AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 515

108TH CONGRESS, 2d Session | SENATE | REPORT 108–264

AMENDING THE INDIAN LAND CONSOLIDATION ACT TO IMPROVE PROVISIONS RELATING TO PROBATE OF TRUST AND RESTRICTED LAND, AND FOR OTHER PURPOSES

MAY 13, 2004.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1721]

The Committee on Indian Affairs, to which was referred the bill (S. 1721) to amend the Indian Land Consolidation Act to improve provisions relating to probate of trust and restricted land, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

PURPOSE

The principal purpose of S. 1721 is to amend the Indian Land Consolidation Act, 25 U.S.C. 2201 et seq. (the "ILCA"), to address the ever-worsening administrative and economic problems associated with the phenomenon of fractionated ownership of Indian lands. To this end, the amendment in the nature of a substitute (the "Amendment") would provide a new, uniform Federal probate code applicable to such lands and to Indian trust funds, as well as to make other mechanisms available to the Department of Interior, Indian tribes and individual owners of trust or restricted interests in land for consolidating ownership of highly fractionated parcels of land.

BACKGROUND

Federal policy towards Indian tribal governments has vacillated between two extremes. Since the founding days of the Republic,

29–010

Federal policy has generally addressed tribal governments directly through a government-to-government relationship.[1] At various times since 1789, however, the Federal government has treated tribal governments with varying degrees of apathy or antipathy, reflecting the relative strength of the United States vis-a-vis the tribes. Near the end of the Indian Wars of the 19th century came the allotment period, beginning in 1887 and continuing through 1934, when Congress enacted the Indian Reorganization Act, which formally ended the policy of allotment. The allotment period and the Federal policy associated with it is widely regarded as the most concerted Federal assault on tribal authority and the tribal land base. The cornerstone of this policy, the General Allotment Act of 1887[2] (GAA) or the "Dawes Act" as it came to be known, sought to end the communal nature of tribal ownership of reservation land by allotting it in parcels of 40 to 160 acres to individual members of the tribes.

Before the allotment policy, Indian tribes bargained with the Federal government to cede vast portions of North America in exchange for Federal recognition of permanent tribal homelands or reservations. Through treaties, acts of Congress, or executive orders, these reservations established a geographic region set apart as areas where Indians, acting though their tribal governments, could "make their own laws and be ruled by them."[3]

Through allotment, the Federal government reduced collective tribal land ownership by patenting parcels of reservation land to individual Indians. In some cases, nearly all of a tribe's land base was allotted in this manner. At first, Indian allotments were subject to restraints on alienation for a twenty-five year period. During that period, tribal members were free to use their individual allotments, but they could not sell or encumber these lands. Federal law did not provide a means for the lease or even the testamentary devise of these interests. The Dawes Act provided only that these interests were to descend pursuant to state intestacy rules. Under these rules, each of a decedent's heirs received an equal undivided share of each interest in land owned by the decedent. It was not until 1910 that Congress provided that individuals could devise these interests.[4] Because tribal members were unfamiliar with European-derived notions of land ownership and the complex systems of law and procedure that had been developed to support the transfer of ownership of property from one generation to the next through testamentary documents, few Indians wrote wills, making explicit devise of such interests an exception rather than the rule. Thus, in each successive generation smaller and smaller interests descended to the next generation. As these interests have grown smaller, it is not uncommon for an interest holder's connection with the land to become more abstract. As far back as 1934, Congressman Howard made the following observation:

> [O]ne heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and

[1] This policy—for the United States to conduct its relations with Indian tribes on a government-to-government basis—was strongly re-affirmed by President Nixon in 1970: see "Special Message to Congress on Indian Affairs," July 8, 1970.

[2] Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. §§ 331 et seq.

[3] *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

[4] Act of June 25, 1910, 36 Stat. 856, codified at 25 U.S.C. 373.

> distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.[5]

It is now seventy years after these remarks were made, and still interests in trust and restricted lands continue to descend by intestate succession and fractionate into ever-smaller units of ownership.[6] Even when partition in kind (i.e., dividing up a single parcel of land into several separate parcels, each going to a separate individual owner) is a legal option, it is rarely a practical alternative, especially where the ownership of a tract is held by dozens of individual Indians. As the Bureau of Indian Affairs ("BIA") reported to the Senate Committee on Interior and Insular Affairs: "As most of the allotments were of not more than 160 acres of dry farming or grazing lands * * * it will readily be seen that it was not feasible to partition the land in kind."[7] The ownership of some tracts have become so fractionated that while partition in kind may remain a theoretical solution, it is a practical impossibility.

Rather than characterizing the allotment policy as an assault on tribal authority, its proponents billed allotment as a means to "elevate" the status of each individual Indian, by replacing communal property with private property and supplanting tribal culture by assimilating individual Indians into mainstream culture. Whether stated or not, however, none of these objectives could be separated from allotment's fundamental purpose of reducing, then eliminating, the tribes' communal land-holdings, followed by the demise of tribal authority.[8] In fact, allotments were frequently accompanied with declarations of "surplus" lands, which were then removed from tribal ownership. By the 1930's, the combined effect of the allotment of Indian lands and the direct government sale of reservation lands, the majority of lands reserved to tribes in 19th century agreements with the United States had passed to non-Indian ownership.

> The majority of Indian lands passed from native ownership under the allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, a loss of 90 million acres. Of this, about 27 million acres, or two thirds of the total land allotted, passed from Indian allottees by sale between 1887 and 1934. An additional 60 million acres were either ceded out-

---

[5] Representative Howard, 78 Cong.Rec. 11728 (1934), as quoted in Hodel v. Irving, 481 U.S. 704, 708 (1987).

[6] See, for example, Indian Programs, Profile of Land Ownership at 12 Reservations, GAO, February 1992 (GAO/RCED–92–96BR). The Committee has shown considerable interest in the issue of fractionation over the past several years. In 1999, the Committee held a joint hearing with the House Resources Committee on S. 1586 (S.Hrg. 106–282) and in 2000 passed extensive amendments to the ILCA, discussed below. See, also, the Committee report accompanying S. 1586, Rep. 106–361, July 26, 2000. In 108th Congress, the Committee held two hearings on S. 550, a bill covering the same subjects as S. 1721, one on May 7 and another on October 16, 2003.

[7] Committee Print, 98th Congress 2nd Sess. Indian Heirship Land and Survey of the 86th Congress, December 1, 1960, p. 3.

[8] Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1 (1995).

> right or sold to non-Indian homesteaders and corporations as "surplus" lands.[9]

Nevertheless, allotment was only one step towards eliminating or reducing the extent of tribal authority. Even when the allotment or diminishment of a reservation was undertaken with the intent of eventually terminating a tribe's authority over its land, the Supreme Court has been reluctant to conclude that the mere loss of a tribe's title to the land automatically divests jurisdiction:

> Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act.[10]

With the enactment of the Indian Reorganization Act of 1934 (IRA),[11] Congress repudiated the allotment policy and provided measures to reverse some of its most nefarious results. As one Federal appellate court explained:

> One of the purposes of the [Indian] Reorganization Act was to put an end to the allotment system which had resulted in a serious diminution of [the] Indian land base and which, through the process of intestate succession, had resulted in many Indians holding uneconomic fractional interests of the original allotments.[12]

The IRA provided some tools to reverse the effects of the allotment policy. First, the IRA formally ended the policy of allotting tribal lands,[13] indefinitely extended the trust period on lands held in trust or restricted status,[14] and ended the widespread practice of issuing so-called "forced-fee patents." Second, it directed the Secretary to restore tribal lands that the government had declared to be "surplus".[15] The IRA also authorized the Secretary to acquire lands and associated interests in lands.[16]

In the late 1940's and the 1950's, Federal Indian policy changed yet again as Congress sought to terminate its relationship with certain specific Indian tribes. During this period, known as the "termination era," the Federal government made few efforts to address

---

[9] See F. Cohen, Handbook of Federal Indian Law (1982 ed.) p. 138.

[10] *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). Eight years before Justice Marshall expressed this view for a unanimous Supreme Court, then-Justice William Rehnquist reached a similar conclusion in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the Court rejected the argument that the fee status of half of the land on the reservation worked a de facto diminishment of the reservation. Thus, although the General Allotment Act provided for state jurisdiction over allottees after their lands were patented to them in fee, this did not result in the end of the "reservation-system." Justice Rehnquist reached this conclusion by relying on the Court's recent decision in *Mattz* v. *Arnett*, 412 U.S. 481 (1973), and "the many complex intervening jurisdictional statutes directed at the reach of state laws [in which] Congress by its more modern legislation has evinced a clear intent to eschew such [a] "checkerboard" approach within an existing Indian reservation[.]"

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

[12] *Stevens* v. *Commissioner of the Internal Revenue Service*, 452 F.2d 741 (9th Cir. 1971).

[13] 25 U.S.C. § 461.

[14] 25 U.S.C. § 462. Indefinitely extending the trust period prevented tracts of Indian lands from immediately passing out of trust. It did not, however, prevent land from passing out of trust when it is inherited by a non-Indian heir or when an allotment owner petitions the Secretary to terminate the trust status of an allotment or remove the Federal restrictions on alienation. With respect to Indian tribes organized pursuant to the IRA, however, allotted lands descend in trust or restricted status to the lineal descendants of a member of the tribe.

[15] 25 U.S.C. § 463.

[16] 25 U.S.C. § 465.

the effects of the GAA. The government sought to find ways to eliminate Federal responsibility to tribes and their members rather than address the problems associated with former policies. On most reservations, Indian owners continued to inherit smaller and smaller shares of the undivided interests in each tract of allotted land. Also, interests were not necessarily inherited by residents, or even tribal members, of the reservation where an allotment was located. As locating dozens of individuals with undivided interests in a tract became increasingly difficult, the Department of Interior simply relied on its authority to lease unused lands on behalf of their owners while discouraging Indian owners from becoming active in the leasing, management, or development of their own lands.[17]

In the 1960's, Congress embarked on yet another new course of Indian policy, abandoning the termination policy and beginning to lay the foundation for the policy of Indian selfdetermination.[18] Fractionated ownership of reservation lands was seen as a problem that required immediate attention. From 1959 through 1961, House and Senate Committees undertook a significant effort to analyze the extent of land fractionation.[19] With the assistance of the Interior Department, studies were commissioned to analyze the magnitude of the fractionation problem. These studies revealed that at least one-half of the 12 million allotted acres were held in fractionated ownership, with one-fourth of these lands owned by six or more heirs. Nevertheless, it was not until 1983 that Congress enacted a statute to address the fractionated ownership of Indian lands.

The Indian Land Consolidation Act of 1983

In 1983, Congress enacted the Indian Land Consolidation Act, P.L. 97–459 (25 U.S.C. 2201 et seq.) which addressed land fractionation by—

(1) Authorizing Indian tribes to establish land consolidation plans (section 204);

(2) Authorizing Indian tribes to acquire an entire parcel of trust land with the consent of the majority of the parcel's owners (section 205);

(3) Authorizing the Secretary of Interior to approve tribal probate codes, including provisions that limit devise or descent to non-member Indians or non-Indians (section 206); and

(4) Providing that both devise and descent were inapplicable to any fractional interest in trust or restricted land if it was 2% of the total acreage in a tract or smaller and it had not produced $100 in income in the previous year; instead, such interests were to escheat to the tribe (section 207).

Although there was no disagreement about the need for legislation to address fractionation of Indian lands, certain provisions in the ILCA were immediately criticized. During the 98th Congress, the Senate Select Committee on Indian Affairs held two hearings

[17] The lease revenue from these lands is a source of the persistent popular misconception that Indians receive some form of Federal stipend, simply because of their status as Indians.

[18] See, F. Cohen, Handbook of Federal Indian Law (1982 ed.), pp. 180–88.

[19] House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong. 2nd Sess. (Com. Print 1961) and Senate Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong. 2nd Sess. (Com. Print 1960–1961). Additional hearings were held in 1966, see Hearings on H.R. 11113 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 98th Cong., 2nd Sess. (1966).

on the 1983 version of the Act."[18a] Most participants directed their criticism at the escheat provision, section 207. In response to concerns that section 207 violated the 5th Amendment restriction on taking property without compensation, the Interior Department responded: "[A] s a legal point, section 207 does not take property away from anybody who currently owns it. What it does is set criteria for whether the property can be further devised[.]"[19a] Accordingly, the amendments approved by Congress in 1984 continued to prevent either the devise or descent of many fractional interests.[20] However, the amendment sought to "loosen[] the restrictive language of the Act providing for the escheat of minor fractional interests in trust allotted lands or restricted lands."[21] It did this by (1) permitting owners of escheatable interests to devise those interests to other owners of a parcel; (2) allowing some ineligible devisees to direct interests towards eligible individuals; and (3) assessing an interest's value using a 5 year "look-back" at the revenue produced by an interest and allowing a beneficiary to rebut the presumption that an interest is without significant economic value . The 1984 amendments also provided that the tribal probate codes adopted pursuant to the ILCA could take precedence over the escheat provisions of section 207.

JUDICIAL REVIEW OF THE ILCA

The Supreme Court found the original version of the ILCA to be unconstitutional in the case of *Irving* v. *Clark,* 758 F.2d 1260 (8th Cir. 1985), aff'd sub nom. *Hodel* v. *Irving,* 481 U.S. 704 (1987). Each member of the Court agreed that the ILCA could not withstand constitutional scrutiny, but there was no consensus on the appropriate basis for this result. In a concurring opinion, Justice Stevens criticized both the majority opinion and Congress, charging that the Congress enacted section 207 of the ILCA "abruptly with [a] lack of explanation." He then criticized the majority opinion for the "substantial gap [that] separates the claims that the Court allows the[] appellees to advance from the rationale that the Court ultimately finds persuasive."[22]

It is possible that each of Justice Stevens' criticisms can be traced to Congress, even those directed at the majority opinion. Justice Stevens noted a number of flaws in the consideration, drafting, and application of the original version of the Act: "The House returned the bill to the Senate, which accepted the House addition without hearings and without any floor discussion of § 207." In addition he noted: "The text of the Act also does not explain why Con-

[18a] Hearing Before the Select Committee on Indian Affairs, United States Senate, Amendments to the Indian Land Consolidation Act, S. Hrng. 98–390 (July 26, 1983) and Hearing Before the Select Committee on Indian Affairs, United States Senate, Amendments to the Indian Land Consolidation Act of 1983, S. Hrng. 98–1054 (July 31, 1984). See also, the Hearing Before the Select Committee on Indian Affairs, United States Senate, S. 2480–S. 2663 (June 21, 1984) and the document submitted for the record by Michael L. Lawson, Heirship: The Indian Amoeba.

