands of people's stories and ceremonies, it eventually became impossible to imagine the people themselves without livestock. Thus the Navajos and other southwestern Indian groups eventually gave thanks not to the Spaniards for introducing the horse or the sheep but to their own holy beings.

Id.

whose ascendance enabled his tribal people to contest for, and hopefully control, a much larger tribal territory.¹⁹

2. The American Indian Peoples' Attitude Toward the Cow

The cow was not as enthusiastically welcomed by the Indian peoples as was the horse, not even among the so-called "civilized" eastern Indian peoples. The Cherokees, for example, regarded the cow as a pest or nuisance. This was because the English colonists allowed the cow, as well as their other domesticated livestock, to roam at will, thereby trampling those Indians' large and flourishing gardens. It was some time before the Cherokees, as well as other eastern Indian peoples, would heed the urgings of President Jefferson and other non-Indians, to engage in livestock raising as their means of successfully adapting to the non-Indian way of living.²⁰ Indeed, the cow, even among the Indian-ranching tribes, has never been valued in the same economically focused manner as it was by the non-Indian ranching cultures. For example, the cow was viewed, particularly by those Indian-ranching tribes of the later nineteenth-century Southwest, as a sort of "cash reserve" on the hoof, meaning that the cow was a relatively liquid asset that could be readily exchanged by its Indian owner for emergency cash when such was required by family circumstances. Alternatively, these Indian peoples viewed the cow as a "feast waiting to happen," meaning that the cow's owner could quickly slaughter it so as to fulfill his cultural obligation to provide a "good feed" at one of the many Indian celebrations or funeral events.²¹

3. The Socio-Cultural Appeal of Indian Ranching as a Contemporary Adaptive Strategy

Why, given the Indian peoples' seemingly fundamentally discrepant views regarding the appropriate cultural and social functions of both the horse and the cow, was Indian ranching ever able to take root as a driving and enduring socio-economic force among the Indian peoples of

19. Historian Webb describes how the horse's arrival revolutionized Plains Indian warfare:

The horse fitted in perfectly with the Plains Indian's scheme of life, with his penchant for war, and his care for his own safety. The Indian's conception of valor and bravery differed from that of the white man. The Indian made war for the purpose of destroying his enemy and preserving himself. . . . The horse fitted into this complex, made the Indian bolder in advance, faster in pursuit, and fleet as the wind in retreat.

WEBB, *supra* note 1, at 61.

20. Professor Iverson asserts that "Indians saw cattle as other than problematic." IVERSON, *supra* note 2, at 16. That is because the "Indian farmers frequently had to contend with English cattle determined to feast on their crops, trampling vegetables they did not actually consume." *Id.* at 16-17. But George Washington and others "urged the Cherokees in 1796 to continue to increase their numbers of cattle and hogs." *Id.* at 17.

21. Professor Iverson asserts that the "Hidatsas did not want to make big profits from their herds. They liked being able to kill a cow and share the meat with their friends." *Id.* at 82.

the northern Great Plains? There is a two-fold rationale for the rise and success of the Indian-ranching phenomenon during the late nineteenth century on the northern Great Plains. The first rationale asserts that Indian ranching gave those Indian peoples a culturally and economically palatable option as their chosen means of conforming, more or less, to the federal government's demand that they quickly become a successful agriculturally based people. Indian ranching, viewed from the Indian peoples' perspective, offered them an opportunity to preserve a large part of their beloved horse culture. Of course, they had to accept the cow along with the horse as part of their civilizing bargain with the federal government. The Indian peoples' adaptation to ranching was a daunting task. They were required to learn quickly many technical and managerial skills such as livestock breeding, cattle herding, cattle feeding, cattle branding, cattle round-ups, as well as the business end of getting their saleable cattle to market at a fair price.²²

The second rationale, quite different from the first, asserts that the rise of Indian ranching among the Indian peoples of the northern Great Plains is neither a surprising nor startling cultural phenomenon. Indian ranching is merely the most recent adaptation, by historically, culturally, and socially resilient tribal peoples, of new material resources into their pre-existing tribal societies on the northern Great Plains. Both the horse and the cow, therefore, are simply evidence of the age-old capability of these Indian peoples to incorporate and transform newly acquired materials, even a magical creature like the horse and a useful critter like the cow, into valued items within their pre-existing cultural and social framework. Indian ranching allowed them to continue their historic horse-centered cultures, while also incorporating the cow into a new material role and function within their tribal societies.²³

Of course, well-acknowledged environmental factors—the arid climate and the predominantly grassland ecology of the northern Great Plains—likely played an important role in the rise of Indian ranching in this region of Indian Country. But these objective factors merely dovetailed with the Indian peoples' dominant cultural preference in favor of Indian ranching. This dominant cultural preference operated in concert with the federal government's eventual endorsement of ranching as the means of placing those Indian peoples upon the “white man's road to

22. Indian ranchers progressed quite rapidly as Professor Hurt reports:

In 1920, 40,962 Indians produced \$11.9 million of agricultural products, and 44,847 Indians raised livestock valued at \$33.1 million. . . . The [Indian] stockmen at the Fort Berthold Reservation in North Dakota shipped hogs weekly to St. Paul and made periodic sales of steers to Chicago through their cooperative shipping association. By the summer of 1924, they, too, were using purebred Herefords to improve the tribal herd.

HURT, *supra* note 12, at 165-66.

23. Professor Iverson argues that “[i]n the nineteenth century, Indian cattle ranching fully emerged as a strategy to confront changing times. It became part of the tradition of many western Indian communities.” IVERSON, *supra* note 2, at 14.

civilization.”²⁴

4. The Socio-Cultural Losses Associated with the Rise of Indian Ranching

It should be remembered that the horse’s arrival in Indian Country, as well as the rise of Indian ranching, did cause some significant cultural and social dislocation within the existing tribal societies of the northern Great Plains. Before the horse’s arrival, Indian women had been, particularly within those agricultural tribes of this region, the primary food producers within their respective tribal societies. After the horse’s arrival, the balance of cultural and social power shifted significantly in favor of those Indian men who successfully seized on the horse as an independent and personal source of new power and prestige within those tribal societies. For that reason, one should not think that the horse’s arrival, or the rise of Indian ranching, did not impose significant social and cultural costs on major segments of these tribal societies.²⁵ This issue will be addressed in more detail in my case-study treatment of Indian-ranching’s impact on the Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Indian Reservation.²⁶

B. Answering Question Number Two: What Were the Socio-Political Rationales for Significant Policy Misjudgments Affecting Indian Ranching During the “Indian New Deal” Era?

Indian ranching, during the “Indian New Deal” era of the 1930s, was finally given some of the federal policy attention for which it had cried out for so long. This new Indian policy—the brainchild of the new Indian Commissioner, Collier—was intended to reverse and remedy those accumulated allotment-era problems. These long-standing problems included the on-going fractionalization of individually owned allot-

24. Professor Iverson cites the federal government’s reluctant acceptance of the Mandan and Hidatsa Indians’ preference for ranching over farming on the Fort Berthold Indian Reservation: “Their remaining lands were better for ranching than farming, even if the peoples historically had been skilled farmers in the short growing seasons of this northern region. The government officials had pushed agriculture; the people liked horses and after a while, cattle, too.” *Id.* at 81.

25. These social costs were borne, especially among the agricultural tribes of the Upper Missouri River Basin, by the Indian women who were the chief food producers of those peoples. Professor Hurt cites the Indian women’s agricultural role among the Mandan and Hidatsa Indians of that region:

The hoe was the most important farm tool among these agriculturists, but it differed from the implements that the eastern and western framers used, because it was fashioned from the shoulder blade of a bison. Because bone hoes were not strong enough to break the tough, fibrous prairie sod, these farmers confined their agricultural activities to the alluvial bottoms. Because only the flood plains were farmed, the fields were small, averaging from one to four acres, and the women frequently traveled as far as ten miles to tend the fields spread along the creeks and rivers.

HURT, *supra* note 12, at 58.