[19a] S. Hrng. 98–390, p. 7. In fact, at the time Congress was considering amendments to the ILCA, the constitutionality of the Act was affirmed by a Federal district court in *Irving* v. *Watt,* Civ. 83–5139 (D. S.D. Dec. 15, 1983), and was on appeal before the 8th Circuit. The 1984 amendments were signed into law on October 30, 1984. The 8th Circuit did not reverse the district court until March 29, 1985. The Supreme Court affirmed the 8th Circuit on May 18, 1987 in *Hodel* v. *Irving,* 481 U.S. 704 (1987).

[20] P.L. 98–608, October 30, 1984, 99 Stat. 3171.

[21] Sen. Rep. 98–632, p. 7.

[22] Hodel at 719, Justices Stevens and White concurring.

gress omitted a grace period for consolidation of the fractional interests that were to escheat to the tribe pursuant to [section 207]."

Justice Stevens also pointed out an apparent inconsistency between the Court's primary rationale for invalidating the statute and the case before the Court. According to the Court: "[The ILCA] effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property." But the facts before the Court concerned interests that would further fractionate, and none of the plaintiffs owned pre-existing interests in the parcels they were to inherit.

Like Justice Stevens, the Court's majority was concerned with the way in which the ILCA was drafted. For example, Congress assumed section 207 would only "restrict the descendancy of some of these fractional interests if these interests are so small as to be financially meaningless."[23] But the provision included in the ILCA relied exclusively on past income generation to assess an interest's value. As the Court noted, the ILCA's "income generation test" fell short of culling valuable from de minimis interests, and it is possible that a more accurate mechanism for determining the value of the 2% interests may have produced a different result before the Court.

Indeed, the Court was willing to concede that a number of factors weighed in favor of the ILCA. The Court noted that Congress enacted the law "pursuant to its broad authority to regulate the descent and devise of Indian trust land [and]* * * as a means of ameliorating, over time, the extreme fractionation of certain Indian lands." Also, the Court noted that it was unlikely that the owners of the interest could point to "investment backed expectations" in property that had been held in trust for a century, and that had been "overwhelmingly acquired by gift, descent, or devise." The Court also noted an "average reciprocity of advantage" weighed "weakly" in favor of the statute. As the Court explained:

> All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.[24]

The absence of a more discerning test for determining the value of each interest created several difficult choices for the *Irving* Court (all of those choices, of course, obviated when the Court ruled ILCA section 207 unconstitutional). First, the Court would have to either devise a judicial test to replace ILCA's "income generation test" or somehow articulate limits on the use of the ILCA's income generation test. Second, even if the Court could fashion a method for determining each fractional interest's value, it would then have to set the standard for which interests were "financially meaningless." Third, if the Court could resolve that difficult question, it would find itself in the classical "slippery slope" dilemma of incremental

[23] House Rep. No. 97–908 (Sept. 30, 1982), p. 11.
[24] *Hodel* at 715–6.

reasoning: that is, if the Court were to decide that interests worth $50 or less could escheat constitutionally, could it then provide a principled basis for deciding that interests worth, say, $51 could not? It is not surprising that the Court did not decide the case in a fashion that would have required it to struggle with these other issues, each of which fall within the province of the legislative rather than the judicial branch, especially in the field of Indian law.

When the original version of the ILCA reached the Court in 1987, § 207 was analyzed by the Court from three very different perspectives. To three Justices, the statute violated the 5th Amendment because it was insufficiently solicitous of Indian rights.[30] Four members of the Court found a 5th Amendment taking because the "character of the Government regulation" was "extraordinary," raising concerns that upholding the statute would expand the government's authority over property rights.[31] Finally, the statute was improperly constructed to please two members of the Court who may have been satisfied if the provision had simply conditioned retention of the interest upon "performance of a modest statutory duty * * * within a reasonable period of time."[32] Although the *Irving* decision may be fairly characterized as an invitation to Congress to "go back to the drawing board" and address the problem of fractionation in a constitutionally acceptable manner, unfortunately the Supreme Court expressed no view on whether Congress's efforts to do so in the 1984 amendments to the ILCA resolved any of the Court's concerns.

In 1984, three years before the *Irving* decision and five months before the Eighth Circuit's decision in *Irving* v. *Clark,* Congress amended the escheat provision in ILCA by providing for a 5-year "look-back" period for determining value instead of one year (with a rebuttable presumption that the income would continue) and allowing a devise of the interest to co-owners in the same parcel. It is not surprising that the 98th Congress assumed that it could constitutionally limit the devise or descent of some interests in trust lands in this manner. In fact, the *Irving* decision itself was neither anticipated[33] nor embraced by commentators, who viewed the case as something of an aberration.[34] Also, Congress appears to have assumed—accurately—that the courts would be sympathetic with the statute's objective.[35] The *Irving* Court conceded: "The fractionation

[30] *Hodel* at 719, Justices Brennan, Marshall, and Blackmun concurring.

[31] *Hodel,* at 716. The Court observed that by enacting section 207, Congress was "acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands" (citing *Jefferson* v. *Fink,* 247 U.S. 288 (1918)). *Irving,* at 712. The Court concluded that, although the forced escheat mechanism in section 207 brings a benefit that "is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands," the "extraordinary" regulation of section 207 "amounts to virtually the abrogation of the right to pass on * * * the small undivided interest * * * to one's heirs" and "effectively abolishes *both descent and devise of these property interests* even when the passing of the property might result in consolidation. * * *" Id., at 716–17 (emphasis added).

[32] Id. at 719, Justices Stevens and White concurring.

[33] See, Kornstein, Inheritance: A Constitutional Right? 36 Rutgers L. Rev. 741 (1984).

[34] See, Chester, Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving, 24 Sw. U. L. Rev. 1195 (1995). Although Professor Chester characterizes Irving as "strange" and questions whether, for a number of reasons, it would be sufficiently robust to have a major impact on the law of inheritance in the long run, he acknowledges its potential as a significant change in the Court's jurisprudence in the area and cautions that "what happens to this case as precedent over the next few years should be watched carefully." Id., at 1213.

[35] In light of the Supreme Court's decision in *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976), Congress assumed that it had wide latitude to regulate the devise and descent of Indian property before it vested in a new owner. In *Hollowbreast*, the Supreme Court addressed mineral interests to allotments on the Northern Cheyenne Indian Reservation. A 1926

problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation."

Ten years after it refused to express an opinion on the 1984 amendments to the ILCA, the Supreme Court considered whether these modest amendments rehabilitated the ILCA in *Babbitt* v. *Youpee*, 519 U.S. 234 (1997). With Justice White no longer on the Court, only Justice Stevens wrote that the amended statute could be constitutionally applied to Mr. Youpee's estate. The remainder of the Court found the ILCA as amended to be unconstitutional. Specifically, the Supreme Court considered the following amendments to the ILCA enacted in 1984:

> [As] amended section 207 differs from the original in three respects: it looks back five years instead of one to determine the income produced from a small interest, and creates a rebuttable presumption that this income stream will continue; it permits devise of otherwise escheatable interests to persons who already own an interest in the same parcel; and it authorizes tribes to develop their own codes governing the disposition of fractional interests.[36]

The Court noted that the Act still relied exclusively on the income generated by a parcel to assess its value, an approach to valuation that could allow valuable interests to escheat if they were not producing income. Most important, although the modified statute allowed an owner to devise his interest, he could only devise it to another "owner of an undivided interest in such parcel of trust or restricted land." This did not go far enough to satisfy the standard established in *Irving*. As the Court explained: "Congress" creation of an ever-so-slight class of individuals equipped to receive fractional interests by devise [i.e. existing interest holders] does not suffice, under a fair reading of Irving, to rehabilitate the measure." Quoting from the 9th Circuit Court of Appeal's observation, Justice Ginsburg pointed out that the class of current owners "is unlikely to contain any [of the testator's] lineal descendants."[37] Finally, the United States did not assert that the establishment of tribal code provisions was relevant in *Youpee*. In light of *Irving*, the result in *Youpee* is not surprising. In fact, several years before *Youpee* even reached the Court, the Department of Interior was soliciting input from tribes and individual owners of trust and restricted land on how to address land fractionation issues.[38]

ILCA and Treaty Rights

A discussion of the principles drawn from the Supreme Court's opinions on the ILCA would not be complete without addressing the concurring opinion in *Irving* authored by Justice Brennan, and joined by Justices Marshall and Blackmun. In their concurring

---

statute conferred the subsurface mineral estates to each allotment owner after fifty years. Before fifty years elapsed, a new law reserved the mineral rights for the benefit of the tribe. The Court upheld the statute and rejected the allottee claims that this constituted a taking of their vested property rights.

[36] *Babbitt* v. *Youpee*, 519 U.S. 234 (1997).

[37] *Youpee* at 733, quoting *Youpee* v. *Babbitt*, 67 F.3d 194, 199–200 (9th Cir. 1995).

[38] Statement of Assistant Secretary for Indian Affairs Kevin Gover, Joint Hearing Before the United States Senate Committee on Indian Affairs and the House of Representatives Committee on Resources, Indian Land Consolidation Amendments; And to Permit Leasing of Oil and Gas Rights on Navajo Allotted Lands, Nov. 4, 1999, S. Hrng. 282, p. 83. (Describing a consultation process on land consolidation begun in 1994.)

opinion, these Justices aligned themselves with the decision of the 8th Circuit Court of Appeals. While the Court of Appeals ruled that a 5th Amendment taking had occurred, they based this conclusion on the nature of the property at issue.[39]

The crux of Justice Brennan's three sentence concurring opinion consists of the following statement: "largely for the reasons discussed by the [8th Circuit] Court of Appeals, I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case an unusual one." Specifically, the 8th Circuit decision referred to the treaty negotiations that led to the creation of the allotments at issue and concluded that the allottees bargained with the United States and "obtain[ed] patents to protect allotments from future governmental interference," including right to devise their interest. Pointing to the Supreme Court's decision in *Choate* v. *Trapp*, 224 U.S. 665 (1912), the 8th Circuit explained that treaty provisions can give rise to individual rights that may not be altered without just compensation. In *Choate*, the original allottees enjoyed an immunity from taxation that could not be altered by Congress without payment of just compensation.

In the 8th Circuit Court of Appeals, the *Irving* plaintiffs claimed that the ILCA violated two interests protected by *Choate*: a promise that interests in allotted land would continue to descend through family lines without governmental interference and that state law would be used to determine the inheritance of allotments. The 8th Circuit interpreted treaty provisions as a Federal guarantee that "lands allotted to individual Indians could not be taken from [the allottees or] their children [i.e. heirs or devisees]."[40] Thus, the panel of judges agreed that the ILCA ran afoul of *Choate* when it prevented either the devise or descent of an interest in allotted land. However, the 8th Circuit explicitly rejected the idea that heirs under state law enjoyed any vested rights under the treaty. The would-be heirs argued that the treaty guaranteed the exclusive use of state law of intestacy to determine the descent of interests in trust land. As the 8th Circuit pointed out, this theory would require courts to find a taking if the law authorized the testamentary devise of allotted land.[41] Such a result would hinder Congressional authority "to alter and condition rights that have not yet vested in individual Indians[]." It would also elevate the rights

[39] By contrast, the Supreme Court's majority in *Irving* found a taking based on the nature of the government's action. According to the Court, "the character of the Government regulation here is extraordinary[,] * * * [a] virtual abrogation of the right to pass on a certain type of property * * * to one's heirs," a right which had "been part of the Anglo-American legal system since feudal times." Id., at 716. Of course, allotments did not exist in feudal Europe, and with limited exceptions, these interests did not even exist in the United States for more than a century after its founding. Although looking to European antecedents as a means of understanding the rights attaching to interests in allotted Indian lands might be, therefore, fraught with hazards, the full measure of an individual's interest in an allotment cannot be ascertained without some reference to concepts of Anglo-American property for at least three reasons. First, the very notion of establishing allotments and the language employed to define these property interests originated in Western, rather than indigenous, culture. Second, these allotments were the result of negotiations between an Indian tribe and the United States. Therefore, Anglo-American notions of property were the intellectual and cultural backdrop for one (but only one) of the two parties that negotiated the relevant agreement. In light of the longstanding principle that treaties are to be interpreted in favor of Indian tribes and their members, it follows a fortiorari that the holders of these rights possess whatever beneficial attributes may be gleaned from the Anglo-American culture that chose to create and characterize them.

[40] *Irving* v. *Clark*, 758 F.2d 1260, 1264, aff'd on different grounds sub. nom. *Hodel* v. *Irving*, 481 U.S. 704 (1987).

[41] In fact, some of the plaintiffs in *Irving* could only assert claims under devise based on Federal laws enacted after the treaty.

of heirs above those of a living allotment owner. "[T]he existence of any vested rights in an allottee's heirs would mean that an Indian to whom land was allotted would have no power to dispose of that property by will." [42]

Although the Supreme Court decided Irving on different grounds, the continuing vitality of *Choate* is obvious; treaties give rise to interests and rights which may not be eliminated without the payment of compensation. Even though the 8th Circuit was solicitous of this principle, it would not accept an invitation to require the Federal government to compensate every would-be heir who was prevented from inheriting because of an adjustment in the rules governing the descent and devise of allotments. The majority in *Irving* v. *Hodel* agreed that Congress's "broad authority to adjust the rules governing the descent and devise" of this property[43] would permit aggressive changes in the rules of devise and descent without effecting a compensable taking. According to the *Irving* Court, Congress could even go so far as "abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe." Id., at 717–18.

The Indian Land Consolidation Act Amendments of 2000 (P.L. 106–462)

In 2000, the Congress adopted further amendments to ILCA—P.L. 106–462, the Indian Land Consolidation Act Amendments of 2000 (the "2000 Amendments"). Section 102 of the 2000 Amendments set forth the five-fold policy of the United States to—

(1) prevent further fractionation of Indian trust allotments;

(2) consolidate fractional interests and their ownership into usable parcels;

(3) consolidate those interests in a manner that enhances tribal sovereignty;

(4) promote tribal self-sufficiency and self-determination; and

(5) reverse the effects of the allotment policy on Indian tribes.

The 2000 Amendments brought a number of significant changes to ILCA that were calculated to implement the various aspects of this declared Federal policy. These changes include extensive revisions of ILCA section 206 (25 U.S.C. 2205) relating to tribal probate codes; a new uniform Indian probate code with provisions for the testamentary disposition and intestate succession of interests in trust and restricted Indian lands (ILCA section 207(a) and (b), 25 U.S.C. 2206(a) and (b)); a new pilot program for the voluntary acquisition of fractional interests as well as provisions for administering the interests acquired under that program (ILCA sections 213 and 214, 25 U.S.C. 2212 and 2213); and provisions to facilitate land consolidating transactions between individual Indians and their tribes (ILCA section 217, 25 U.S.C. 2216). Thus, the 2000 Amendments brought an assortment of different mechanisms to bear on the problem on Indian land fractionation, which had continued unabated since the 1984 amendments to ILCA.