26. *See infra* Part II.C.

ted lands into smaller and smaller, essentially valueless, economic interests. The problems also included the phenomenon of non-Indian lessees gobbling up the available Indian grazing lands at favorable BIA-established grazing rates.²⁷

Collier's proposed solution to these problems was both simple and ingenious. His goal was to restore eventually all of those lands within the exterior boundaries of Indian reservations—the Indian allotted lands, the non-Indian fee owned lands, and the so-called un-allotted or surplus tribal lands—to tribal use and ownership. His proposed conceptual means to this end was the restoration of “tribal communalism” as the driving economic and social force to salvage Indian Country from these failed federal Indian policies.²⁸

A new Indian agricultural policy, including a new Indian-ranching policy, was Collier's chosen economic strategy whereby his plan to redevelop Indian Country would be realized. But to realize this goal, Collier had to enable the Indian peoples somehow to re-capture tribal title to over seventeen million acres of allotted Indian lands, including some seven million acres of severely fractionalized, individually owned Indian allotments. He envisioned an adequately funded tribal land reacquisition program that, over time, would restore tribal title to all those lost tribal lands.²⁹

But Collier was forced to compromise legislatively some of the

27. Non-Indian leasing of Indian grazing lands is explained by Professor Hurt as originating in Indian Commissioner Teller's idea in 1883 that such a land-use policy could somehow help civilize the Indians. He allowed the local Indian agents to lease Indian lands to non-Indian grazers at two cents an acre because he thought that:

[A] few “responsible” [white] men could teach the Indians to become herders. “The Indians so employed,” he wrote, “will soon become skillful herdsmen familiar with cattle raising . . . and become stock raisers themselves.” He thought that any Indians who were employed as herdsmen should be paid in cattle. As a result, the Indians soon would have enough cattle to warrant the use of the entire grazing lands by themselves, and white cattlemen would be displaced.

HURT, *supra* note 12, at 130.

28. Hurt asserts that Collier believed that:

[A]ll efforts to acculturate and assimilate the Indians into white society had failed. Previous agricultural policy, with its accrual of allotment, heirship, and leasing problems, had served only to destroy the inherent strengths of Indian tribal life. Henceforth the Indians might become farmers, but they would not do so within the context of white culture. Instead, the Indians would retain their cultural uniqueness; no longer would they be forced to emulate white farmers. Cultural pluralism, not acculturation and assimilation, was the key to the Indian problem. Tribal communalism, rather than private individualism, Collier maintained, would engender viable social alternatives to life based on the precepts of white society.

Id. at 174.

29. Collier's ambitious tribal-land reacquisition plan, according to Hurt, was an enormous undertaking:

The Indian lands that remained, Collier believed, had to be brought under a new system of Indian ownership. The approximately 17 million acres of allotted lands and the 7 million acres of heirship lands had to be “salvaged” for productive use by the Indians themselves and “permanently safeguarded against voluntary or forced alienation.” To achieve that end, “deep readjustments,” voluntary on the part of the Indians but supported by legislation to ensure success, were needed.

Id. at 177.

more radical elements of his proposed act. Even so, his new Indian act, known popularly as the Indian Re-organization Act (IRA) of 1934,³⁰ declared several significant new Indian policies. It ended the Indian allotment program, authorized an ambitious tribal land consolidation and land re-acquisition program, and authorized Indian allottees to transfer voluntarily title to their respective tribal governments.³¹ But some Indian peoples actively opposed Collier's new Indian act because, in their judgment, it was a potential threat to their long established land and related rights.³² This ideological opposition, coupled with Collier's seemingly heavy-handed and culturally insensitive tribal livestock reduction programs, particularly on the Navajo Indian reservation, caused a large minority of Indian peoples to refuse to adopt Collier's IRA.³³

On the northern Great Plains, unlike the American Southwest, the Indian ranchers suffered from an insufficient number of livestock, as well as insufficient capital, land, and inferior breeding stocks. These practical barriers prevented Indian ranchers from transitioning beyond subsistence-level ranching to commercial-level livestock operations on the northern high plains.³⁴ But those Indian ranchers did have some unlikely allies in their struggle to expand and improve their ranching operations. That era's twin scourges—the Dust Bowl and the Great Depression—combined to bust many of the ranching operations of those non-Indian grazing lessees who had long dominated ranching on the reservations of the northern Great Plains. The Dust Bowl and the Great Depression accomplished what the BIA had been unwilling or unable to accomplish—expel those non-Indian lessees from Indian Country.³⁵

Meanwhile, Indian ranchers, given the BIA's new Indian Cattle Purchase Program, were able to improve significantly their livestock herds through their acquisition of high-quality breed stock. That pro-

30. Pub. L. No. 73-383, 48 Stat. 984 (1934).

31. *See id.* Professor Hurt argues that despite Collier's compromises to win congressional approval for his bill, it nonetheless brought about powerful changes in Indian policy: "The compromise bill extended the trust period indefinitely for Indian lands, restored unallotted and surplus lands to tribal ownership, made possible the voluntary return of [tribal] allotments to communal control, and provided for the addition of lands with an annual fund of \$2 million." HURT, *supra* note 12, at 178.

32. For example, some Indians feared Collier's act "would now force them to give up their allotments and their heirship rights to the tribe." HURT, *supra* note 12, at 178.

33. Professor Hurt contends that Collier was "upset that the returns [from tribal elections to approve his act] were far less than unanimous." *Id.* at 179. Ultimately, seventy-seven tribes rejected the act while 181 tribes accepted it. *Id.* The Navajo voted to reject the act "because Collier's opponents had convinced them that the act would permit the federal government to take their sheep and goats in a stock-reduction program, and the Navajo believed that such a policy would make them destitute." *Id.*

34. Hurt argues that livestock problems of the "Great Plains tribes stemmed from an inadequate number of cattle, which prevented the development of a viable livestock economy." *Id.* at 183. This factor, as well as "[i]nsufficient credit, deficient annuities, and inadequate breeding stock . . . [prevented] the plains tribes from building individual or tribal herds." *Id.*

35. Hurt observes that by "1935, many white cattlemen who leased Indian grazing lands . . . had liquidated their herds." *Id.*

gram provided over 25,000 head of well-bred cattle at a total cost of \$800,000.³⁶ While the BIA retained title to those cattle, the Indian ranchers did get to choose the breed stock that best suited their respective reservation environments. These “ID” branded cattle were distributed to both eligible individual Indian ranchers as well the newly established tribal-livestock corporations or cooperatives. This small federal cattle relief program had a significant impact on Indian ranching—before this program, 8,627 Indian ranchers owned 167,313 head of cattle; after the program, 13,787 Indian ranchers owned 229,345 head of cattle.³⁷

Even more important, perhaps, was the BIA’s efforts to establish tribally owned livestock and cooperatives on the northern Great Plains. The newly established Sioux livestock association in South Dakota, for example, succeeded in greatly improving the quality and quantity of the herds it either owned or that it managed on behalf of its members. Furthermore, this association, and others like it, provided valuable help and guidance to those young tribal members who wanted to enter the livestock industry and, perhaps later, become established, dues-paying members of that association.³⁸

These tribal livestock organizations also provided their tribal members with other substantial benefits. For example, the Blackfeet tribal livestock association was able to engage in large-scale cattle sales that yielded, on average, a 12-30% higher sale price when compared with those contemporary, small-scale cattle sales engaged in by nonmembers.³⁹ Furthermore, these new tribal organizations were able to sponsor new cattle breeding techniques and management strategies that

36. Professor Hurt credits the Bureau of Indian Affairs’s (BIA) “cattle purchase program” with enabling qualified Indian ranchers to acquire high-quality and needed cattle:

In late summer 1934 the Department of Agriculture allocated \$800,000 to the Department of the Interior for the purchase of “well-bred” cattle in the drought-stricken area of the Great Plains. All purchases were to be made in cooperation with the Aberdeen-Angus, Shorthorn, and Hereford Breeder’s associations, thereby benefiting white and Indian cattlemen alike.

... Although administrative delays slowed the implementation of the program, the bureau estimated that it would acquire 25,000 cattle through the drought cattle-purchase program.

Id.

37. *Id.* at 184.

38. Professor Hurt cites the successes of tribal livestock associations across the Great Plains, as well as in the Southwest, as evidence of the “remarkable degree of success” that some of the ranching tribes had realized by the late 1930s. *Id.* at 185.

39. Professor Hurt acknowledges that the tribal livestock associations significantly assisted their tribal members by enabling them to participate in large-scale cattle sales that increased the sale price for the cattle they sold:

At the Blackfoot Agency in Montana, a cooperative marketing association earned prices from 12 to 30 percent higher than those received by nonmembers. These associations made the best use of reservation lands that were checkerboarded with allotted, tribal, and white holdings. By fencing a large tract of land, association members could command a larger amount of range land than individual operators could muster; thus small-scale cattlemen could receive the same economies of scale that the larger operators enjoyed.