The probate code in the 2000 Amendments (see ILCA section 207, 25 U.S.C. 2206) was also intended to have, over time, a con-

[42] *Irving* v. *Clark*, 758 F.2d 1260, 1265 (1985).
[43] Id., at 717.

solidating effect on fractionated parcels of Indian land. The code, which has not yet gone into effect,[44] establishes a scheme of intestate succession that has a much narrower range of potential individual heirs than is found in typical state codes of intestate succession, and makes the Indian tribe the "heir of last resort" if there are no eligible individual heirs. Although the testamentary provisions of the probate code in the 2000 Amendments (ILCA section 207(a)) provide landowners of trust and restricted land with some latitude in terms of selecting from eligible devisees of their land, allowing the devise of a trust or restricted interest to any Indian person or to the Indian tribe, it still has significant limitations: a devise of an interest to a non-Indian (which might include the testator's own non-Indian children) creates only a life estate in the devisee, with the remainder going to heirs of the 1st or 2nd degree if those heirs happen to be "Indian" as that term is defined in ILCA section 202(2) (25 U.S.C. 2201(2)).[45] If the testator's heirs of the 1st or 2nd degree are non-Indian, they inherit the remainder interest only if they already own an undivided interest in the same parcel of land, failing which the remainder interest passes to the tribe.

Accordingly, under the 2000 Amendments, many Indian owners of trust or restricted interests in Indian lands would be unable to devise anything more than a life estate in those interests—or to have the interests pass by intestate succession—to their own children or grandchildren who were not Indian as defined in the ILCA. Not surprisingly, in the hearings in May and October of 2003 on S. 550, a bill that is, in essence, an earlier version of S. 1721, the Committee received statements from Indian landowners and tribal representatives expressing great concern over the limitations placed on landowners by the intestate and testamentary provisions of the 2000 Amendments, and indicating that some landowners have submitted, or were prepared to submit, applications for fee patents of their interests in order to avoid the limitations of the Federal probate code and assure their ability to devise the property to their children or other family members.[46] This unfortunate result was never intended happen with the 2000 Amendments. To the contrary, the 2000 Amendments were an effort to preserve the trust status of individual Indian lands, and to build on the Federal Indian policy reflected by the enactment of the Indian Reorganization Act of 1934, including the 1934 act's indefinite extension of the trust and restricted period on Indian lands and its repudiation of laws from an earlier period that facilitated the unilateral issuance of fee patents to owners of Indian trust land, even over their pro-

[44] Pursuant to ILCA section 207(g)(5), the probate provisions of the 2000 amendments do not affect the estate of any decedent who dies prior to the day which is 365 days after the date on which the Secretary makes a certification under section 207(g)(4). That certification has not yet been made.

[45] The 2000 Amendments would allow the devise of a trust or restricted interest to a testator's non-Indian heir of the 1st or 2nd degree or non-Indian collateral heir of the 1st or 2nd degree only if the testator has no Indian spouse, Indian lineal descendent, Indian heir of the 1st or 2nd degree or Indian collateral heir of the 1st or 2nd degree. Therefore, if a testator happened to have, for instance, an Indian uncle or and Indian first cousin, he could not devise the interest to his own children if they were not Indian.

[46] See, written testimony of Ben O'Neal, a trust land owner and member of the Business Council of the Eastern Shoshone Tribe of the Wind River Reservation, submitted for the record of the Committee's hearing on May 7, 2003, and written testimony of D. Fred Matt, Chairman, Confederated Tribes of the Salish and Kootenai Tribes of the Flathead Reservation, submitted for the record of the Committee's hearing on October 15, 2003.

test.[47] Therefore, in addition to addressing the alarming rate of fractionation of Indian lands, the Amendment is intended to address the concerns of Indian landowners and their advocates over the impact that the probate code of the 2000 Amendments would have if it were to be certified.

THE NEED FOR LEGISLATION

Several decades after adopting a policy of breaking up Indian reservations through allotments and other means, Congress ended and formally repudiated this policy through the Indian Reorganization Act of 1934. Congress also sought to reverse the effects of the allotment era, although its efforts in this regard have achieved only limited success. While testimony before the Committee's hearing on S. 550 in May of 2003 indicates that the Department's fractional interest acquisition pilot program in the BIA's Midwest Regional Office had succeeded, as of that time, in purchasing over 40,000 fractional interests located on 3 reservations—and thereby forever avoiding any further fractionation of those interests over the course of future generations—the Department's witness also testified that the rate of fractionation of other interests has been so great that the same number of outstanding interests exist today on these 3 reservations as when the program first began 4 years ago.[48] It is clear, then, that more aggressive measures are necessary in order to (1) slow the rate of fractionation; (2) consolidate fractionated interests; and (3) facilitate and improve the implementation of the Congressional policy of acquiring and consolidating fractional interests embodied and expressed in the 2000 Amendments.

Like the probate code in the 2000 amendments, the intestacy provisions of the Amendment's uniform probate code that would replace[49] ILCA section 207(a) are intended to slow the rate of fractionation of individual Indian trust and restricted land over the course of time. The general rules of intestate succession in the Amendment would limit (1) the number of successive classes of potential individual heirs standing to inherit an interest before it would pass to the Indian tribe, and also (2) the eligibility for membership within each such class. The classes of individual heirs in the general rule (i.e., section 207(a)(2)(B)) are children and, by representation, grandchildren; great-grandchildren; parents; and, finally, siblings. To be eligible to inherit within these classes, a child, grandchild, great grandchild, etc., must qualify as an "eligible

[47] See, 25 U.S.C. 462 (extending the trust and restricted period) and 478–1 (making section 462 applicable to all tribes and all trust and restricted Indian lands). See, also, *Sampson* v. *Andrus*, 483 F. Supp. 240, 242 (D.C. S.D. 1980).

[48] See, Testimony of Wayne Nordwall, Director, Western Region, Bureau of Indian Affairs, submitted for the record at the Committee's hearing on S. 550 held on May 7, 2003. Mr. Nordwall also testified at the Committee's hearing on October 15, 2003, and his written testimony submitted there indicates that the rate of fractionation may have even outstripped the Department's total acquisitions. This excerpt from his testimony submitted at the latter hearing, describing the same highly fractionated tract that was at issue in *Hodel* v. *Irving*, supra, also illustrates both the magnitude and the financial impact of the fractionation problem:

Today, this tract produces $2000 in income annually and is valued at $22,000. It now has 505 owners but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the 505 owners could agree) for its estimated $22,000 value, the smallest heir would now be entitled to $.00001824. The administrative cost of handing this tract in 2003 are estimated by the BIA at $42,800.

[49] As with the probate code in the 2000 amendments, the probate code in the Amendment would not affect the estate of any person who dies before the date that is one year after the Secretary certifies compliance with the notification requirements of section 8(a) of the Amendment.

heir," a term that the Amendment adds to ILCA's definition section, 25 U.S.C. 2201. The term "eligible heirs" is defined to mean, for purposes of ILCA section 207 (25 U.S.C. 2206), any of a decedent's children, grandchildren, great grandchildren, parents, full siblings, and halfsiblings by blood who are (1) "Indian" as defined by the Amendment,[50] (2) lineal descendants within two degrees of consanguinity of an Indian, or (3) owners of a trust or restricted interest in a parcel of land for purposes of inheriting another such. interest in the same parcel.[51] These classes of individuals eligible to inherit by intestate succession under the Amendment are limited in comparison to those of typical state codes, which tend to reach out to remote collateral family relations to find an heir before property escheats to the State.[52] See, for examples, A.R.S. § 14–2103 (Arizona), MT.ST. § 72–2–113 (Montana), and Cal. Prob. Code App. §§ 6401 and 6402 (California).

In addition, the uniform probate code in the Amendment has a special "single heir rule"[53] applicable to small interests that are not passing under a valid will—i.e., any trust or restricted interest in land in the decedent's estate that represents less than 5% of the entire undivided ownership of the parcel of which it is a part.[54] The single heir rule is intended to place a "floor" on fractionation insofar as it is the consequence of intestate succession and to provide owners of trust or restricted land with a strong incentive to write wills. The rule would reduce the number of classes of potential eligible heirs standing to inherit these small interests to just three—children, grandchildren, and great grandchildren—and only one person in each successive class, the oldest eligible heir, may inherit the interest. If there are no eligible heirs in any of the three classes, the interest passes to the Indian tribe with jurisdiction over the

[50] The Amendment defines Indian so as to include, inter alia, "any person who is a member of any Indian tribe, is eligible to become a member of any Indian Tribe, or is an owner (as of the date of enactment of the Indian Probate Reform Act of 2004) of a trust or restricted interest in land * * *."

[51] The term "eligible heirs" determines who may inherit under the probate code by intestate succession. The term is not used to limit who may receive an interest in trust or restricted land or trust personalty by testamentary devise under the probate code.

[52] Use of the limiting term "eligible heir" in section 207(a) somewhat increases the probability that the tribe, as the "heir of last resort" under the Amendment's probate code, will inherit the interest where the decedent dies without a will, because only those individual family members within each successive statutory class of heirs who meet the definition of "eligible heirs" may inherit the trust or restricted interest. A child, grandchild, etc., of the decedent who does not qualify as an "eligible heir" cannot inherit a trust or restricted interest by intestate succession. On the other hand, the term is defined broadly enough to allow close family members of many decedents to inherit trust or restricted interests through intestate succession—and by maintaining the trust or restricted status of the interests, keep the interests within the reach of a probate code that, unlike state probate codes, will have a consolidating effect over the course of time, and keep those interests available for purchase by co-heirs or co-interest owners at probate under the amendments to ILCA section 207 or by the Secretary under the fractional interest acquisition program under ILCA section 213. See footnote 59.

[53] If enacted, the single heir rule would become ILCA section 207(a)(2)(D).

[54] The interest to which this percentage applies is the interest held by the decedent at the time of his or her death and is to be determined based on "the Secretary's records at the time of the heirship determination." This wording is intended to address problems of ownership calculation that might frequently arise in tracts that have hundreds, and in some instances thousands, of different owners. For example: if, unknown to a decedent's surviving family members, another co-owner of the parcel who was related to the decedent had predeceased her, and the decedent was an eligible heir of this other co-owner, it is possible that the Secretary's records may show that the decedent owned less than 5% of the parcel whereas in reality she owned slightly more than 5%. In such a case, a subsequent determination that the decedent may have owned somewhat more than the Secretary's records reflected at the time of the heirship determination would not undo the application of the single heir rule. Similar language is included in other provisions of S. 1721 that require ownership calculations—the partition section (new section 205(d)(2)(E)) and the purchase option at probate (new section 207(p)(5))—for similar reasons.

interest.[55] It is important to note, however, that the Amendment would expressly allow the owners of trust and restricted interests to avoid the application of the single heir rule by disposing of the interest by executing a will.

While the intestate provisions of the Amendment are designed to limit the range of eligible heirs, the testamentary provisions of S. 1721 (i.e., the bill's amendment to ILCA section 207(b)) are written to provide owners of trust and restricted interests in land and trust personalty with a very wide range of testamentary options. Specifically, the landowner may devise such interests in trust status to his or her lineal descendants, to any other person who owns another trust or restricted interest in the same parcel, to the Indian tribe, or to any Indian, and may also devise the interest (1) as a life estate to any person or (2) as an unrestricted fee interest to any person who is not Indian (including the testator's non-Indian lineal descendants).

As the Court states in *Irving:*

> [E]ncouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation.

Id., at 712.

The Amendment's limitations on inheritance by intestate succession, especially in the context of the single heir rule, are indeed examples of "dramatic action to encourage consolidation."[56] On the other hand, owners of trust or restricted interests in land may devise this property to lineal descendants and many other persons who are eligible devisees of the property. Therefore, the Amendment's probate code would provide landowners with a strong incentive to write wills rather than simply "default" to the law of intestate succession, which, even under the narrow rules of the Amendment's probate code, would inevitably lead to some fractionation. At the same time, because landowners would have real testamentary choices under the Amendment, the constitutionality issues enunciated in *Irving* and *Babbitt* v. *Youpee,* and cases such as *Phillips* v. *Washington Legal Foundation,* 524 U.S. 156 (1998), wherein the Rehnquist Court relies on *Irving* in a non-Indian setting, have been addressed.

The Amendment includes additional mechanisms, beyond the probate code, that are intended to facilitate the consolidation of fractional interests. For example, section 4 of the Amendment amends 25 U.S.C. 2204 (ILCA section 205) by creating a process for

---

[55] The rule would allow the Indian tribe with jurisdiction over the interest to adopt a different rule of intestate succession applicable to interests of less than 5%, provided that the tribal rule does not allow intestate inheritance of such interests by more than one person. The tribe's rule should be set forth in a tribal ordinance, legislation or other appropriate enactment of the governing body of the tribe.

[56] However, the intestate provisions of the Amendment do not go nearly as far as the majority of the Court in *Irving* suggests that Congress might go in order to resolve the fractionation problem—i.e., with the Amendment, Congress would not be "abolishing descent of such interest by rules of intestacy" and "forcing the owners to formally designate an heir to prevent escheat to the Tribe." *Irving,* at 718. The Committee recognizes, then, that there are ways in which Amendment's probate code might have provided an even more "dramatic" solution to fractionation than it does and still have been constitutional. However, the probate code is intended to apply to trust and restricted lands in many different areas and reservations across the United States that are characterized by great diversity in local circumstances, and the most aggressive uniform Indian probate code that the constitution would allow would not be appropriate in many parts of Indian country.

the partition by sale of certain highly fractionated Indian lands. This provision would allow the Indian owners of undivided interests in tracts of land that meet the definition of "highly fractionated"[57] to request that the Secretary partition the property by sale.[58] Another example of a "consolidating mechanism" in the Amendment is the amendment to ILCA section 207 that would allow the coowners of trust or restricted interests, co-heirs and the Indian tribe to purchase, at not less than fair market value, fractional interests in a decedent's estate prior to entry of the order distributing the estate. Under this provision, the heirs' consent would be required except where the heir's interest is less than 5% of the entire undivided ownership of the parcel of which it is a part and such interest is passing without a will.

As noted above, the Committee received testimony from the Department indicating that the fractional interest acquisition program has achieved some success but that, since the initiation of that program, the rate of fractionation has been equal to or greater than the rate at which the Department has been able to purchase fractional interest from landowners. The Amendment attempts to address this problem with amendments to ILCA that are intended to (1) improve and facilitate the implementation and execution of the fractional interest acquisition program (see, for example, the amendments to ILCA section 213 (25 U.S.C. 2212 in section 6(a)(5) of the Amendment); (2) put a "floor" on fractionation with the "single heir rule" applicable to intestate succession of small interests (see discussion above); and (3) keep fractional interests under a Federal probate code that slows the rate of fractionation and promotes consolidation, as opposed to state probate codes which tend to promote fractionation.[59]

---

[57] The definition section of ILCA (section 202) is amended to include the term "parcel of highly fractionated Indian land," which is defined as any parcel that has either (1) 50 to 99 coowners, none of whom holds an undivided trust or restricted interest in the parcel that is greater than 10 percent of entire undivided ownership, or (2) 100 or more co-owners of undivided trust or restricted interests.

[58] The partition provision includes a requirement that the party requesting the partition be responsible for the costs of mailing and publishing notice to co-owners and pay the estimated costs, or submit a bond for that amount, "up front." There are two primary purposes for this requirement. First, the partition contemplated by this subsection will result in the forced sale of fractionated interests held by a great number of individuals, and it is appropriate that the process be initiated only by persons who have a genuine desire to have their property partitioned. Furthermore, although each administrative partition action should result in a significant collective benefit to Indian landowners and a benefit to the United States—consolidation of ownership of a parcel of land from dozens, hundreds or, in some cases, thousands of co-owners down to a single owner, and with that, a dramatic decline in the costs incurred by the Department in managing and tracking fractional interests—each such action will nevertheless demand considerable time, effort and resources of the Department to complete. Therefore, the second purpose behind the requirement that the party requesting the partition be responsible for mailing and publication costs is to control the number of requests for partition to which the Secretary must respond and to assure that the process is not easily abused or invoked for reasons other than for the consolidation of interests (for example, to simply have the property appraised). The Committee is nevertheless mindful that, in a great number of cases, the cost of mailing and publication will exceed the proportionate share of the proceeds that any one owner of a fractional interest stands to receive from a sale of the property, so that there may be little incentive for any such co-owner to initiate the process (with the exception of co-owners who initiate the process to bid for and acquire full ownership of the land). Accordingly, the Secretary is given the express authority and discretion to waive this payment and bonding requirement, in whole or in part, in any case where doing so would further the purposes of the Act.

[59] Allowing fractional trust or restricted interests to pass into fee status and to become subject to state laws of intestate succession (and frequently the laws of multiple States, whenever decedents die possessed of trust or restricted interests in reservations situated in several States), means that those interests will likely continue to fractionate and thereby further complicate and enlarge the Department's difficulties in managing, and consolidating the ownership of, highly fractionated tracts of Indian land. On the other hand, by keeping these interests in trust or restricted status, the Amendment would facilitate the consolidation of fractional interests by allowing co-heirs, co-owners, the tribe with jurisdiction over the interest or the Secretary on behalf

LEGISLATIVE HISTORY

S. 1721 was introduced by Senator Campbell on October 14, 2003, and was referred to the Committee on Indian Affairs. On November 12, 2003, at the request of Senator Campbell, Senator Thomas was added as a co-sponsor of S. 1721. Although the Committee on Indian Affairs did not hold a hearing on S. 1721 itself, the Committee held two hearings on a predecessor bill to S. 1721, to wit, S. 550, on May 7 and October 15, 2003.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on January 28, 2004, the Committee on Indian Affairs, by voice vote, adopted an amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to the Senate. Before the bill was delivered to the Clerk of the Senate, the Senate Committee on Indian Affairs, in an open business session on April 21, 2004, approved the amendment in the nature of a substitute by voice vote and ordered the bill, as amended, reported favorably to the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section sets forth the short title of the bill: "American Indian Probate Reform Act of 2004."

Section 2. Findings

This section sets forth the findings in support of the provisions of the bill, including the General Allotment Act's provisions directing that Indian allotments would descend in accordance with the State law of intestate succession based on the location of the allotment, and how this Congressional reliance on State law has contributed to fractionation and, where lands are located in more than 1 state, made estate planning unnecessarily difficult. The findings section also states the advantages of a single uniform probate code, including a reduction in fractionation, facilitation of efforts to provide estate planning and inter-tribal efforts to develop tribal probate codes, and that a uniform probate code should operate to further the policy of the United States as set forth in the 2000 Amendments.

Section 3. Indian probate reform

Section 3 of the Amendment amends ILCA by replacing existing subsections (a) and (b) of section 207 (25 U.S.C. 2206 (a) and (b)) of the ILCA with a new uniform Indian probate code that includes provisions for intestate succession (i.e., where there is no valid will) of interests in trust and restricted lands and trust funds, as well as for the testamentary devise (i.e., by will) of such interests and funds. Section 3 also amends and subsection (c) relating to joint tenancy by creating a rule of construction for devises of trust or restricted interests in land to multiple devisees.

---

of the tribe to exercise the "purchase option at probate," or to allow heirs to enter into consolidation agreements during probate proceedings. In short, maintaining the trust or restricted status of these fractional interests operates to further the principal goals of the ILCA and the Indian policies it embodies: consolidation of fractional interests and ownership of those interests into usable parcels of land and reversing the effects of the allotment policy on Indian tribes.

Generally, the uniform Federal Indian probate code (amendments to subsections (a) and (b) of ILCA section 207) would apply to the inheritance of trust or restricted land and trust funds unless a tribal probate code applicable to a particular reservation has been approved by the Secretary of Interior pursuant to section 206 of ILCA (25 U.S.C. 2205). The Amendment also includes a provision that makes the uniform Indian probate code and other provisions of the ILCA inapplicable to specific reservations or trust and restricted lands that are governed by special Federal laws that expressly identify those reservations or lands.

Where the owner of trust or restricted land dies without a will, the probate code's general rule of intestate succession provides that interests in trust or restricted lands and trust funds will pass to "eligible heirs" within the following successive classes of heirs: the decedent's surviving children or, by "right of representation," grandchildren (meaning a grandchild only shares what his or her deceased parent would have received had the parent outlived the decedent), then the surviving great-grandchildren, then the surviving parents, then surviving siblings—with members of each succeeding class inheriting only if the interest does not pass to one or more members of the previous classes. If an interests does not pass to some member of any of the forgoing classes, then the Indian tribe with jurisdiction over the interest inherits it as the heir of last resort.[60]

The probate code includes a special rule applicable to the inheritance of small fractional interests (specifically, any fractional interest that is less than 5% of the total undivided ownership of the parcel of which it is a part) passing without a will—the "single heir rule." These small interests may be inherited by only one person: the oldest eligible heir among the decedent's surviving children, and if there are no eligible heirs among the children, then the oldest eligible heir among the decedent's surviving grandchildren, and if there are no such heirs among the surviving grandchildren, then the oldest eligible heir among the decedent's surviving great-grandchildren, and if there are no eligible heirs among the great-grandchildren, then the Indian tribe.[61] However, the single heir rule does not apply to an interest passing under a valid will, and the code authorizes the tribe to adopt a different rule of succession for these small fractional interests, but only if the tribal rule provides for inheritance of the interest by one person, to prevent further fractionation.

The probate code also authorizes an owner of trust or restricted land to "devise" (to pass property on by executing a will) the land in trust or restricted status to the testator's lineal descendants, any person who owns a pre-existing trust or restricted interest in the same parcel of land, the Indian tribe with jurisdiction over the interest, or any Indian. The owner may also give a life-estate to any

[60] The Amendment also provides for the contingency of there being no such tribe to inherit the property, by allowing for division of an interest among co-owners of trust or restricted interests in the same parcel and, in the absence of such co-owners, sale of the interest and use of the proceeds under the ILCA's fractional interest acquisition program.

[61] Both the general rule of succession and the single heir rule provide for division of the interest equally among all co-owners of trust or restricted interests in the same parcel where there are no individual heirs and no Indian tribe to inherit the interest, and for the sale of the interest and application of proceeds to the fractional interest acquisition program in the unlikely event that there are no individual heirs, no tribe and no co-owners.

person, and may devise the interest in non-trust status to persons who are not Indian.

The Amendment also sets forth sets out rules for interpretation of wills under the probate code, rules preventing "heirship by killing," and general rules governing probate that (1) address pretermitted spouses and children, divorce, after-born heirs, advancements of trust or restricted personalty during lifetime, multiple lines of inheritance, and (2) give the Secretary authority to approve renunciations of inherited interests by heirs and consolidation agreements within the context of probate proceedings. The Amendment also provides a rule of construction for a term used throughout the probate code ("applicable federal law") and a provision that makes the Act inapplicable to lands and allotments that are already the subject of special legislation expressly applicable to specific Indian reservations or to the allotted lands of specific tribes.

Section 4. Partition of highly fractionated indian lands

This section amends ILCA section 205 by adding a new subsection authorizing any co-owner of an interest in a parcel of trust or restricted land that is highly fractionated to request the Secretary to commence the partition by sale of the parcel.[62] The Secretary is authorized to proceed if the parcel meets the definition of "highly fractionated," that is, if it has at least 50–99 co-owners, no one of whom owns an undivided interest that is greater than 10% of the whole, or by 100 or more co-owners. The requesting party is responsible for payment of the costs of providing notice and publication, although the Secretary may waive this requirement if doing so would further the policies of the ILCA.[63]

If a parcel is determined by the Secretary to meet this test, the land may be partitioned by sale—by auction or sealed bids—for not less than its fair market value, subject to certain consent requirements (for example, where the tribe owns an interest in the parcel, its consent is required, or where a co-owner has been residing or operating a business on the property). Generally, only parties eligible to bid at the partition sale would be the Indian tribe, members of the tribe, descendants of the original allotee and co-owners of trust interests in the property who are members of an Indian tribe other than the tribe with jurisdiction over the interest.[64] The Amendment would allow the owner of the largest interest in the tract to match the highest bid if that interest is greater than 20% of the whole, and, subject to certain conditions, it would also allow the tribe of jurisdiction to match the highest bid if the high bidder is not a member of that tribe. The Secretary is authorized to adopt any regulations that may be necessary to implement the partition provision. Any such regulations must include provisions for giving notice of partition sales to eligible bidders.

---

[62] By its terms, the partition process will not be immediately available. Subsection (d)(2) states that no application for partition "shall be valid or considered if it is received by the Secretary prior to the date that is 1 year after the date on which notice is published pursuant to section 8(a)(4) American Indian Probate Reform Act of 2004."

[63] See footnote 58.

[64] For land in the State of California not within a tribe's reservation or subject to a tribe's jurisdiction, the only eligible purchasers would be persons who are members or eligible to be members of a tribe and owners of trust or restricted interests in the parcel being partitioned.

Section 5. Owner managed interests

This section would add a new section to ILCA that would authorize the owners of trust or restricted lands to enter into surfaces leases of their lands for a term of not more than 10 years, for agricultural purposes only. Before any interest would acquire "owner managed" status under the section, all of the owners of trust or restricted interests in the same parcel must agree upon the status—so that no parcel would be partially owner-managed and partially managed by the Secretary. Once a parcel acquires owner-managed status, it would remain owner-managed despite transfer or conveyance of trust or restricted interests to new owners, until such time that all owners of such interests have submitted applications to the Secretary to revoke the status. The Secretary is not responsible for the collection of or accounting for revenues under a lease authorized by this section so long as the interests are in owner-managed status. However, if owner-managed status is revoked, the Secretary must collect and account for all future revenues from and after the date of revocation, but revocation of the owner-managed status does not affect the validity of a lease that was made in accordance with the section prior to the date of revocation.

Section 6. Additional amendments

This section of the substitute amendment to S. 1721 amends various sections of ILCA, in both technical and substantive ways. The following is a brief description of the more substantive amendments that S. 1721 makes to ILCA.

(a) Purchase option at probate

This new provision would allow the heirs of undivided trust or restricted interests (and surviving spouses who are receiving a life estate) to voluntarily sell their interests, for not less than fair market value, to "eligible" purchasers during probate proceedings. Eligible purchasers include co-heirs of the same property in the estate, co-owners of trust or restricted interests in the same parcel of land involved in the estate, and the Indian tribe with jurisdiction over the interest or the Secretary on behalf of that tribe. The sale would require the heirs' consent, unless the interest passing was less than 5% of the parcel of which it was a part and the interest is passing without a will, and if more than one eligible purchaser wishes to purchase the interest, the Secretary must sell it by auction to the highest bidder among the eligible purchasers. If the interest is less than a 5% interest and is passing without a will, any of the eligible purchasers could force the sale at probate—unless the heir was residing on the parcel at the time of the decedent's death, in which case the heir's consent would still be required. As with the "single heir rule," any owner of trust property may avoid this involuntary sale of small interests simply by writing a will. The provisions of this subsection would not apply to any interest that is subject to a consolidation agreement authorized under ILCA section 207(e) or by the new provision that the Amendment would add as ILCA section 207(k)(9).

(b) Tribal probate code limitations

This section disallows approval of a tribal probate code under ILCA section 206 if the code prohibits devises to lineal descendants

of the original allottee or to an Indian who is not a member of the tribe with jurisdiction over the interest, unless the tribal code, in the context of those devises, also provides for renunciation of the interest to an eligible devisee, the opportunity for a devisee who is a surviving spouse or lineal descendent of a testator to reserve a life estate, and payment of fair market value as provided under ILCA section 206(c)(2). It also places a "family farm" exception on the right of a tribe to purchase an interest devised to a non-Indian person under 25 U.S.C. section 2205(c), where the devisee is a member of the decedent's family (lineal descendant of the decedent or landowner or of the grandparent of the decedent or landowner, a spouse of the decedent or landowner, or the spouse of the decedent's or landowner's lineal descendant) and the devisee agrees that the tribe will have the opportunity to acquire the interest if the interest is offered for sale to a non-family member.

(c) Fractional Interest Acquisition Program and Secretarial liens on acquired interests

The substitute amendment to S.1721 would make several revisions to ILCA sections 213 and 214 (25 U.S.C. 2212 and 2213) relating to the fractional interest acquisition program, designed to improve the manner in which it is carried out. One change is that the 3-year limitation placed on the program is eliminated. Several other provisions of this section are designed to facilitate the administration of the acquisition program, inter alia, by allowing the Secretary to make program acquisitions in the context of probate proceedings (i.e., allowing the Secretary to exercise the "purchase option at probate" on behalf of the tribe). The Amendment would also authorize to be appropriated $75,000,000 for fiscal year 2005, $95,000,000 for fiscal year 2006, and $145,000,000 for each of fiscal years 2007 through 2010 for purposes of carrying out the acquisition program under ILCA section 213 (25 U.S.C. 2212).

The Amendment also gives the Secretary discretion to remove of Secretarial liens in certain circumstances, and facilitates the financing of repayment obligations of individual Indians who purchase reacquired interests under the program from the Secretary.

This section of the Amendment also includes a provision that would give the tribe with jurisdiction a right of first refusal to purchase any interest that is the subject of an application to terminate trust status or remove restrictions by matching any offer being paid for the interest or, if there is no such offer, paying fair market value for the interest. There is an exception for conveyances of interests that are part of a "family farm" being conveyed to a "family member" as defined in section 206(c)(2)(A)(iv) (see discussion in (b), above, relating to tribal probate codes) if the conveyance requires that the tribe with jurisdiction over the interest be afforded to purchase match the offered price or pay fair market value where no price is offered.