Id.

were simply unavailable to the subsistence-level individual rancher.⁴⁰

If Indian ranching progressed so much during the Indian New Deal period, why did it not move beyond its subsistence-level origins to the next level of commercially based tribally owned and managed ranching operations? Somewhat surprisingly, Commissioner John Collier, and to some extent the Indian leadership of that time, bear the shared responsibility for this outcome. Collier, despite his seemingly boundless faith in the Indian peoples, believed that it was both practically and politically unwise for Indian ranchers to expand their livestock operations to the commercial level of development. He feared that Congress, in response to the non-Indian ranching industry's lobbying against what it perceived as unfair competition from the Indian ranchers, would choose to end Indian ranching, rather than have it compete with the non-Indian ranching industry on the northern Great Plains.⁴¹

Furthermore, the BIA's economic experts doubted whether a commercial-level Indian-ranching industry could be practicably developed. They concluded that 9.7 million acres of new Indian grazing lands would have to be acquired, just to ensure the existing Indian ranchers a subsistence standard of living from their livestock operations.⁴² Furthermore, they concluded that 15.9 million acres of new Indian grazing lands would have to be acquired in order to ensure the Indian ranchers a moderate standard of living from their ranching operations.⁴³ At that point, congressional appropriations had enabled the BIA to purchase just 993,673 acres of new Indian lands.⁴⁴

However, Indian ranching's future was also limited by the Indian peoples' strongly held beliefs and values that denigrated the notion of individually motivated economic gain as a goal worth striving for at the expense of all other values. This reality, coupled with the Indian peo-

40. *Id.*

41. Professor Hurt asserts that "Collier was seeking only to bring the Indian farmers up to a subsistence level; he did not stress the goal of commercial production because he did not want Indian farmers to compete with white agriculturists." *Id.* at 192.

42. Professor Hurt criticizes Congress's failure to provide adequate funding during the 1930s for the restoration to tribal ownership of the so-called "surplus lands" that had been removed from tribal ownership by congressional action during the allotment era:

Bureau officials estimated that 3 million acres [of surplus and other lost tribal lands] could be acquired, but Congress provided only \$1 million for the purchase of new lands during fiscal 1936. This funding hardly contributed to a needed land-acquisition program. Bureau officials estimated that the Indians needed an additional 15.9 million acres to ensure a "modest" standard of living from agriculture, while 9.7 million acres more were required to bring the Indians up to the subsistence standard of living of an "average rural white family."

Id. at 188.

43. *Id.*

44. "Congress's failure to provide [sufficient] funds for a significant land-acquisition program . . . prevented any possibility of making either subsistence or commercial farmers out of the tribesmen." *Id.* at 193. What little money Congress did appropriate for the tribal land acquisition period allowed the BIA to acquire only a fraction of the lands needed for Indian commercial ranching development on the northern Great Plains, as well as elsewhere in Indian Country. *Id.* at 188.

ples' continuing esteem for the horse as a transcendent symbol of personal worth and esteem, meant that Indian ranchers did not see personal-wealth creation as a motivating factor to move beyond their subsistence-level ranching operations. These enduring cultural values had both specific economic and ecological consequences within the arid and semi-arid rangelands of Indian Country. For example, the BIA's range managers observed that it was not unusual for a single Navajo man to own a hundred or more horses. Although that fact made no economic or ecological sense to the BIA's rangers, it made perfect cultural and social sense to the Navajo man. His horses served him and his family as a valuable "cultural currency" whereby they could be exchanged for a respectable marriage arrangement, or they could provide a respected ceremonial gift when that occasion arose.⁴⁵

But other commentators contend that Collier's new Indian-ranching policy was simply overtaken by larger national and world events. By 1940, the federal government's attention and financial resources were directed to the coming war in Europe.⁴⁶ Therefore, Indian ranchers simply were left to fend for themselves, given the federal government's larger national responsibilities to all of the American people. Although, as of 1939, some 16,624 Indian ranchers owned some 262,551 head of livestock,⁴⁷ they desperately needed more cattle and capital to improve and build their livestock herds. But the needed federal aid was not forthcoming, and by 1942, driven by high war time cattle and land prices, non-Indian ranchers were once again leasing virtually every acre of Indian grazing land that was not being used by its Indian owners.⁴⁸

C. Answering Question Number Three: What Were Indian Ranching's Socio-Cultural Impacts on the Mandan, Hidatsa and Arikara People of the Fort Berthold Indian Reservation?

I have argued that Indian ranching was, perhaps, the federal government's only successful Indian-civilizing strategy. But that claim

45. Professor Hurt contends that the BIA's Navajo "horse-reduction program still was an emotional issue, because the animals had a 'high prestige value' for their owners." *Id.* at 189. Horses provided their Navajo owners not only with recreational opportunities, they also "enabled them to make gift exchanges for marriages, and served for ceremonial purposes." *Id.*

46. Professor Hurt identifies 1940 as the year in which Congress lost interest in funding the costly tribal land re-acquisition program. He emphasizes that congressional "appropriations [for that program] had nearly ceased by 1940, because many congressmen believed the expenditures were wasteful." *Id.* But according to Hurt, the real reason for this congressional change of heart was because "the drift towards a new European war essentially ended the agricultural progress of the Indian New Deal." *Id.*

47. Professor Hurt argues that even the limited progress made by Indian ranchers during the 1930s was jeopardized by the BIA's failure to come to grips with economic and social realities that impeded the Indian ranchers' likelihood of real success. "Although 16,624 Indians raised 262,551 cattle in 1939, insufficient credit, despite the 'repayment cattle pool,' prevented the adequate expansion of the industry. In addition, the leasing system kept many potential cattlemen in a state of lethargy and poverty." *Id.*

48. *Id.* at 191.

leaves unanswered the question as to what was Indian ranching's contemporary impact upon a long established, culturally conservative, tribal people. In answering this question, I have chosen my home Indian reservation, the Fort Berthold Indian Reservation, as the case study of ranching's demonstrable socio-cultural impact on a historically significant tribal people—the Mandan, Hidatsa, and Arikara Nation. My goal is not to argue that Indian ranching is either good or bad, but to document my assertion that the rise of Indian ranching had subtle and not-so-subtle acculturating impacts on the tribal peoples of the northern Great Plains.

The Mandan people had occupied the river bottoms along the Upper Missouri River and its tributaries many centuries ago.⁴⁹ They, along with those tribal peoples who later joined them—the Hidatsa and Arikara—are the so-called “village Indians” who resided in their famed earth lodge settlements along the bottomlands of the Upper Missouri River Basin. They established and maintained a remarkable agriculturally based economy by their farming of the rich, alluvial soils that were annually deposited on their lands by the flooding of the Missouri River. Their historic corn-based culture, wherein the Mandan, Hidatsa and Arikara women enjoyed a distinctive socio-cultural role in producing the bulk of the food products, has been the subject of many scholarly studies.⁵⁰ These tribal peoples' special relationship with the lands along the Missouri River embodied an interlacing of sexual, social, and economic statuses that dominated and defined their way of life. Professor Virginia Peters powerfully depicts the Indian women's complicated land-based relationship:

Many young men and a few of the old helped pick the ears of ripe corn as they had during the green corn harvest. For this the women paid them by building fires near their piles of corn on which they placed kettles containing corn and meat. The men and girls were all painted and dressed in their best clothes. The prettiest girls always had the largest group of young men around their piles of corn. As the husking proceeded, any unripe ears were [placed] aside to become the property of the male helpers. They either ate them or fed them to their ponies; the women did not want them because they would rot and spoil the ripe corn if placed in caches.

Although there was much rejoicing and jollity at harvest time, there was a serious undertone. The village women felt a sacred duty to be sure that every ear of corn was gathered and used for some purpose. A missionary told Wilson that an Arikara woman whom she knew dropped every seed with a kind of prayer. The Arikara legend of “The Forgotten Ear” emphasizes the women's love for their gardens and the food they

49. Professor Meyer asserts that “as early as A.D. 900 and perhaps two centuries earlier, agricultural groups began to occupy the region.” ROY W. MEYER, *THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDANS, HIDATSAS, AND ARIKARAS* 5 (1977).