(d) Establishing fair market value

Section 216 (25 U.S.C. 2215), which allows the Secretary to develop a system for establishing fair market value of various types of lands and improvements to for purposes of the fractional interest acquisition program, is amended by having it govern amounts to be offered under the other provisions of the ILCA as well.

(e) Acquisition fund

The Amendment makes technical changes to the wording of ILCA section 216 (25 U.S.C. 2215), and requires that all proceeds from leases, permits and sales derived from interests acquired under section 213 (25 U.S.C. 2212) or paid by Indian landowners under that section be used for the acquisition of undivided interests. It also authorizes the Secretary to use the revenues to acquire undivided interests in accordance with section 205 (25 U.S.C. 2204).

(f) Trust and restricted land transactions

The Amendment amends ILCA section 217 (25 U.S.C. 2216) which authorizes certain sales, exchanges and gift deeds for no or nominal consideration between certain Indian family members and between an Indian and the Indian tribe provided that the grantor is first given an estimate of value of the interest. The grantor may waive the requirement of an estimate if the conveyance is to certain family members. The Amendment would also allow the written waiver in the context of transfers to the tribe with jurisdiction over the interest as well as to co-owners if the grantor's interest represents 5 percent or less of the parcel.

Section 217 is also amended in subsection (e) by making certain the names, and mailing addresses of the owners of any interest in trust or restricted lands available to designated persons upon written request.

Finally, section 217 is amended by requiring the Secretary, before approving an application to terminate trust status of, or remove restrictions from, a parcel of trust or restricted land, to provide the tribe with jurisdiction over the property with the right to match any offer to purchase the parcel in the application or to pay fair market value where there is no purchase price offered. This section provides an exception for family farms, where the conveyance is to a member of the family of the landowner.

(g) Approvals of leases, rights-of-way, and sales of natural resources

ILCA section 219 (25 U.S.C. 2218) is amended, first, in subsection (b)(1)(A) by changing the consent percentage for leases and agreements relating to trust or restricted land owned by 5 or fewer persons from 100 down to 90 percent, and, second, by adding a section that says nothing in the Act supersedes, repeals or modifies any general or specific statute authorizing the grant or approval of any land use transaction involving fractional interests in trust or restricted land.

(h) Definitions

The substitute amendment would amend the definitions of several terms and it would add new defined terms, including "Indian," "trust or restricted lands" and "trust or restricted interest in land," "parcel of highly fractionated Indian land," "land," "person" and "individual," "eligible heirs" and "without regard to waste." See, also, discussion above regarding the defined terms "Indian," "eligible heirs" and "highly fractionated Indian lands."

(i) Revisions to the acts of February 8, 1887 (25 U.S.C. 348) and June 18, 1934 (25 U.S.C. 464)

The provisions of two acts, section 5 of the Indian General Allotment Act (25 U.S.C. 348, the "GAA") and section 4 of the Indian Reorganization Act (25 U.S.C. 464, the "IRA"), respectively, would be amended so as to conform them to changes to the ILCA. Section 5 of the GAA is amended to reflect that the Amendment's probate code, or an applicable tribal probate code, will apply to the land for which trust patents have been issued, and similar conforming amendments are made to section 4 of the IRA.

(j) Estate planning and probate code development

The Amendment would amend ILCA section 207(f)(1) and (2) (25 U.S.C. 2206(f)(1) and (2)) by including language that the Secretary's (1) activities under this subsection shall be in accordance with any applicable tribal probate code or land consolidation plan, and (2) estate planning assistance program should dramatically increase the use of wills and reduce the number and complexity of estate passing by intestate succession, and by adding a new provision authorizing grants to non-profit and other organizations to provide estate planning services to Indians and probate code development assistance to Indian tribes and Indian organizations.

(k) Notification to landowners

The Amendment adds a new subsection to ILCA section 207 requiring the Secretary to provide certain ownership information relating to a parcel of trust or restricted land upon written request by an owner of an interest in the parcel.

(l) Pilot program for the management of trust assets of Indian families and relatives

This section of the Amendment also includes revisions to ILCA section 207 that would authorize the Secretary to establish, with certain limitations, a pilot project whereby private and family trusts or other entities would facilitate and assist in the management of trust assets owned by Indian family members and relatives in furtherance of the purposes of the ILCA. The total number of entities participating in the pilot project cannot exceed thirty, and no such entity may engage in activities under the project until implementing regulations have been adopted. The subsection includes provisions that any transactions involving the lease, use, mortgage or other disposition of trust assets administered by an entity under the pilot program requires approval by the Secretary in accordance with applicable Federal law and that authorize the Secretary to make payments of income or revenues derived from such assets directly to a participating entity in accordance with regulations adopted pursuant to the subsection.

(m) Giving notice to and locating heirs

Section 6 of the Amendment includes two new subsections to section 207 of ILCA pertaining to the manner of searching for heirs and dealing with heirs whose whereabouts have been unknown for extended periods. The bill provides that if the Secretary determines during the probate hearing that a missing heir has had no contact with the Department for a 6-year period preceding the hearing,

that heir may be presumed to have predeceased the decedent for purposes of descent and distribution of trust or restricted land and trust personalty within that decedent's estate.

Section 7. Annual notice and filing; current whereabouts of interest owners

This section adds a new section to ILCA requiring the Secretary to send landowners written notice, at least annually, along with other regular reports to owners of trust or restricted lands or individual Indian money accounts, a change of address form to confirm or update the owner's name and address.

Section 8. Notice of amendments and effective date

This section requires the Secretary to give notice to Indian landowners of the amendments made by this Act informing the landowners of estate planning options and transactions that may be used to consolidate ownership of land, and, after doing so, to certify that the notice requirements have been met—in the same manner required under the 2000 amendments to ILCA—and to thereafter certify that notice had been given. This section, also like the 2000 amendments, states that the amendments would not apply to the estate of any individual who dies before the date that is 1 year after the date of the Secretary's certification.

Section 9. "Severability"

This section sets forth a "severability clause" applicable to the Act.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1721, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 13, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1721, the American Indian Probate Reform Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, *Director.)*

Enclosure.

S. 1721—American Indian Probate Reform Act of 2004

Summary: S. 1721 would amend laws that regulate how the ownership of interest in Indian trust or restricted land (certain parcels of land that are owned by individuals or groups) is transferred upon the death of the owner. CBO estimates that implementing the bill would cost $25 million in 2005 and $457 million over the 2005–

2009 period for the Secretary of the Interior to acquire interests in trust or restricted land and to administer the grant and loan programs that would be established under the bill. This activity is known as Indian land consolidation, and costs for this purpose would be subject to appropriation of the necessary sums. Most of the costs would stem from specified authorizations in S. 1271.

S. 1721 also would authorize the Secretary of the Interior to acquire certain interests in Indian trust or restricted land using revenue collected from leasing of natural resources on Indian land that has been acquired by the Secretary or from the sale of such land. Because such acquisitions could be made without appropriations, enacting S. 1721 would increase direct spending, but CBO estimates these costs would be less than $500,000 in each year over the 2005–2014 period.

S. 1721 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no significant costs on state, local, or tribal governments.

S. 1721 contains two private-sector mandates as defined in UMRA. The bill would impose a private-sector mandate on individuals who would otherwise inherit interests in Indian lands under current law. The bill also would allow the Secretary of the Interior to partition parcels of Indian land for sale under certain conditions. In the event that land is partitioned for sale without the consent of all the interest owners, S. 1721 would impose a private-sector mandate on those not consenting to the partition. CBO estimates that the direct cost of mandates in the bill would fall below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation). The bill also may benefit interest owners in Indian trust and restricted lands since it would remove certain restrictions on the use of such lands.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1721 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2004	2005	2006	2007	2008	2009
SPENDING SUBJECT TO APPROPRIATION						
Spending for Indian Land Consolidation Under Current Law:						
Budget Authority	22	0	0	0	0	0
Estimated Outlays	13	12	5	2	0	0
Proposed Changes:						
Purchase of Indian trust and restricted land by the Secretary of the Interior:						
Authorization Level	0	75	95	145	145	145
Estimated Outlays	0	23	59	97	128	140
Tribal Grants to Develop Probate Codes and Estate Planning:						
Estimated Authorization Level	0	2	2	2	2	2
Estimated Outlays	0	2	2	2	2	2
Grants and Loans to Indians to purchase partitions at auction:						
Estimated Authorization Level	0	*	*	*	*	*
Estimated Outlays	0	*	*	*	*	*
Total Proposed Changes:						
Enacted Authorization Level	0	77	79	147	147	147
Estimated Outlays	0	25	61	99	130	142
Total Spending Under S. 1721:						
Estimated Authorization Level	22	77	97	147	147	147

	By fiscal year, in millions of dollars—					
	2004	2005	2006	2007	2008	2009
Estimated Outlays	13	37	66	101	130	142

Note.—* = less than $500,000.

Basis of estimate: For this estimate, CBO assumes that S. 1721 will be enacted near the beginning of fiscal year 2005, and that the authorized and estimated amounts will be appropriated for each year. We also assume that outlays will follow the historical spending pattern of the Indian Land Consolidation Pilot Program.

The federal government originally allotted interests in trust and restricted land to individual Indians over a century ago. Over time, the number of owners of such allotted land has grown as owners have passed ownership on to their descendants. The cost to the Bureau of Indian Affairs (BIA) to administer ownership of this property has also grown. S. 1721 would modify the Indian Land Consolidation Act, which attempts to prevent further partitioning of such land.

Spending subject to appropriation

S. 1721 would authorize the appropriation of $75 million in 2005, $95 million in 2006, and $145 in each of 2007 through 2010 for the Secretary to acquire undivided interests in Indian trust and restricted lands from willing sellers at fair market value and to collect any revenue generated from the leasing of natural resources on that interest. CBO estimates that appropriating the specified amounts would result in outlays of $23 million in 2005 and over $440 million over the five-year period for purchases of such land.

The bill also would authorize the Secretary of the Interior to provide grants to Indian tribes to develop tribal probate codes and provide estate planning services to tribal members. Based on information from the Department of the Interior (DOI), CBO estimates that implementing this provision would cost $2 million in each year over the 2005–2009 period for the Secretary to provide such grants.

In addition, S. 1721 would establish a process whereby an owner in an undivided parcel of land or the tribe may apply for the partition (when a parcel of land with multiple owners is split into discrete pieces) by sale of certain parcels of trust or restricted land. S. 1721 would authorize DOI to provide grants and low-interest loans to individuals who successfully bid on Indian land auctioned by the Secretary on behalf of an owner who wishes to partition and sell their interest in such land. Based on information from the department, CBO estimates that providing such grants and loans would cost the federal government about $1 million over the five-year period, subject to the availability of appropriated funds.

Based on information from BIA, CBO expects that implementing S. 1721 could result in some administrative cost savings to that agency because there would be fewer individual owners of interests in trust and restricted lands. Any such savings would depend on amounts appropriated in the future, but CBO estimates that savings would not be significant over the 2005–2009 period.

Direct spending

Under current law, the Department of the Interior may spend—subject to appropriation—any receipts from natural resource leases

on trust or restricted land that has been purchased by the Secretary or any proceeds from the sale of such land. Subject to appropriation, the Secretary is authorized to spend such funds to acquire additional interests in Indian land, so long as the additional land is located on the same reservation that generated those leasing receipts or land sale proceeds.

S. 1721 would authorize the Secretary to spend such receipts or land sale proceeds without further appropriation. Since the start of the program in 1999, the department has collected nearly $200,000 from such transactions. CBO estimates that enacting this provision would increase direct spending by about $200,000 in 2005 and a negligible amount in each subsequent year over the 2006–2014 period.

Estimated impact on state, local, and tribal governments: S. 1721 contains no intergovernmental mandates as defined in UMRA and would impose no significant costs on state, local, or tribal governments.

Estimated impact on the private sector: S. 1721 contains two private-sector mandates as defined in UMRA. The bill would impose a private-sector mandate on individuals who would otherwise inherit interests in Indian trust or restricted lands under current law. The bill also would allow the Secretary of the Interior to partition parcels of Indian land for sale under certain conditions. In the event that land is partitioned for sale without the consent of all the interest owners, S. 1721 would impose a private-sector mandate on those not consenting to the partition. CBO estimates that the direct cost of mandates in the bill would fall below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation). The bill also may benefit interest owners in Indian trust and restricted lands since it would remove certain restrictions on the use of such lands.

Intestate disposition of interests in trust and restricted lands

S. 1721 would amend federal probate laws that govern how an individual's interest in certain parcels of Indian land is transferred upon death. The bill would impose a private-sector mandate on certain individuals who would inherit interest in trust or restricted lands under current law. Indian trust or restricted lands are those lands held by the United States in trust for an Indian tribe or held by an individual Indian or tribe subject to restrictions against transferring such property.

Currently, the probation of Indian trust and restricted lands follows the laws for intestate succession of the state where the land is located in cases where there is no tribal probate code. In such cases when there are no heirs in the immediate family, distant relatives would be eligible to inherit land interests under current law. Under S. 1721, such distant relatives would not be eligible heirs in certain cases. The loss of inheritance could impose costs on persons who would otherwise receive an interest in such property. The changes in probate code would apply to very small interests in few cases. CBO expects that the cost of the mandate would be small.

Partition of highly fractionated Indian lands

The bill also would allow the Secretary of the Interior to partition certain parcels of Indian lands with a large number of owners

for sale at the request of the Indian tribe with jurisdiction over the land or any owner of an interest in the parcel. To partition the land, among other conditions, the Secretary must obtain the written consent of the Indian tribe with jurisdiction, any owner who has kept residence or operated a business (including a farm or ranch) on the land for the three years preceding the date of the request for partition, and the owners of at least 50 percent of the undivided interests in the parcel if at least one owner's undivided interest has a value in excess of $1,500. The bill would impose a mandate on those interest owners not consenting to the partition. CBO estimates that the cost the mandate would impose on nonconsenting interest holders would be small. The interests involved are small, and all owners of interests in the partitioned land would receive compensation equal to at least the fair market value of their interest in land.

Estimate prepared by: Federal Costs: Lanette J. Walker; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Selena Caldera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that the amendment in the nature of a substitute to S. 1721 will create only de minimis regulatory or paperwork burdens.

EXECUTIVE COMMUNICATIONS

The Committee has received a letter dated May 5, 2004, from the Department of Interior addressing the amendment in the nature of a substitute approved by the Committee on April 21, 2004. That letter, which generally supports the amendment, is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, May 5, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of the Interior on S. 1721, the "American Indian Probate Reform Act of 2004", which was amended in the nature of a substitute by the Committee on April 21, 2004. The Department would like to thank the Congress for its continued efforts to address this extremely important issue. S. 1721 is a positive step forward and will provide the Department valuable tools to help us stop the exponential growth of fractionated interests. The Department generally supports S. 1721.

As Secretary Norton stated in her letter to you and Senator Inouye on April 6, 2004, the Department is committed to achieving a just resolution of the issues related to Indian Trust and to the four part plan you envisioned for trust reform. The plan includes

swiftly enacting legal reforms to Indian probate, commencing efforts to reconsolidate the Indian land base, and returning Indian lands to tribal ownership. The Department is in complete agreement that legislation to provide for probate reform and tools to strengthen the Department's land consolidation effort is needed. As we have stated on numerous occasions, this may be our last opportunity to reform probate before the current system collapses.

However, previously we had serious concerns with the version of S. 1721 that was moving forward. It was our view that modifications to that version were necessary in order to make improvements to the current law. Any legislation in this area must provide meaningful reform before the Administration can support it. Since the last markup in January, we have worked extensively with your staff on this issue and are pleased to see that many important changes are now reflected in the bill.

Taken as a whole, S. 1721 would provide the Department valuable tools for attacking the growing fractionation problem facing Indian Country. It is a positive and meaningful step forward. We look forward to working with the Congress as the legislation moves forward on some remaining issues we have with the bill, such as (1) enabling the Department to address the aftermath of the Supreme Court's decision in *Babbit* v. *Youpee* (519 U.S. 234 (1997)), the decision of the District of South Dakota decision in *DuMarce* v. *Norton,* and other situations involving statutes under which highly fractionated intestate interests automatically escheat to the tribe; (2) ensuring that language creating a new loan program meets Federal credit standards; (3) clarifying that the government does not retain any liability for owner managed interests; and (4) ensuring that any waiver of sovereign immunity is consistent with the appropriate type of relief for partition actions.

Again, the Department would like to thank the Congress for its continued effort to address this extremely important issue.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DAVID L. BERNHARDT,
Director, Office of Congressional and Legislative Affairs and Counselor to the Secretary.

CHANGES IN EXISTING LAW

In Compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 1721 will result in the following changes in 25 U.S.C. 2201, et seq., and 25 U.S.C. §§ 348 and 464, with existing language which is to be deleted in black brackets and the new language to be added in italic:

25 U.S.C. 2201

§ 2201. Definitions

For the purpose of this chapter—

* * * * * * *

(2) [“Indian” means any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of ‘Indian’ under a provision of Federal law if the Secretary determines that using such law’s definition of Indian is consistent with the purposes of this chapter;] *“Indian” means—*

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of the date of enactment of the American Indian Probate Reform Act of 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 207, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.

* * * * * * *

[(4) “trust or restricted lands” means lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by Indians or an Indian tribe subject to a restriction by the United States against alienation; and]

(4) “trust or restricted lands” means lands, title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and “trust or restricted interest in land” or “trust or restricted interest in a parcel of land” means an interest in land, title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

* * * * * * *

(6) “parcel of highly fractionated Indian land” means a parcel of land that the Secretary, pursuant to authority under a provision of this Act, determines to have, as evidenced by the Secretary’s records at the time of the determination—

(A) 50 or more but less than 100 co-owners of undivided trust or restricted interests, and no 1 of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or

(B) 100 or more co-owners of undivided trust or restricted interests;

(7) “land” means any real property, and includes within its meaning for purposes of this Act improvements permanently affixed to real property,

(8) “person” or “individual” means a natural person;

(9) “eligible heirs” means, for purposes of section 207 (25 U.S.C. 2206), any of a decedent’s children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are—

(A) Indian; or

(B) lineal descendants within 2 degrees of consanguinity of an Indian; or

(C) owners of a trust of restricted interest in a parcel of land for purposes of inheriting by descent, renunciation or consolidation agreement under section 207 (25 U.S.C. 2206), another trust or restricted interest in such parcel from the decedent; and

(10) "without regard to waste" means, with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen.

25 U.S.C. 2204

§ 2204. Purchase of trust or restricted or controlled lands at no less than fair market value; requisite conditions

(a) IN GENERAL.—Subject to subsection (b), any Indian tribe may purchase at no less than the fair market value part or all of the interests in any tract of trust or restricted land within that tribe's reservation or otherwise subject to that tribe's jurisdiction with the consent of the owners of such interests. The tribe may purchase all of the interests in such tract with the consent of the owners of [over 50 per centum of the undivided interests] *undivided interests equal to at least 50 percent of the undivided interest* in such tract. Interests owned by an Indian tribe in a tract may be included in the computation of the percentage of ownership of the undivided interests in that tract for purposes of determining whether the consent requirement under the preceding sentence has been met.

* * * * * * *

(d) PARTITION OF HIGHLY FRACTIONATED INDIAN LANDS.—

(1) APPLICABILITY.—This subsection shall be applicable only to parcels of land (including surface and subsurface interests, except with respect to a subsurface interest that has been severed from the surface interest, in which case this subsection shall apply only to the surface interest) which the Secretary has determined, pursuant to paragraph (2)(B), to be parcels of highly fractionated Indian land.

(2) REQUIREMENTS.—Each partition action under this subsection shall be conducted by the Secretary in accordance with the following requirements:

(A) APPLICATION.—Upon receipt of any payment or bond required under subparagraph (B), the Secretary shall commence a process for partitioning a parcel of land by sale in accordance with the provisions of this subsection upon receipt of an application by—

(i) the Indian tribe with jurisdiction over the subject land that owns an undivided interest in the parcel of land; or

(ii) any person owning an undivided interest in the parcel of land who is eligible to bid at the sale of the parcel pursuant to subclause (II), (III), or (IV) of subparagraph (I)(i);

provided that no such application shall be valid or considered if it is received by the Secretary prior to the date that

is 1 year after the date on which notice is published pursuant to section 8(a)(4) of the American Indian Probate Reform Act of 2004.

(B) COSTS OF SERVING NOTICE AND PUBLICATION.—The costs of serving and publishing notice under subparagraph (F) shall be borne by the applicant. Upon receiving written notice from the Secretary, the applicant must pay to the Secretary an amount determined by the Secretary to be the estimated costs of such service of notice and publication, or furnish a sufficient bond for such estimated costs within the time stated in the notice, failing which, unless an extension is granted by the Secretary, the Secretary shall not be required to commence the partition process under subparagraph (A) and may deny the application. The Secretary shall have the discretion and authority in any case to waive either the payment or the bond (or any portion of such payment or bond) otherwise required by this subparagraph, upon making a determination that such waiver will further the policies of this Act.

(C) DETERMINATION.—Upon receipt of an application pursuant to subparagraph (A), the Secretary shall determine whether the subject parcel meets the requirements set forth in section 202(6) (25 U.S. C. 2201(6)) to be classified as a parcel of highly fractionated Indian land.

(D) CONSENT REQUIREMENTS.—

(i) IN GENERAL.—A parcel of land may be partitioned under this subsection only if the applicant obtains the written consent of—

(I) the Indian tribe with jurisdiction over the subject land if such Indian tribe owns an undivided interest in the parcel;

(II) any owner who, for the 3-year period immediately preceding the date on which the Secretary receives the application, has—

(aa) continuously maintained a bona fide residence on the parcel; or

(bb) operated a bona fide farm, ranch, or other business on the parcel, and

(III) the owners (including parents of minor owners and legal guardians of incompetent owners) of at least 50 percent of the undivided interests in the parcel, but only in cases where the Secretary determines that, based on the final appraisal prepared pursuant to subparagraph (F), any 1 owner's total undivided interest in the parcel (not including the interest of an Indian tribe or that of the owner requesting the partition) has a value in excess of $1,500.

Any consent required by this clause must be in writing and acknowledged before a notary public (or other official authorized to make acknowledgments), and shall be approved by the Secretary unless the Secretary has reason to believe that the consent was obtained as a result of fraud or undue influence.

(ii) CONSENT BY THE SECRETARY ON BEHALF OF CERTAIN INDIVIDUALS.—For the purposes of clause (i)(III), the Secretary may consent on behalf of—

(I) undetermined heirs of trust or restricted interests and owners of such interests who are minors and legal incompetents having no parents or legal guardian; and

(II) missing owners or owners of trust or restricted interests whose whereabouts are unknown, but only after a search for such owners has been completed in accordance with the provisions of this subsection.

(E) APPRAISAL.—After the Secretary has determined that the subject parcel is a parcel of highly fractionated Indian land pursuant to subparagraph (C), the Secretary shall cause to be made, in accordance with the provisions of this Act for establishing fair market value, an appraisal of the fair market value of the subject parcel.

(F) NOTICE TO OWNERS ON COMPLETION OF APPRAISAL.—Upon completion of the appraisal, the Secretary shall give notice of the requested partition and appraisal to all owners of undivided interests in the parcel, in accordance with principles of due process. Such notice shall include the following requirements:

(i) WRITTEN NOTICE.—The Secretary shall attempt to give each owner written notice of the partition action stating the following:

(I) That a proceeding to partition the parcel of land by sale has been commenced.

(II) The legal description of the subject parcel.

(III) The owner's ownership interest in the subject parcel as evidenced by the Secretary's records as of the date that owners are determined in accordance with clause (ii).

(IV) The results of the appraisal.

(V) The owner's right to receive a copy of the appraisal upon written request.

(VI) The owner's right to comment on or object to the proposed partition and the appraisal.

(VII) That the owner must timely comment on or object in writing to the proposed partition or the appraisal, in order to receive notice of approval of appraisal and right to appeal.

(VIII) The date by which the owner's written comments or objections must be received, which shall not be less than 90 days after the date that the notice is mailed under this clause or last published under clause (ii)(II).

(IX) The address for requesting copies of the appraisal and for submitting written comments or objections.

(X) The name and telephone number of the official to be contacted for purposes of obtaining information regarding the proceeding, including the

time and date of the auction of the land or the date for submitting sealed bids.

(XI) Any other information the Secretary deems to be appropriate.

(ii) MANNER OF SERVICE.—

(I) SERVICE BY CERTIFIED MAIL.—The Secretary shall use due diligence to provide all owners of interests in the subject parcel, as evidenced by the Secretary's records at the time of the determination under subparagraph (C), with actual notice of the partition proceedings by mailing a copy of the written notice described in clause (i) by certified mail, restricted delivery, to each such owner at the owner's last known address. For purposes of this subsection, owners shall be determined from the Secretary's land title records as of the date of the determination under subparagraph (C) or a date that is not more than 90 days prior to the date of mailing under this clause, whichever is later. In the event the written notice to an owner is returned undelivered, the Secretary shall attempt to obtain a current address for such owner by conducting a reasonable search (including a reasonable search of records maintained by local, state, federal and tribal governments and agencies), and by inquiring with the Indian tribe with jurisdiction over the subject parcel, and, if different from that tribe, the Indian tribe of which the owner is a member, and if successful in locating any such owner, send written notice by certified mail in accordance with this subclause.

(II) NOTICE BY PUBLICATION.—The Secretary shall give notice by publication of the partition proceedings to all owners that the Secretary was unable to serve pursuant to subclause (I), and to unknown heirs and assigns by—

(aa) publishing the notice described in clause (i) at least 2 times in a newspaper of general circulation in the county or counties where the subject parcel of land is located or, if there is an Indian tribe with jurisdiction over the parcel of land and that tribe publishes a tribal newspaper or newsletter at least once every month, 1 time in such newspaper of general circulation and 1 time in such tribal newspaper or newsletter;

(bb) posting such notice in a conspicuous place in the tribal headquarters or administration building (or such other tribal building determined by the Secretary to be most appropriate for giving public notice) of the Indian tribe with jurisdiction over the parcel of land, if any, and

(cc) in addition to the foregoing, in the Secretary's discretion, publishing notice in any

other place or means that the Secretary determines to be appropriate.

(G) REVIEW OF COMMENTS ON APPRAISAL.—

(i) IN GENERAL.—After reviewing and considering comments or information timely submitted by any owner of an interest in the parcel in response to the notice required under subparagraph (F), the Secretary may, consistent with the provisions of this Act for establishing fair market value—

(I) order a new appraisal; or

(II) approve the appraisal;

provided that if the Secretary orders a new appraisal under subclause (I), notice of the new appraisal shall be given as specified in clause (ii).

(ii) NOTICE.—Notice shall be given—

(I) in accordance with subparagraph (H), where the new appraisal results in a higher valuation of the land; or

(II) in accordance with subparagraph (F)(ii), where the new appraisal results in a lower valuation of the land.

(H) NOTICE TO OWNERS OF APPROVAL OF APPRAISAL AND RIGHT TO APPEAL.—Upon making the determination under subparagraph (G) the Secretary shall provide to the Indian tribe with jurisdiction over the subject land and to all persons who submitted written comments on or objections to the proposed partition or appraisal, a written notice to be served on such tribe and persons by certified mail. Such notice shall state—

(i) the results of the appraisal;

(ii) that the owner has the right to review a copy of the appraisal upon request;

(iii) that the land will be sold for not less than the appraised value, subject to the consent requirements under paragraph (2)(D);

(iv) the time of the sale or for submitting bids under subparagraph (I);

(v) that the owner has the right, under the Secretary's regulations governing administrative appeals, to pursue an administrative appeal from—

(I) the determination that the land may be partitioned by sale under the provisions of this section; and

(II) the Secretary's order approving the appraisal;

(vi) the date by which an administrative appeal must be taken, a citation to the provisions of the Secretary's regulations that will govern the owner's appeal, and any other information required by such regulations to be given to parties affected by adverse decisions of the Secretary;

(vii) in cases where the Secretary determines that any person's undivided trust or restricted interest in the parcel exceeds $1,500 pursuant to paragraph (2)(C)(iii), that the Secretary has authority to consent

to the partition on behalf of undetermined heirs of trust or restricted interests in the parcel and owners of such interests whose whereabouts are unknown; and

(viii) any other information the Secretary deems to be appropriate.

(I) SALE TO ELIGIBLE PURCHASER.—

(i) Subject to clauses (ii) and (iii) and the consent requirements of paragraph (2)(D), the Secretary shall, after providing notice to owners under subparagraph (H), including the time and place of sale or for receiving sealed bids, at public auction or by sealed bid (whichever of such methods of sale the Secretary determines to be more appropriate under the circumstances) sell the parcel of land by competitive bid for not less than the final appraised fair market value to the highest bidder from among the following eligible bidders:

(I) The Indian tribe, if any, with jurisdiction over the trust or restricted interests in the parcel being sold.

(II) Any person who is a member, or is eligible to be a member, of the Indian tribe described in subclause (I).

(III) Any person who is a member, or is eligible to be a member, of an Indian tribe but not of the tribe described in subclause (I), but only if such person already owns an undivided interest in the parcel at the time of sale.

(IV) Any lineal descendent of the original allottee of the parcel who is a member or is eligible to be a member of an Indian tribe or, with respect to a parcel located in the State of California that is not within an Indian tribe's reservation or not otherwise subject to the jurisdiction of an Indian tribe, who is a member, or eligible to be a member, of an Indian tribe or owns a trust or restricted interest in the parcel.