50. Professor Meyer asserts that “horticulture, food-handling, and the maintenance of the lodges were the women's tasks.” *Id.* at 75.

produce. One day an Arikara woman thought she heard a child begging not to be left behind when she started to leave her field. She searched through her whole garden until at last she finally found one small ear of corn which she had overlooked. As soon as she gathered in the ear of corn, the crying stopped.⁵¹

But these tribal people's long established relationship with their gardens and their lands ended with the coming of land allotment to the Fort Berthold Indian Reservation in the late nineteenth century. One commentator, Castle McLaughlin, has studied in some detail the socio-cultural impact of Indian ranching on these tribal people.⁵² For that reason, I rely on his research to document my assertion that Indian ranching may well have been the federal government's only successful Indian-civilizing initiative.

McLaughlin emphasized that Indian allotment on Fort Berthold and other Great Plains Indian reservations had as its goal the "dissolution of tribal organization and the assimilation of Indian individuals" via "the adoption of practices and values associated with a capitalist democracy, such as nuclear family organization, Christianity, the 'Protestant ethic,' and utilitarianism."⁵³

He also described the contemporary rise of Indian ranching on Fort Berthold as a direct result of the allotment process:

As on other reservations, agrarian enterprises—first farming, then livestock production—were used as a vehicle for promoting individual "civilization" at Fort Berthold. Cattle were first distributed as part of a federal payment following an 1886 agreement . . . by which the Fort Berthold people relinquished 228,168 acres of their 1,193,788-acre reservation and agreed to the allotment of the remaining 965,620 acres. Between that year and 1902, the U.S. government spent 140,000 dollars of tribal funds on livestock, and the number of Indian-owned cattle rose from 416 to 7,000 head. Prior to a 1910 land cession, the sale of beef to the government and to markets such as Chicago accounted for nearly half of the total income on the reservation. While "unearned income" from land sales and leases became the most significant income source after 1910, during the following decade the value of crops raised (\$367,549) and livestock sold (\$419,984) at Fort Berthold far surpassed income from (primarily per diem) wage labor (\$144,951).⁵⁴

McLaughlin argued that allotment, as well as the other related federal assistance programs directed to foster Indian-ranching enterprises on the Fort Berthold Reservation, have resulted in on-going conflict between the Indian landowning community and the Indian ranching community. Here is how he describes this conflict in the 1980s and 1990s on Fort Berthold:

51. VIRGINIA BERGMAN PETERS, *WOMEN OF THE EARTHLODGES: TRIBAL LIFE ON THE PLAINS* 119-20 (1995) (footnotes omitted).

52. Castle McLaughlin, *Nation, Tribe, and Class: The Dynamics of Agrarian Transformation on the Fort Berthold Reservation*, 22 *AM. INDIAN CULTURE & RESERVATION J.* 101 (1998).

53. *Id.* at 106.

54. *Id.* at 106-07 (footnotes omitted).

Class consciousness has developed from both opposing material interests and contrasting ideological and moral frameworks that guide interaction between people and the natural world. Landowners have been led to assign commodity values to their lands and have constructed their identity in part from their inability to control and realize “fair returns” for its use; they have developed a keen sense of their position within the local political economy. Unequal relations of exchange, not production per se, have engendered the construction of these class identities. Ranchers are viewed as having repudiated the signs and practice of reciprocity, which both functions as a material “safety net” and serves as a metaphor for the commensal social order: “Half of us are starving, but they’d die before they’d give us a beef.” Age, gender (most landowners are tribal elders, and today many are women), internally perceived racial differences (many ranchers are of mixed heritage), and commitment to traditional values are all drawn on for the discursive construction of materially reproduced differences. One young landowner characterized conflict between ranchers, landowners, and the tribe as “spiritual warfare” and forecast, “Eventually the tribe will end up buying all of the land, and then Uncle Sam will come and collect.”⁵⁵

McLaughlin further argues that the new Indian-ranching class was born directly out of allotment and related federal assimilation policies on the Fort Berthold Reservation:

[T]he government “patronage system” rewarded this incipient private sector through the provision of unsecured reimbursable loans and by utilizing proceeds from tribal land sales for the establishment of demonstration farms and for the purchase of high-grade livestock. Such practices were frequently protested by older traditional leaders, who regarded such use of tribal funds as inequitable and whose formal influence and ability to redistribute goods were undermined by the emergent agrarian entrepreneurs. Initially, ranchers organized economic labor and galvanized support within indigenous social institutions such as kinship groups, using their skills and relative wealth to become prominent leaders. Under pressure to assimilate and increasingly invested in market exchange, by the 1920s and 1930s agrarian entrepreneurs had begun to disengage partially from such social and moral networks and associated responsibilities. As the child of a successful Fort Berthold rancher recalled, “My father wasn’t much of a ‘pow-wowzer’; he regarded dances and give-aways as a waste of time and money.”⁵⁶

Furthermore, McLaughlin concludes that some of the more successful Indian ranchers sought to avoid BIA regulation of their grazing practices. They converted their trust patent lands to fee patent status. This led one agency superintendent to charge that at least “forty ‘of the more intelligent and thrifty’” Indians were avoiding the reservation-wide cattle round-ups and working their stock without agency supervision.⁵⁷

In sum, whether or not Indian ranching was the best Indian-

55. *Id.* at 124 (footnotes omitted).

56. *Id.* at 107-08 (footnotes omitted).

57. *Id.* at 108.

civilizing initiative possible, it nonetheless had significant socio-cultural impacts on the tribal people of the Fort Berthold Indian Reservation. My overall point is that Indian ranching, insofar as it was a successful acculturating mechanism, may have helped bridge the vast socio-cultural gulf that existed, and still exists, between the Indian and non-Indian societies on the northern Great Plains.

D. Answering Question Number Four: Why Did the Federal Government Seemingly Abandon Its Indian-Ranching Policy During the “Termination Era” of the 1950s and Early 1960s?

Indian ranching confronted new and different challenges during the so-called “termination era” of the 1950s and the early 1960s. My analysis of this era’s impact on Indian ranching revolves around the following issues.

1. The BIA Re-Evaluated Its Indian-Ranching Policy

Collier’s successor as Indian Commissioner, William Brophy, believed that American agriculture “had entered a new age and that successful farming in the future would require larger farms, the intensive application of science and technology, and expanded capital investment.”⁵⁸ He also recognized that Indian ranchers and Indian agriculturalists had none of the required resources available to them. For that reason, he concluded that Indian ranching would, during this new agricultural era, prove “insufficient in quantity and quality.”⁵⁹ But Indian ranchers did not agree with Brophy’s bleak assessment of their future, and they wanted more federal financial aid and technical assistance to improve and enlarge their ranching operations. But during the war years, the BIA’s congressional funding for its tribal land reacquisition and consolidation efforts had virtually dried up. This factor, combined with the accelerating fractionalization of Indian heirship lands on the northern Great Plains’ reservations, meant that Indian ranching was facing a real crisis, if not outright catastrophe.⁶⁰

58. HURT, *supra* note 12, at 195.

59. *Id.*

60. Professor Hurt comments that the federal government’s Indian ranching and agriculture policies during this era had trapped the Indians in a “vicious cycle”:

They could not obtain the necessary capital to expand and develop viable economic enterprises. Their inefficient operations and limited managerial abilities, compared to those of many university-trained white farmers, prevented lenders from having the confidence needed for granting loans to Indian farmers, and without land reform, even the best agricultural managers could not make Indian lands economically viable.

Id. at 209.

2. Indian Ranching as the BIA's Most Successful Agricultural Program

Indian ranching—the most lucrative form of Indian agriculture—had previously generated significant income for Indian-ranching families, particularly on the northern Great Plains. Indian ranching had generated over \$16.3 million in 1945, thus, far outstripping the \$1.3 million in income derived from ranching in 1932.⁶¹ Indian-ranching families also derived significant in-kind income benefits from this source in 1945: They directly consumed some \$9.2 million worth of beef at their family tables that year.⁶² To be fair, the BIA's Indian agricultural service was not totally inactive during the 1950s. It sought to organize hundreds of reservation-based Indian 4-H clubs, thereby instilling in the Indian youth an early interest in the ranching lifestyle. But the federal government's growing termination fever did begin to impact adversely income from ranching. The average Indian rancher's annual income was \$918 in 1947. By 1949, however, his average annual income had dropped to \$500.⁶³

3. The Socio-Legal Impact of Termination

Congress's formal initiation of its Indian-termination policy, commencing with its 1953 enactment of House Concurrent Resolution 108,⁶⁴ truly threatened the future existence of Indian ranching on the northern Great Plains, as well as elsewhere in Indian Country. A terminated Indian rancher faced both dire and immediate consequences. Upon termination, that Indian rancher would lose access to the BIA's agricultural credit programs and its cattle acquisition programs. Given that Indian ranchers historically lacked access to private agricultural credit sources, as well as other agricultural credit sources generally available to non-Indian ranchers, both those experienced Indian ranchers who wanted to improve their ranching operations as well as those young Indian ranchers who wanted to enter the livestock business, depended on the BIA's financial and technical assistance. Termination, by ending Indian ranchers' access to those BIA programs, meant that their Indian-ranching opportunities would wither on the vine.⁶⁵

61. Professor Hurt candidly asserts that Indian ranching was, by far, the most significant economic component of Indian agriculture. "Moreover, cattle raising, the most important part of Indian agriculture, grossed more than \$16.3 million in sales during 1945—a substantial increase from the less than \$1.3 million in 1932. The tribesmen also consumed an estimated \$9.2 million worth of beef at home." *Id.* at 196.