(ii) RIGHT TO MATCH HIGHEST BID.—If the highest bidder is a person who is only eligible to bid under clause (i)(III), the Indian tribe that has jurisdiction over the parcel, if any, shall have the right to match the highest bid and acquire the parcel, but only if—

(I) prior to the date of the sale, the governing body of such tribe has adopted a tribal law or resolution reserving its right to match the bids of such nonmember bidders in partition sales under this subsection and delivered a copy of such law or resolution to the Secretary; and

(II) the parcel is not acquired under clause (iii).

(iii) RIGHT TO PURCHASE.—Any person who is a member, or eligible to be a member, of the Indian tribe with jurisdiction over the trust or restricted interests in the parcel being sold and is, as of the time of sale under this subparagraph, the owner of the largest undivided interest in the parcel shall have a right to purchase the parcel by tendering to the Secretary an

amount equal to the highest sufficient bid submitted at the sale, less that amount of the bid attributable to such owner's share, but only if—

(I) the owner submitted a sufficient bid at the sale;

(II) the owner's total undivided interest in the parcel immediately prior to the sale was—

(aa) greater than the undivided interest held by any other co-owners, except where there are 2 or more co-owners whose interests are of equal size but larger than the interests of all other co-owners and such owners of the largest interests have agreed in writing that 1 of them may exercise the right of purchase under this clause; and

(bb) equal to or greater than 20 percent of the entire undivided ownership of the parcel;

(III) within 3 days following the date of the auction or for receiving sealed bids, and in accordance with the regulations adopted to implement this section, the owner delivers to the Secretary a written notice of intent to exercise the owner's rights under this clause; and

(IV) such owner tenders the amount of the purchase price required under this clause—

(aa) not less than 30 days after the date of the auction or time for receiving sealed bids; and

(bb) in accordance with any requirements of the regulations promulgated to implement this section.

(iv) Any purchaser of a parcel of land under this paragraph shall acquire title to the parcel in trust or restricted status, free and clear of any and all claims of title or ownership of all persons or entities (not including the United States) owning or claiming to own an interest in such parcel prior to the time of sale.

(J) PROCEEDS OF SALE.—

(i) Subject to clauses (ii) and (iii), the Secretary shall distribute the proceeds of sale of a parcel of land under the provisions of this section to the owners of interests in such parcel in proportion to their respective ownership interests.

(ii) Proceeds attributable to the sale of trust or restricted interests shall be maintained in accounts as trust personalty.

(iii) Proceeds attributable to the sale of interests of owners whose whereabouts are unknown, of undetermined heirs, and of other persons whose ownership interests have not been recorded shall be held by the Secretary until such owners, heirs, or other persons have been determined, at which time such proceeds shall be distributed in accordance with clauses (i) and (ii).

(K) LACK OF BIDS OR CONSENT.—

(i) LACK OF BIDS.—If no bidder described in subparagraph (I) presents a bid that equals or exceeds the final appraised value, the Secretary may either purchase the parcel of land for its appraised fair market value on behalf of the Indian tribe with jurisdiction over the land, subject to the lien and procedures provided under section 214(b) (25 U.S.C. 2213(b)), or terminate the partition process.

(ii) LACK OF CONSENT.—If an applicant fails to obtain any applicable consent required under the provisions of subparagraph (D) by the date established by the Secretary prior to the proposed sale, the Secretary may either extend the time for obtaining any such consent or deny the request for partition.

(3) ENFORCEMENT.—

(A) IN GENERAL.—If a partition is approved under this subsection and an owner of an interest in the parcel of land refuses to surrender possession in accordance with the partition decision, or refuses to execute any conveyance necessary to implement the partition, then any affected owner or the United States may—

(i) commence a civil action in the United States district court for the district in which the parcel of land is located; and

(ii) request that the court issue an order for ejectment or any other appropriate remedy necessary for the partition of the land by sale.

(B) FEDERAL ROLE.—With respect to any civil action brought under subparagraph (A)—

(i) the United States—

(I) shall receive notice of the civil action; and

(II) may be a party to the civil action; and

(ii) the civil action shall not be dismissed, and no relief requested shall be denied, on the ground that the civil action is against the United States or that the United States is a necessary and indispensable party.

(4) GRANTS AND LOANS.—The Secretary may provide grants and low interest loans to successful bidders at sales authorized by this subsection, provided that—

(A) the total amount of such assistance in any such sale shall not exceed 20 percent of the appraised value of the parcel of land sold; and

(B) the grant or loan funds provided shall only be applied toward the purchase price of the parcel of land sold.

(5) REGULATIONS.—The Secretary is authorized to adopt such regulations as may be necessary to implement the provisions of this subsection. Such regulations shall include provisions for giving notice of sales to prospective purchasers eligible to submit bids at sales conducted under paragraph (2)(I).

25 U.S.C. 2205

§ 2205. Tribal probate codes; acquisitions of fractional interests by tribes

(a) TRIBAL PROBATE CODES.—

(1) IN GENERAL.—

* * * * * * *

[(3) LIMITATIONS.—The Secretary shall not approve a tribal probate code if such code prevents an Indian person from inheriting an interest in an allotment that was originally allotted to his or her lineal ancestor.]

(3) TRIBAL PROBATE CODES.— Except as provided in any applicable Federal law, the Secretary shall not approve a tribal probate code, or an amendment to such a code, that prohibits the devise of an interest in trust or restricted land to—

(A) an Indian lineal descendant of the original allotee; or

(B) an Indian who is not a member of the Indian tribe with jurisdiction over such an interest;

unless the code provides for—

(i) the renouncing of interests to eligible devisees in accordance with the code;

(ii) the opportunity for a devisee who is a spouse or lineal descendant of the testator to reserve a life estate without regard to waste; and

(iii) payment of fair market value in the manner prescribed under subsection (c)(2).

* * * * * * *

(c) AUTHORITY AVAILABLE TO INDIAN TRIBES.—

[(1) IN GENERAL] *(1) AUTHORITY.—*

(A) IN GENERAL.—If the owner of an interest in trust or restricted land devises an interest in such land to a non-Indian under [section 207(a)(6)(A) of this title] *section 207(b)(2)(A)(ii) of this title*, the Indian tribe that exercises jurisdiction over the parcel of land involved may acquire such interest by paying to the Secretary the fair market value of such interest, as determined by the Secretary on the date of the decedent's death. [The Secretary shall transfer such payment to the devisee.]

(B) TRANSFER.—The Secretary shall transfer payments received under subparagraph (A) to any person or person who would have received an interest in land if the interest had not been acquired by the Indian tribe in accordance with this paragraph.

(2) LIMITATION.—

[(A) IN GENERAL.—Paragraph (1) shall not apply] *(A) INAPPLICABILITY TO CERTAIN INTERESTS.—*

(i) IN GENERAL.—Paragraph (1) shall not apply to an interest in trust or restricted land [if, while] *if—*

(I) while the decedent's estate is pending before the Secretary, the non-Indian devisee renounces the interest in favor of an Indian person[.]*; or*

(II)—

(aa) the interest is part of a family farm that is devised to a member of the family of the decedent; and

(bb) the devisee agrees that the Indian tribe with jurisdiction over the land will have the opportunity to acquire the interest for fair market value if the interest is offered for sale

to a person or entity that is not a member of the family of the owner of the land.

(ii) RECORDING OF INTEREST.—On request by the Indian tribe described in clause (i)(II)(bb), a restriction relating to the acquisition by the Indian tribe of an interest in a family farm involved shall be recorded as part of the deed relating to the interest involved.

(iii) MORTGAGE AND FORECLOSURE.—Nothing in clause (i)(II) prevents or limits the ability of an owner of land to which that clause applies to mortgage the land or limits the right of the entity holding such a mortgage to foreclose or otherwise enforce such a mortgage agreement in accordance with applicable law.

(iv) DEFINITION OF "MEMBER OF THE FAMILY".—In this paragraph, the term "member of the family", with respect to a decedent or landowner, means—

(I) a lineal descendant of a decedent or landowner;

(II) a lineal descendant of the grandparent of a decedent or landowner;

(III) the spouse of a descendant or landowner described in subclause (I) or (II); and

(IV) the spouse of a decedent or landowner.

(B) RESERVATION OF LIFE ESTATE.—A non-Indian devisee described in ⟦subparagraph (A) or a non-Indian devisee described in Section 2206(a)(6)(B) of this title⟧ *paragraph (1)*, may retain a life estate in the interest involved, including a life estate to the revenue produced from the interest. The amount of any payment required under paragraph (1) shall be reduced to reflect the value of any life estate reserved by a non-Indian devisee under this subparagraph.

25 U.S.C. 2206

§ 2206. Descent and distribution

⟦(a) TESTAMENTARY DISPOSITION.—

⟦(1) IN GENERAL.—Interests in trust or restricted land may be devised only to—

⟦(A) the decedent's Indian spouse or any other Indian person; or

⟦(B) the Indian tribe with jurisdiction over the land so devised.

⟦(2) LIFE ESTATE.—Any devise of an interest in trust or restricted land to a non-Indian shall create a life estate with respect to such interest.

⟦(3) REMAINDER.—

⟦(A) IN GENERAL.—Except where the remainder from the life estate referred to in paragraph (2) is devised to an Indian, such remainder shall descend to the decedent's Indian spouse or Indian heirs of the first or second degree pursuant to the applicable law of intestate succession.

⟦(B) DESCENT OF INTERESTS.—If a decedent described in subparagraph (A) has no Indian heirs of the first or second degree, the remainder interest described in such subparagraph shall descend to any of the decedent's collateral

heirs of the first or second degree, pursuant to the applicable laws of intestate succession, if on the date of the decedent's death, such heirs were a co-owner of an interest in the parcel of trust or restricted land involved.

[(C) DEFINITION.—For purposes of this section, the term "collateral heirs of the first or second degree" means the brothers, sisters, aunts, uncles, nieces, nephews, and first cousins, of a decedent.

[(4) DESCENT TO TRIBE.—If the remainder interest described in paragraph (3)(A) does not descend to an Indian heir or heirs it shall descend to the Indian tribe that exercises jurisdiction over the parcel of trust or restricted lands involved, subject to paragraph (5).

[(5) ACQUISITION OF INTEREST BY INDIAN CO-OWNERS.—An Indian co-owner of a parcel of trust or restricted land may prevent the descent of an interest in Indian land to an Indian tribe under paragraph (4) by paying into the decedent's estate the fair market value of the interest in such land. If more than 1 Indian co-owner offers to pay for such an interest, the highest bidder shall obtain the interest. If payment is not received before the close of the probate of the decedent's estate, the interest shall descend to the tribe that exercises jurisdiction over the parcel.

[(6) SPECIAL RULE.—

[(A) IN GENERAL.—Notwithstanding paragraph (2), an owner of trust or restricted land who does not have an Indian spouse, Indian lineal descendant, an Indian heir of the first or second degree, or an Indian collateral heir of the first or second degree, may devise his or her interests in such land to any of the decedent's heirs of the first or second degree or collateral heirs of the first or second degree.

[(B) ACQUISITION OF INTEREST BY TRIBE.—An Indian tribe that exercises jurisdiction over an interest in trust or restricted land described in subparagraph (A) may acquire any interest devised to a non-Indian as provided for in section 206(c).

[(b) INTESTATE SUCCESSION.—

[(1) IN GENERAL.—An interest in trust or restricted land shall pass by intestate succession only to a decedent's spouse or heirs of the first or second degree, pursuant to the applicable law of intestate succession.

[(2) LIFE ESTATE.—Notwithstanding paragraph (1), with respect to land described in such paragraph, a non-Indian spouse or non-Indian heirs of the first or second degree shall only receive a life estate in such land.

[(3) DESCENT OF INTERESTS.—If a decedent described in paragraph (1) has no Indian heirs of the first or second degree, the remainder interest from the life estate referred to in paragraph (2) shall descend to any of the decedent's collateral Indian heirs of the first or second degree, pursuant to the applicable laws of intestate succession, if on the date of the decedent's death, such heirs were a co-owner of an interest in the parcel of trust or restricted land involved.

[(4) DESCENT TO TRIBE.—If the remainder interest described in paragraph (3) does not descend to an Indian heir or heirs it shall descend to the Indian tribe that exercises jurisdiction over the parcel of trust or restricted lands involved, subject to paragraph (5).

[(5) ACQUISITION OF INTEREST BY INDIAN CO-OWNERS.—An Indian co-owner of a parcel of trust or restricted land may prevent the descent of an interest in such land for which there is no heir of the first or second degree by paying into the decedent's estate the fair market value of the interest in such land. If more than 1 Indian co-owner makes an offer to pay for such an interest, the highest bidder shall obtain the interest. If no such offer is made, the interest shall descend to the Indian tribe that exercises jurisdiction over the parcel of land involved.

[(c) JOINT TENANCY; RIGHT OF SURVIVORSHIP.—

[(1) TESTATE.—If a testator devises interests in the same parcel of trust or restricted lands to more than 1 person, in the absence of express language in the devise to the contrary, the devise shall be presumed to create joint tenancy with the right of survivorship in the land involved.

[(2) INTESTATE.—

[(A) IN GENERAL.—Any interest in trust or restricted land that—

[(i) passes by intestate succession to more than 1 person, including a remainder interest under subsection (a) or (b) of section 207; and

[(ii) that constitutes 5 percent or more of the undivided interest in a parcel of trust or restricted land;

shall be held as tenancy in common.

[(B) LIMITED INTEREST.—Any interest in trust or restricted land that—

[(i) passes by intestate succession to more than 1 person, including a remainder interest under subsection (a) or (b) of section 207; and 46

[(ii) that constitutes less than 5 percent of the undivided interest in a parcel of trust or restricted land;

shall be held by such heirs with the right of survivorship.

[(3) EFFECTIVE DATE.—

[(A) IN GENERAL.—This subsection (other than subparagraph (B)) shall become effective on the later of—

[(i) the date referred to in subsection (g)(5); or

[(ii) the date that is six months after the date on which the Secretary makes the certification required under subparagraph (B).

[(B) CERTIFICATION.—-Upon a determination by the Secretary that the Department of the Interior has the capacity, including policies and procedures, to track and manage interests in trust or restricted land held with the right of survivorship, the Secretary shall certify such determination and publish such certification in the Federal Register.]

(a) NONTESTAMENTARY DISPOSITION.—

(1) RULES OF DESCENT.—Subject to any applicable Federal law relating to the devise or descent of trust or restricted prop-

erty, any trust or restricted interest in land or interest in trust personalty that is not disposed of by a valid will—

(A) shall descend according to an applicable tribal probate code approved in accordance with section 206; or

(B) in the case of a trust or restricted interest in land or interest in trust personalty to which a tribal probate code does not apply, shall descend in accordance with—

(i) paragraphs (2) through (5); and

(ii) other applicable Federal law.