62. *Id.*

63. *Id.* at 197-98.

64. H.R. Con. Res. 108, 83d Cong., 67 Stat. 132 (1953).

65. See HURT, *supra* note 12, at 209.

4. Termination's Impact on the Indian Peoples of the Northern Great Plains

The termination era's policies, in terms of their direct and indirect effects on Indian ranching, contributed to greatly increased non-Indian leasing of Indian grazing lands on the northern Great Plains. More than 600,000 acres of Indian grazing lands on the Rosebud Sioux Reservation were leased to non-Indian ranchers, some two-thirds of the total amount of those lands. And more than 50% of the Indian grazing lands on the Blackfeet Reservation were leased to non-Indian ranchers during this period.⁶⁶ Furthermore, the BIA's de-emphasis of its Indian-ranching programs resulted in a dramatic drop in the number of Indian ranchers, as well as the size of their livestock herds. The number of Indian ranchers on the Rosebud Sioux Reservation decreased from 203 to 129 during this period, with more than 90% of the full-blood Indian ranchers choosing to exit that industry.⁶⁷

Moreover, the BIA's new termination-era policies helped to downsize the Indian ranchers' livestock herds. More than 40% of the Indian ranchers on the Blackfeet Indian Reservation had fewer than twenty head of cattle. More than 80% of the Indian ranchers on the Fort Peck Indian Reservation had fewer than 100 head of cattle, the absolute minimum amount of cattle that was deemed necessary for a viable ranching operation.⁶⁸

5. The Socio-Economic Impact of the BIA's Exit from Indian Ranching

The termination era's larger Indian assimilation goals, coupled with the BIA's virtual withdrawal from the Indian-ranching business, pushed the existing Indian-ranching enterprises into a downward spiral.⁶⁹ Given that few Indian-ranching enterprises were deemed to meet the threshold standards for viable ranching operations—meaning that they lacked the required number of cattle or other livestock, the appropriate kind and quality of ranch machinery, and the appropriate level of ranch

66. Professor Hurt argues that termination's indirect impact was to increase significantly non-Indian leasing of Indian grazing lands on several Indian reservations on the northern Great Plains:

Between 1950 and 1960, two-thirds, or 600,000 acres, of South Dakota's Rosebud Reservation was leased to whites. Although these Sioux did not alienate much land during that decade, the number of Sioux cattlemen shrank from 203 to 129, with 90 percent of the decline occurring among full bloods.

...

The agricultural situation was similar on Montana's Blackfeet Reservation, approximately 50 percent of which was leased to white operators.
Id. at 201-02.

67. *Id.* at 208.

68. *Id.* at 202-03, 208.

69. *Id.* at 209.

management skills—they were generally deemed “bad credit risks” by private agricultural lenders. Due to the BIA’s exit from the Indian-ranching business, Indian ranchers would soon find themselves effectively barred from private agricultural credit sources.⁷⁰

The intervening decades, from the 1970s to the 1990s, introduced a new and significant federal actor—the United States Department of Agriculture (USDA)—into the arena of Indian ranching on the northern Great Plains. The next Section assesses and evaluates the successes and failures wrought by that federal agency in its efforts to promote Indian ranching as an economically and socially viable industry on the northern high plains.

a. The State of Indian Ranching Today

About 38% of today’s 80,000 Indian farm operators are classified by the USDA’s 2007 Indian farm census as beef cattle ranchers.⁷¹ Furthermore, this farm census also documents the relative non-competitive economic and social status of these Indian ranchers. For example, it reveals that Indian ranchers derive substantially less income from their ranching operations when compared with non-Indian ranch and farm operators. It shows the average Indian rancher had 2007 annual farm sales valued at \$40,331, while the average non-Indian rancher had 2007 annual farm sales valued at \$134,887.⁷² This disparity in ranch-related sales occurred despite the fact that the average Indian-owned ranching operation is, on average, significantly larger than non-Indian ranching operations: approximately 1,431 acres compared to 418 acres.⁷³

Furthermore, the USDA’s 2007 Indian farm census report has been subjected to scathing criticism by American Indian farm advocacy groups. First, the non-profit law center, Farmers’ Legal Action Group, Inc. (FLAG), criticized the farm census’s failure to emphasize the fact that only 1.6% of the population of principal-farm operators is American Indian.⁷⁴ Second, the advocacy organization Village Earth characterized that census report as a “gross misrepresentation of the data” regarding the contemporary state of Indian ranching.⁷⁵ It pointed out that Indian farm operators, in total, earned only some 16% of the total 2007

70. *Id.*

71. U.S. DEP’T OF AGRIC., 2007 CENSUS OF AGRICULTURE 1, 3 (2009), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/american_indian.pdf.

72. *Id.* at 2.

73. *Id.*

74. Minority Farmers, <http://aglaw.blogspot.com/2009/10/minority-farmers.html> (Oct. 18, 2009, 13:18 CST). The farm census report pointed out that 94% of principal farm operators are white. *Id.*

75. USDA Misrepresents Situation of Native American Farmers, http://villageearth.org/pages/Projects/Pine_Ridge/pineridgeblog/2009/11/usda-misrepresents-situation-of-native.html (Nov. 4, 2009, 22:00 MST).

farm sales revenue of \$1.6 billion.⁷⁶ That organization also criticized the USDA's report for failing to address the underlying legal and credit-based reasons why Indian ranchers now confront such dire challenges:

As reported earlier by Village Earth, the unequal land-use patterns seen on Native American Reservations today is a direct outcome of discriminatory lending practices, land fractionation and specifically Federal policies . . . that have excluded native land owners from the ability to utilize their lands while at the same time opening them up to non-native farmers and ranchers. Discriminatory lending practices, as argued in court cases such as the pending *Keepseagle vs. Vilsack*, claim that Native Americans have been denied roughly [\$]3 billion in credit. Another significant obstacle is the high degree of fractionation of Reservation lands caused by the General Allotment Act (GAA) of 1887. Over a century of unplanned inheritance under the GAA has created a situation where reservation lands have become severely fractionated. Today, for a Native land owner to consolidate and utilize his or her allotted lands they may have to get the signed approval of dozens, hundreds or even thousands of separate land owners. As a result of this complexity, most Indian land owners have few options besides leasing their lands out as part of the Federal Government's leasing program. Additionally, historical and racially-based policies by the Federal government have been designed to exclude Native American farmers and ranchers from utilizing their own lands, opening them up to non-natives for a fraction of their . . . market value.⁷⁷

Surprisingly, perhaps, the USDA's expert defense witness in the *Keepseagle v. Venneman*⁷⁸ litigation, Dr. Dean Leuck, generally agrees with the critiques offered by both FLAG and Village Earth as to why Indian ranching is in such dire straits on the northern Great Plains. His expert analysis of Indian ranching confirms these Indian advocacy groups' conclusions that long standing legal, jurisdictional, and credit-based barriers have significantly undermined Indian ranching on the heavily allotted Indian reservations on the northern Great Plains. For example, he cites the allotment era's policies as creating the checkerboarded land tenure situation that now bedevils the tribal governments' efforts to regulate land use effectively with their respective reservation boundaries. "The allotment era had a relatively large impact on the Northern Tier states of Idaho, North and South Dakota, Montana, Wyoming and Washington. These reservations tend to have an even more complicated land tenure mosaic than reservations in other regions."⁷⁹

He concludes that these allotment-era policies still adversely impact Indian ranching today:

This complicated mosaic of Indian land tenure [on the Indian reservations of the northern Great Plains] is laden with counterproductive incen-

76. *Id.*

77. *Id.*

78. No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001).

79. Expert Report of Dr. Dean Leuck, at 24, *Keepseagle v. Venneman*, No. Civ.A.9903119 EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (on file with author).

tives. These incentives make it difficult to organize land and labor to maximize land value, thus making it difficult to get loans and access capital markets. Each type of land tenure carries associated economic incentives that impact the use, management, and productivity of the land and affect lending decisions. Otherwise identical neighbors might encounter very different responses from the capital markets if one parcel is held in fee title and the other is in trust status.

....

Given the counterproductive economic incentives inherent in the current land tenure mosaic on many western Indian reservations, even programs that direct loans to Native American farmers are unlikely to result in equal outcomes among Indian and non-Indian farmers and ranchers.⁸⁰

Dr. Leuck argued that the “counterproductive economic incentives inherent in the current land tenure mosaic” are to blame for the dire financial condition of Indian ranching, not the asserted discriminatory treatment of Indian ranchers by the USDA; nonetheless, the federal government has recently pledged to settle the *Keepseagle* litigation.⁸¹

b. How the Lack of Available Credit Has Crippled Indian Ranching on the Northern Great Plains

Indian ranchers on the northern Great Plains rely almost exclusively on federal direct loans from the Farm Services Administration (FSA) because they do not meet the credit-worthiness requirements imposed by private farm credit lenders.⁸² Furthermore, Indian ranchers tend to cluster on the Great Plains, and they tend to operate larger ranches than do non-Indian ranchers. Additionally, only one-third of those minority ranchers serviced by the FSA, including Indian ranchers, reported farm-related sales of more than \$10,000 in 1997.⁸³ In contrast, more than one-half of all other farmers and ranchers reported farm-related sales in excess of that amount.⁸⁴

The FSA administers both the direct and guaranteed farm loan programs made especially available to those “socially disadvantaged farmers” who cannot qualify for private farm credit. Given that Indian ranchers, who are classified as minority farmers by the USDA, tend to have relatively low average incomes and limited asset bases, they are unlikely to qualify for farm credit assistance from private lenders. Furthermore, USDA statistics show that those Indian ranchers, particularly

80. *Id.* at 29.

81. See Ken Thomas, *USDA Committed to Resolving Suit by American Indians*, WASH. TIMES, Nov. 7, 2009, available at <http://www.washingtontimes.com/news/2009/nov/07/usda-committed-to-resolving-suit-by-american-india/>.

82. Steve Koenig & Charles Dodson, *FSA Credit Programs Target Minority Farmers*, AGRIC. OUTLOOK, Nov. 1999, at 14, available at <http://www.ers.usda.gov/publications/agoutlook/nov1999/ao266e.pdf>.

83. *Id.*

84. *Id.*

those who reside in the counties on or near Indian reservations, tend to rely on the FSA as their only available source of capital.⁸⁵

The FSA sets aside a portion of its annual available loan funds for use by its socially disadvantaged loan applicants, including eligible Indian ranchers. This set aside is based on its estimate of the number of potentially eligible socially disadvantaged loan applicants who reside in a given state or county. For example, in 1999, the FSA lent approximately \$296 million, about 8% of its total loan obligations, to socially disadvantaged farmers or ranchers.⁸⁶ Although minority farmers and ranchers comprised only 4% of the total farmer and rancher population in 1999, they comprised 7% of all direct borrowers from the FSA that year.⁸⁷ Because the FSA does not follow the same lending practices as do private farm credit lenders, minority ranchers, including the Indian ranchers on the northern Great Plains, tend to see that federal lending agency as their only available source of farm credit.⁸⁸

E. Answering Question Number Five: How to Put “Humpty Dumpty” Back Together Again: Designing an Adequate Legislative Settlement Framework for Restoring Indian Ranching on the Northern Great Plains

1. Scope of the Task

Restoring Indian ranching on the northern Great Plains can be likened to the daunting task of putting “Humpty Dumpty” back together again. Despite the difficult challenges presented, I believe that my proposed “Tribal Land Consolidation Plus” strategy may offer some hope for the restoration of Indian ranching on the northern Great Plains. A vigorous and adequately funded tribal land consolidation program will be a necessary, but not sufficient, step toward the re-establishment of Indian ranching on the northern Great Plains. Furthermore, my proposal takes seriously the Obama Administration’s pledges to settle fairly the pending *Cobell v. Babbitt*⁸⁹ and *Keepseagle* lawsuits.⁹⁰ In that regard, my proposal builds upon the administration’s declared commitment to settle those two Indian lawsuits.

My proposed plan for the restoration of Indian ranching envisions the following three elements: (1) an adequately funded, comprehensive

85. *Id.*

86. *Id.* at 14-15.

87. *See id.* at 15.

88. *Id.*

89. *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff’d sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

90. *Keepseagle v. Venneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001).

tribal land consolidation program; (2) the statutory establishment of tribally chartered livestock-grazing authorities that are empowered to exercise comprehensive land-use control over grazing, by either Indian or non-Indian ranchers, within tribally designated grazing districts; and (3) the statutory establishment of a substantially enlarged federally sponsored program of financial and technical assistance to Indian-ranch operators.

Based on the federal government's well-acknowledged plenary authority over Indian economic and social affairs within Indian Country, my proposal assumes there will be no insurmountable legal barriers to the congressional enactment of my proposed legislatively declared objectives. The pending fulfillment of the Obama Administration's pledge to settle these two lawsuits provides the immediate catalyst for this opportunity to restore Indian ranching on the northern Great Plains.⁹¹ Somewhat fortuitously, the federal government's recent successful settlement of a minority farmers' lawsuit—a lawsuit that is strikingly similar to the *Keepseagle* litigation—provides a potential settlement model for structuring some of the financial and managerial elements of my proposal for the restoration of Indian ranching on the northern Great Plains.⁹²

91. The Department of the Interior's recently proposed *Cobell* settlement appropriately focuses on resolving the land fractionation problem. In a series of questions and answers, the Department explains why its \$2 billion Indian land consolidation program is an essential feature of this settlement:

What is the land consolidation program? How did the parties arrive at the \$2 billion land consolidation figure?

The land consolidation fund addresses an historic legacy of the General Allotment Act of 1887 (the "Dawes Act"), which divided tribal lands into parcels between 40 and 160 acres in size, allotted them to individual Indians and sold off all remaining unallotted Indian lands. As original allottees died, their intestate heirs received an equal, undivided interest in the allottees' lands. Today, it is common to have hundreds of Indian owners for one parcel. As of September 30, 2009, there were 143,663 individual Indian allotments and more than four million fractionated interests. These four million interests could expand to 11 million interests by the year 2030 unless an aggressive approach to fractionation is taken. The \$2 billion land consolidation program will provide for the voluntary buy-back of fractionated land interests. By reducing the number of individual trust accounts that the U.S.[.] must maintain, the program will greatly reduce on-going administrative expenses and future accounting-related disputes. In order to provide owners with an additional incentive to sell their fractionated interests, the settlement authorizes the Interior Department to set aside up to 5 percent of the value of the interests into a college and vocational school scholarship fund for American Indian students.

U.S. Dep't of the Interior, *Cobell v. Salazar: Q & As*, http://www.doi.gov/documents/Cobell_v_Salazar_QA.html (last visited Apr. 18, 2010) [hereinafter *Q & As*].

The department's proposal also candidly admits the adverse economic effects that land fractionation inflicts upon the individual Indian land owners and the tribal governments' initiatives to manage Indian grazing lands among other tribal land resource values:

What are the economic consequences of fractionation?

The economic consequences of fractionation are severe. Appraisal studies suggest that when the number of owners per tract of land grows to between ten and twenty, the fair market value associated with each interest declines -- often precipitously. Fractionated interests, however, still hold cultural and historical significance for many individual allottees.

Id. The Obama Administration also has pledged to settle the *Keepseagle* lawsuit on fair terms to the Indian plaintiffs. See Thomas, *supra* note 81.

92. *Pigford v. Glickman*, 185 F.R.D. 82, 105 (D.D.C. 1999).

2. The Major Elements of My Proposal

The fair and thorough implementation of the major elements of my proposal likely would go some distance toward restoring Indian ranching as a viable economic and social endeavor on the northern Great Plains.

Tribal Land Consolidation

My proposed legislative settlement framework contemplates the enactment of a tribal land consolidation initiative that will focus primarily, but not exclusively, on the restoration of tribal land title to the roughly seven million acres of highly fractionalized, individually owned, Indian-allotted lands. This problem is particularly significant on the heavily allotted Indian reservations of the northern Great Plains. I recognize that the cost of this undertaking, even assuming a “rock bottom” average purchase price of \$1000 per acre for the acquisition of these identified lands, would likely exceed \$7 billion in total.

But of almost equal importance, particularly on the grazing-oriented northern Great Plains reservations, is a statutory focus on the tribal acquisition and consolidation of high-quality grazing lands, including the acquisition of high quality forage producing lands, whether those lands are fractionated lands or not. It would be up to the affected Indian people, in consultation with the BIA, to formulate an appropriate and adequate tribal land consolidation plan for their particular portion of Indian Country. Although the Obama Administration’s proposed amount for tribal land consolidation purposes is about \$2 billion, even such a relatively small tribal land consolidation fund could, if thoughtfully and judiciously administered, go some distance, particularly on the heavily “checkerboarded” reservations of the northern high plains, toward restoring the Indian grazing industry.⁹³

Tribal Livestock Regulatory Authority

My proposed legislative settlement framework also contemplates the creation of new, statutorily authorized, tribal regulatory entities called Tribal Livestock Regulatory Authorities. These new regulatory entities, endowed with the necessary and appropriate managerial and jurisdictional authority, would be responsible, subject to the review and approval of the BIA, for the establishment and comprehensive man-

93. “Checkerboarding” refers to the alternating pattern of land ownership and results in the jurisdictional exclusion of tribal regulatory authority, generally speaking, over those lands held in fee-simple tenure by non-Indian landowners within Indian Country. See *Montana v. United States*, 450 U.S. 544, 565-67 (1981) (holding that Indian tribes generally lack civil regulatory authority over non-Indian owners of fee-status lands within Indian Country).

agement of suitably sized and ecologically sustainable Tribal Grazing Districts. These statutorily authorized tribal authorities would be empowered—either by Congress’s recognition of the Indian peoples’ inherent authority or by Congress’s delegation of the necessary regulatory authority—to exercise regulatory authority over all lands (including individually owned allotted lands, non-Indian owned fee lands, and tribally owned lands) that are located within tribally established tribal grazing districts.⁹⁴

Federal Trust Duty to Provide Adequate Federal Financial and Technical Assistance to Indian Ranchers

The federal government’s well-acknowledged federal trust duty to Indian ranchers would provide the needed legislative authority for Congress’s restoration of an economically and socially viable tribal livestock industry on the northern Great Plains. The existing legal definition of “Indian trust agency” would be broadened to include not only the BIA and other Indian-oriented agencies of the Interior Department but all of those federal agencies that administer financial or technical assistance programs that are intended for the benefit of Indian ranchers.

Additionally, each newly defined Indian trust agency would be authorized to enter into tribal self-determination contracts or related agreements with the affected tribal governments. This new trust-based relationship would help ensure that available federal and technical assistance benefits are provided to the Indian peoples in a manner consistent with tribally identified needs and priorities. Furthermore, a new adequately staffed and funded inter-agency “working group” would be established—one that includes appropriate representatives from the export and international trade oriented federal agencies, such as the Department of Commerce. This working group would be charged with developing, in consultation with the affected tribal governments and the

94. The past success of tribally owned and managed livestock associations supports the statutory establishment of tribally owned and managed grazing regulatory authorities that are clothed with the power to oversee and manage all livestock owners located within any tribally established grazing district. Indeed, absent such a statutory innovation, it may be unlikely that Indian ranching can be restored on the northern Great Plains Indian reservations. Professor Hurt seems to agree implicitly that such radical regulatory innovations are required to overcome the legacy of Indian allotment:

Inheritance policies that divided estates among the heirs further fragmented Indian landholdings and made leasing not only a necessity but a way of life. As a result, the dreams and promises for an agricultural life that would enable the Indians to acculturate and assimilate moved further and further from reality. At the same time, governmental policy made the alienation of Indian lands increasingly easy, and the land base of the tribesmen was rapidly disappearing by the early twentieth century. With every acre of land lost to white control or ownership, the creation of a viable agricultural economy that would provide subsistence and, eventually, commercial profitability became increasingly harder to achieve.

HURT, *supra* note 12, at 232.

interested Indian livestock industry representatives, the appropriate tribal livestock marketing strategies and programs whereby Indian ranchers can secure reasonable access to the increasingly significant, international export markets for Indian owned livestock.

These elements of my proposal would largely replace the grievously incomplete and fragmented statutory and regulatory framework that presently governs Indian ranching.⁹⁵

An Indian land use organization's recent report has criticized the federal government for its failure to address those practical barriers that presently constrain the Indian peoples' ability to utilize effectively their property rights as the appropriate self-help means for their realization of their economic and social development goals within Indian Country. This report cites the fractionated ownership of individually allotted Indian lands and their checker-boarded pattern of land ownership as the major reasons why Indian property rights cannot be effectively developed for the Indian peoples' benefit.⁹⁶ That report also cites the lack of credit availability, from either federal or private sources, as a major reason why Indian ranchers and Indian farmers are unable to establish and maintain viable ranching and farming operations.⁹⁷

3. How the Obama Administration's Fair and Thoughtful Settlement of the Two Pending Indian Lawsuits Could Help Promote the Restoration of Indian Ranching on the Northern Great Plains

The Obama Administration has recently committed to the legislative settlement of the two pending Indian lawsuits against the federal government known as *Cobell*⁹⁸ and *Keepseagle*.⁹⁹ Furthermore, the federal government's recent settlement of the minority farmer lawsuit

95. Unfortunately, the major Indian agricultural resources statute, the American Indian Agricultural and Resources Management Act of 1993, does little to ameliorate these cited barriers to the development of Indian grazing enterprises on the heavily allotted reservations of the northern Great Plains. See American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3746 (2006). That act does explicitly recognize that "Indian agricultural lands . . . are vital to the economic, social, and cultural welfare of many Indian tribes and their members." *Id.* § 3701(3). But its provisions do not address the fractionated lands problem or the jurisdictional checkerboarding issue that have contributed to the defeat of any contemporary tribal initiatives that are directed at the realization of that act's tribal, social, and economic development goals. For that reason, that act's positive goals of "increased economic returns, enhance[d] Indian self-determination, [increased] employment opportunities, and improve[d] social and economic well-being" for the Indian peoples remain unrealized. *Id.* § 3701(4). Likewise, the BIA's limited regulatory jurisdiction over Indian grazing activities within Indian Country does not extend to fee patent lands. See 25 C.F.R. § 162.102(c) (2009).

96. INDIAN LAND TENURE FOUNDATION, COMMUNITY SURVEY; IMPORTANCE OF LAND AND VALUE OF PROPERTY RIGHTS 5 (2003), available at http://www.indianlandtenure.org/publications/survey_results.pdf.

97. *Id.*

98. *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

99. *Keepseagle v. Venneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001).

*Pigford v. Glickman*¹⁰⁰—a lawsuit that has striking legal and factual similarities to the *Keepseagle* litigation—provides a potential model for my proposed legislative settlement framework. The *Pigford* settlement has potential application to the *Keepseagle* litigation given the Obama Administration’s recent pledge to settle that case on fair terms.¹⁰¹ Given the striking factual and legal similarities between the two lawsuits, similarities that have been fully documented in recent U.S. Government Accountability Office (GAO) reports on this matter, it is reasonable to assume that the settlement structure of the latter litigation will be of a similar character and scope to that ordered by the *Pigford* court. That settlement’s goal was to enable many, if not most, of those African-American farmers to re-organize their farming operations and to continue to work their lands as successful minority farmers. Doubtless, one goal of the envisioned *Keepseagle* settlement would be to enable the Indian ranchers likewise to re-organize their ranching operations so that they could continue to work their lands on the northern Great Plains.

Furthermore, the *Pigford* settlement model may have direct application to the *Keepseagle* litigation given the substantial factual and legal similarities between these two lawsuits. These similarities were fulsomely acknowledged in the 2002 and 2008 reports by the GAO regarding the USDA’s continuing disregard of the Indian ranchers’ complaints regarding their discriminatory mistreatment at the hands of the local official in the FSA.¹⁰²

Here is a brief description of the factual and legal context of these two Indian lawsuits against the federal government.

100. 185 F.R.D. 82, 86-90 (D.D.C. 1999). This case involved a class-action lawsuit brought by African-American farmers who were also applicants for federal loans and other assistance under the minority farmer assistance programs administered by the United States Department of Agriculture (USDA). *Id.* at 86-87. These minority farmers sued the USDA alleging that it had systematically discriminated against them by either denying or delaying their applications for benefit programs or by mishandling their discrimination complaints. *Id.* at 89. The court granted the plaintiffs’ request for class-action certification on October 9, 1998. *Id.* at 90. The case was later settled by a court approved consent decree on February 19, 1999. *Id.* at 91. The settlement was, in part, directed at enabling some of the injured minority farmers to reorganize their existing operations and, thus, continue as farmers. *Id.*

Under the settlement’s terms, each successful individual claimant could receive up to \$187,000 in money damages and related judicial relief. In addition to a cash award of \$50,000, each successful claimant was eligible to receive additional relief, including tax assistance, debt forgiveness, foreclosure termination, technical assistance, and a one-time loan priority consideration. *Id.* at 108-09. Therefore, the court concluded that a successful claimant’s total court ordered relief could amount to \$187,000. *Id.* at 109.

101. See Thomas, *supra* note 81.

102. See *Management of Civil Rights Efforts Continues to Be Deficient Despite Years of Attention: Testimony Before the H. Subcomm. on Government Management, Organization, and Procurement Comm. on Oversight and Government Reform*, 110th Cong. 2-3 (2008) (statement of Lisa Shames, Director, Natural Resources and Environment, U.S. Gov’t Accountability Office); *Hispanic and Other Minority Farmers Would Benefit from Improvements in the Operations of the Civil Rights Program: Testimony Before the H. Subcomm. on Department Operations, Oversight, Nutrition, and Forestry, Comm. on Agriculture*, 107th Cong. 6-8 (2002) (statement of Lawrence J. Dyckman, Director, Natural Resources and Environment, U.S. Gen. Accounting Office).

a. Cobell v. Salazar¹⁰³

The Obama Administration has recently proposed a \$3.4 billion settlement of all the plaintiffs' claims in *Cobell*.¹⁰⁴ That proposal has earmarked about \$2 billion to fund a tribal land consolidation program that will likely focus, in part, on the restoration of high-quality grazing lands to tribal ownership on the northern Great Plains. Given that the legislative details of this settlement remain to be defined, Indian rancher and farmer advocates have an important opportunity to educate Congress regarding potential funding priorities as they relate to the restoration of an economically and socially viable Indian-ranching industry on the northern Great Plains. The Obama Administration's proposal contemplates a \$3.4 billion settlement of all claims in this matter.¹⁰⁵ Congress has not approved the administration's proposed settlement. The structure of this proposed settlement, particularly the \$2 billion of federal settlement funds that have been potentially "earmarked" for tribal land consolidation efforts, will be evaluated as a potential model for helping salvage some of the existing American Indian-ranching operations on the northern Great Plains.¹⁰⁶

b. Keepseagle v. Venneman

The Obama Administration has likewise recently pledged to settle the *Keepseagle* lawsuit on fair terms.¹⁰⁷ The Indian plaintiffs alleged that they had lost over \$450 million in potential income over the past thirty years due to their discriminatory treatment by the federal government in the granting of agricultural loans and credit to that plaintiff class.¹⁰⁸ Recently, USDA Secretary Tom Vilsack told Indian ranchers

103. The *Cobell* litigation has been ongoing since its filing in 1996, and in each round the secretary of the interior is the named defendant. The current secretary of the interior is Ken Salazar.

104. Posting of Ojibwa to Native American Netroots, <http://www.nativeamericannetroots.net/diary/306/breaking-news-cobell-v-salazar-settled> (Dec. 8, 2009, 9:44 PST); see also 91 F. Supp. 2d 1 (D.D.C. 1999). This case, filed in 1996, is an on-going class-action lawsuit brought on behalf of American Indian trust beneficiaries of the federally administered Indian trust accounts known as Individual Indian Monies (IIM) accounts. *Id.* at 6-7. Most of these Indian plaintiffs own individual Indian allotments that are held in trust for them by the United States. *Id.* Any income derived from such allotments is deposited into the individual Indian's IIM account that is administered by the federal government on the Indian's behalf. *Id.* at 9-12. The plaintiffs allege that the federal government had mismanaged at least 3.5 million IIM accounts. *Id.* at 50-51. In 1999, the court found that the federal government had breached the fiduciary duties it owed to the plaintiffs. *Id.* at 7.

105. See Q & As, *supra* note 91.

106. *Id.*

107. See Thomas, *supra* note 81. This on-going class-action lawsuit was brought by American Indian ranchers and farmers who had applied for USDA-administered agricultural loans and other USDA-administered farm credit or technical assistance programs. *Keepseagle v. Venneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944, *1 (D.D.C. Dec. 12, 2001). These Indian plaintiffs also alleged that the USDA systematically discriminated against them in the processing of their farm credit applications and did not adequately investigate their discrimination complaints. *Id.* The court granted the plaintiffs' request for class certification in 2001. *Id.* at *15.

108. See Thomas, *supra* note 81.

and farmers that he was “committed to resolving” this lawsuit.¹⁰⁹ He also told the Indians at this meeting that the department has had “litigation going on for a considerable period of time involving farmers, and we’re committed to resolving this.”¹¹⁰

Secretary Vilsack may have been referring to the USDA’s 1999 settlement with African-American farmers of the *Pigford* lawsuit in which the federal government has paid out \$980 million even though it continued to fight the Indian ranchers’ similar lawsuit.¹¹¹ Similar to *Pigford’s* settlement, the Indian ranchers and farmers are seeking adequate money damages, as well as significant modifications as to how the USDA administers its Indian-oriented farm credit programs.

Given that the details of the Obama Administration’s proposed settlement of the *Cobell* and *Keepseagle* lawsuits have not been finalized, it is an opportune time for the Indian-ranching and farming advocates to present their views as to how these two proposed settlements could be effectively integrated to promote the restoration of Indian ranching on the northern Great Plains.

The *Pigford* settlement model has potential application to the Obama Administration’s proposed settlement of the *Keepseagle* litigation. The substantial factual and legal similarities between these two lawsuits were fulsomely cited in the 2002 and 2008 reports¹¹² by the GAO regarding the USDA’s continuing disregard of the Indian ranchers’ complaints about their discriminatory mistreatment at the hands of the local officials in the FSA. Indeed, an earlier 1997 official civil rights report on the plight of minority farmers and ranchers cited similar concerns regarding the USDA’s treatment of those complainants:

The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA county office might claim to have no applications available and ask the farmer to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversights in the loan application. Often those requests for correcting the application could be stretched for months, since they would come only if the minority farmer contacted the office to check on the loan processing. By the time processing is completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the strength of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies necessary for the best yields. The farmer’s profit is then reduced.¹¹³

That report also cited the “real world” financial impact of the FSA’s al-

109. *See id.*

110. *Id.*

111. *See id.*

112. *See Management of Civil Rights Efforts*, *supra* note 102; *Hispanic and Other Minority Farmers*, *supra* note 102.

113. CIVIL RIGHTS ACTION TEAM, CIVIL RIGHTS AT THE U.S. DEP’T OF AGRIC. 15 (1997).

leged discrimination upon the minority farmer:

If the farmer's promised FSA loan finally does arrive, it may have been arbitrarily reduced, leaving the farmer without enough money to repay suppliers and any mortgage or equipment debts. In some cases, the FSA loan never arrives, again leaving the farmer without means to repay debts. Further operating and disaster loans may be denied because of the farmer's debt load, making it impossible for the farmer to earn any money from the farm. . . . As an alternative, the local FSA official might offer the farmer an opportunity to lease back the land with an option to buy it back later. The appraised value of that land is set very high, presumably to support the needed operating loans, but also making repurchase of the land beyond the limited-resource farmer's means. The land is lost finally and sold at auction, where it is bought by someone else at half the price being asked of the minority farmer. Often it is alleged that the person was a friend or relative of one of the FSA county officials.¹¹⁴

III. CONCLUSION

Indian ranching may yet prove to be the only Indian-civilizing strategy that worked. Whether that, in fact, proves to be the case will depend on how successfully the federal government, in conjunction with the relevant Indian leadership, settles the two above-cited Indian lawsuits. It is my belief that only through the successful settlement of those two lawsuits will adequate congressional attention and funding become available for the restoration of Indian ranching on the northern Great Plains.

114. *Id.* at 16.