(2) RULES GOVERNING DESCENT OF ESTATE.—

(A) SURVIVING SPOUSE.—If there is a surviving spouse of the decedent, such spouse shall receive trust and restricted land and trust personalty in the estate as follows:

(i) If the decedent is survived by one or more eligible heirs described in subparagraph (B) (i), (ii), (iii), or (iv), the surviving spouse shall receive 1/3 of the trust personalty of the decedent and a life estate without regard to waste in the interests in trust or restricted lands of the decedent.

(ii) If there are no eligible heirs described in subparagraph (B) (i), (ii), (iii), or (iv), the surviving spouse shall receive all of the trust personalty of the decedent and a life estate without regard to waste in the trust or restricted lands of the decedent.

(iii) The remainder shall pass as set forth in subparagraph (B).

(iv) Trust personalty passing to a surviving spouse under the provisions of this subparagraph shall be maintained by the Secretary in an account as trust personalty, but only if such spouse is Indian.

(B) INDIVIDUAL AND TRIBAL HEIRS.—Where there is no surviving spouse of the decedent, or there is a remainder interest pursuant to subparagraph (A), the trust or restricted estate or such remainder shall, subject to subparagraphs (A) and (D), pass as follows:

(i) To those of the decedent's children who are eligible heirs (or if 1 or more of such children do not survive the decedent, the children of any such deceased child who are eligible heirs, by right of representation, but only if such children of the deceased child survive the decedent) in equal shares.

(ii) If the property does not pass under clause (i), to those of the decedent's surviving great-grandchildren who are eligible heirs, in equal shares.

(iii) If the property does not pass under clause (i) or (ii), to the decedent's parent who is an eligible heir, and if both parents survive the decedent and are both eligible heirs, to both parents in equal shares.

(iv) If the property does not pass under clause (i), (ii), or (iii), to those of the decedent's surviving siblings who are eligible heirs, in equal shares.

(v) If the property does not pass under clause (i), (ii), (iii), or (iv), to the Indian tribe with jurisdiction over the interests in trust or restricted lands;

except that notwithstanding clause (v), an Indian co-owner (including the Indian tribe referred to in clause (v)) of a parcel of trust or restricted land may acquire an interest that would otherwise descend under that clause by paying into the estate of the decedent, before the close of the probate of the estate, the fair market value of the interest in the land; if more than 1 Indian co-owner offers to pay for such interest, the highest bidder shall acquire the interest.

(C) NO INDIAN TRIBE.—

(i) IN GENERAL.—If there is no Indian tribe with jurisdiction over the interests in trust or restricted lands that would otherwise descend under subparagraph (B)(v), then such interests shall be divided equally among co-owners of trust or restricted interests in the parcel; if there are no such co-owners, then to the United States, provided that any such interests in land passing to the United States under this subparagraph shall be sold by the Secretary and the proceeds from such sale deposited into the land acquisition fund established under section 216 (25 U.S.C. 2215) and used for the purposes described in subsection (b) of that section.

(ii) CONTIGUOUS PARCEL.—If the interests passing to the United States under this subparagraph are in a parcel of land that is contiguous to another parcel of trust or restricted land, the Secretary shall give the owners of the trust or restricted interest in the contiguous parcel the first opportunity to purchase the interest at not less than fair market value determined in accordance with this Act. If more than 1 such owner in the contiguous parcel request to purchase the parcel, the Secretary shall sell the parcel by public auction or sealed bid (as determined by the Secretary) at not less than fair market value to the owner of a trust or restricted interest in the contiguous parcel submitting the highest bid.

(D) INTESTATE DESCENT OF SMALL FRACTIONAL INTERESTS IN LAND.—

(i) GENERAL RULE.—Notwithstanding subparagraphs (A) and (B), and subject to any applicable Federal law, any trust or restricted interest in land in the decedent's estate that is not disposed of by a valid will and represents less than 5 percent of the entire undivided ownership of the parcel of land of which such interest is a part, as evidenced by the decedent's estate inventory at the time of the heirship determination, shall descend in accordance with clauses (ii) through (iv).

(ii) SURVIVING SPOUSE.—If there is a surviving spouse, and such spouse was residing on a parcel of land described in clause (i) at the time of the decendent's death, the spouse shall receive a life estate without regard to waste in the decedent's trust or restricted interest in only such parcel, and the remainder interest in that parcel shall pass in accordance with clause (iii).

(iii) SINGLE HEIR RULE.—Where there is no life estate created under clause (ii) or there is a remainder interest under that clause, the trust or restricted interest or remainder interest that is subject to this subparagraph shall descend, in trust or restricted status, to—

(I) the decedent's surviving child, but only if such child is an eligible heir; and if 2 or more surviving children are eligible heirs, then to the oldest of such children;

(II) if the interest does not pass under subclause (I), the decedent's surviving grandchild, but only if such grandchild is an eligible heir; and if 2 or more surviving grandchildren are eligible heirs, then to the oldest of such grandchildren;

(III) if the interest does not pass under subclause (I) or (II), the decedent's surviving great grandchild, but only if such great grandchild is an eligible heir; and if 2 or more surviving great grandchildren are eligible heirs, then to the oldest of such great grandchildren;

(IV) if the interest does not pass under subclause (I), (II), or (III), the Indian tribe with jurisdiction over the interest; or

(V) if the interest does not pass under subclause (I), (II), or (III), and there is no such Indian tribe to inherit the property under subclause (IV), the interest shall be divided equally among co-owners of trust or restricted interests in the parcel; and if there are no such co-owners, then to the United States, to be sold, and the proceeds from the sale used, in the same manner provided in subparagraph (C).

The determination of which person is the oldest eligible heir for inheritance purposes under this clause shall be made by the Secretary in the decedent's probate proceeding and shall be consistent with the provisions of this Act.

(iv) EXCEPTIONS.—Notwithstanding clause (iii)—

(I)(aa) the heir of an interest under clause (iii), unless the heir is a minor or incompetent person, may agree in writing entered into the record of the decedent's probate proceeding to renounce such interest, in trust or restricted status, in favor of—

(AA) any other eligible heir or Indian person related to the heir by blood, but in any case never in favor of more than 1 such heir or person;

(BB) any co-owner of another trust or restricted interest in such parcel of land; or

(CC) the Indian tribe with jurisdiction over the interest, if any; and

(bb) the Secretary shall give effect to such agreement in the distribution of the interest in the probate proceeding; and

(II) the governing body of the Indian tribe with jurisdiction over an interest in trust or restricted land that is subject to the provisions of this subparagraph may adopt a rule of intestate descent applicable to such interest that differs from the order of descent set forth in clause (iii). The Secretary shall apply such rule to the interest in distributing the decedent's estate, but only if—

(aa) a copy of the tribal rule is delivered to the official designated by the Secretary to receive copies of tribal rules for purposes of this clause;

(bb) the tribal rule provides for the intestate inheritance of such interest by no more than 1 heir, so that the interest does not further fractionate;

(cc) the tribal rule does apply to any interest disposed of by a valid will;

(dd) the decedent died on or after the date described in subsection (b) of section 8 of the American Indian Probate Reform Act of 2004, or on or after the date on which a copy of the tribal rule was delivered to the Secretary pursuant to item (aa), whichever is later; and

(ee) the Secretary does not make a determination within 90 days after a copy of the tribal rule is delivered pursuant to item (aa) that the rule would be unreasonably difficult to administer or does not conform with the requirements in items (bb) or (cc).

(v) RULE OF CONSTRUCTION.—This subparagraph shall not be construed to limit a person's right to devise any trust or restricted interest by way of a valid will in accordance with subsection (b).

(3) RIGHT OF REPRESENTATION.—If, under this subsection, all or any part of the estate of a decedent is to pass to children of a deceased child by right of representation, that part is to be divided into as many equal shares as there are living children of the decedent and predeceased children who left issue who survive the decedent. Each living child of the decedent, if any, shall receive 1 share, and the share of each pre-deceased child shall be divided equally among the pre-deceased child's children.

(4) SPECIAL RULE RELATING TO SURVIVAL.—In the case of intestate succession under this subsection, if an individual fails to survive the decedent by at least 120 hours, as established by clear and convincing evidence—

(A) the individual shall be deemed to have predeceased the decedent for the purpose of intestate succession; and

(B) the heirs of the decedent shall be determined in accordance with this section.

(5) STATUS OF INHERITED INTERESTS.—Except as provided in paragraphs (2)(A) and (D) regarding the life estate of a surviving spouse, a trust or restricted interest in land or trust personalty that descends under the provisions of this subsection

shall vest in the heir in the same trust or restricted status as such interest was held immediately prior to the decedent's death.

(b) TESTAMENTARY DISPOSITION.—

(1) GENERAL DEVISE OF AN INTEREST IN TRUST OR RESTRICTED LAND.—

(A) IN GENERAL.—Subject to any applicable Federal law relating to the devise or descent of trust or restricted land, or a tribal probate code approved by the Secretary in accordance with section 206, the owner of a trust or restricted interest in land may devise such interest to—

(i) any lineal descendant of the testator;

(ii) any person who owns a preexisting undivided trust or restricted interest in the same parcel of land;

(iii) the Indian tribe with jurisdiction over the interest in land, or

(iv) any Indian;

in trust or restricted status.

(B) RULES OF INTERPRETATION.—Any devise of a trust or restricted interest in land pursuant to subparagraph (A) to an Indian or the Indian tribe with jurisdiction over the interest shall be deemed to be a devise of the interest in trust or restricted status. Any devise of a trust or restricted interest in land to a person who is only eligible to be a devisee under clause (i) or (ii) of subparagraph (A) shall be presumed to be a devise of the interest in trust or restricted status unless language in such devise clearly evidences an intent on the part of the testator that the interest is to pass as a life estate or fee interest in accordance with paragraph (2)(A).

(2) DEVISE OF TRUST OR RESTRICTED LAND AS A LIFE ESTATE OR IN FEE.—

(A) IN GENERAL.—Except as provided under any applicable Federal law, any trust or restricted interest in land that is not devised in accordance with paragraph (1)(A) may be devised only—

(i) as a life estate to any person, with the remainder being devised only in accordance with subparagraph (B) or paragraph (1); or

(ii) except as provided in subparagraph (B), as a fee interest without Federal restrictions against alienation to any person who is not eligible to be a devisee under clause (iv) of paragraph (1)(A).

(B) INDIAN REORGANIZATION ACT LANDS.—Any interest in trust or restricted land that is subject to section 4 of the Act of June 18, 1934 (25 U.S.C. 464), may be devised only in accordance with—

(i) that section;

(ii) subparagraph (A)(i); or

(iii) paragraph (1)(A);

provided that nothing in this section or in section 4 of the Act of June 18, 1934 (25 U.S.C. 464), shall be construed to authorize the devise of any interest in trust or restricted land that is subject to section 4 of that Act to any person as a fee interest under subparagraph (A)(ii).

(3) GENERAL DEVISE OF AN INTEREST IN TRUST PERSONALTY.—

(A) TRUST PERSONALTY DEFINED.—The term "trust personalty" as used in this section includes all funds and securities of any kind which are held in trust in an individual Indian money account or otherwise supervised by the Secretary.

(B) IN GENERAL.—Subject to any applicable Federal law relating to the devise or descent of such trust personalty, or a tribal probate code approved by the Secretary in accordance with section 206, the owner of an interest in trust personalty may devise such an interest to any person or entity.

(C) MAINTENANCE AS TRUST PERSONALTY.—In the case of a devise of an interest in trust personalty to a person or Indian tribe eligible to be a devisee under paragraph (1)(A), the Secretary shall maintain and continue to manage such interests as trust personalty.

(D) DIRECT DISBURSEMENT AND DISTRIBUTION.—In the case of a devise of an interest in trust personalty to a person or Indian tribe not eligible to be a devisee under paragraph (1)(A), the Secretary shall directly disburse and distribute such personalty to the devisee.

(4) INVALID DEVISES AND WILLS.—

(A) LAND.—Any trust or restricted interest in land that is not devised in accordance with paragraph (1) or (2) or that is not disposed of by a valid will shall descend in accordance with the applicable law of intestate succession as provided for in subsection (a).

(B) PERSONALTY.—Any trust personalty that is not disposed of by a valid will shall descend in accordance with the applicable law of intestate succession as provided for in subsection (a).

(c) JOINT TENANCY; RIGHT OF SURVIVORSHIP.—

(1) PRESUMPTION OF JOINT TENANCY.—If a testator devises trust or restricted interests in the same parcel of land to more than 1 person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a jointenancy with the right of survivorship in the interests involved.

(2) EXCEPTION.—Paragraph (1) shall not apply to any devise of an interest in trust or restricted land where the will in which such devise is made was executed prior to the date that is 1 year after the date on which the Secretary publishes the certification required by section (8)(a)(4) of the American Indian Probate Reform Act of 2004.

* * * * * * *

(f) ESTATE PLANNING ASSISTANCE.—

[(1) IN GENERAL.—The Secretary shall provide estate planning assistance in accordance with this subsection, to the extent amounts are appropriated for such purpose.**]**

(1) IN GENERAL.—

(A) The activities conducted under this subsection shall be conducted in accordance with any applicable—

(i) tribal probate code; or

(ii) tribal land consolidation plan.

(B) The Secretary shall provide estate planning assistance in accordance with this subsection, to the extent amounts are appropriated for such purpose.

(2) REQUIREMENTS.—The estate planning assistance provided under paragraph (1) shall be designed to—

(A) inform, advise, and assist Indian landowners with respect to estate planning in order to facilitate the transfer of trust or restricted lands to a devisee or devisees selected by the landowners; [and]

(B) dramatically increase the use of wills and other methods of devise among Indian landowners;

(C) substantially reduce the quantity and complexity of Indian estates that pass intestate through the probate process, while protecting the rights and interests of Indian landowners; and

[(B)] *(D)* assist Indian landowners in accessing information pursuant to section 217(e).

[(3) CONTRACTS.—In carrying out this section, the Secretary may enter into contracts with entities that have expertise in Indian estate planning and tribal probate codes.]

(3) PROBATE CODE DEVELOPMENT AND LEGAL ASSISTANCE GRANTS.—In carrying out this section, the Secretary may award grants to—

(A) Indian tribes, for purposes of tribal probate code development and estate planning services to tribal members; and

(B) organizations that provide legal assistance services for Indian tribes, Indian organizations, and individual owners of interests in trust or restricted lands that are qualified as nonprofit organizations under section 501(c)(3) of the Internal Revenue Code of 1986 and provide such services pursuant to Federal poverty guidelines, for purposes of providing civil legal assistance to such Indian tribes, individual owners, and Indian organizations for the development of tribal probate codes, for estate planning services or for other purposes consistent with the services they provide to Indians and Indian tribes; and

(C) in specific areas and reservations where qualified nonprofit organizations referred to in subparagraph (B) do not provide such legal assistance to Indian tribes, Indian organizations, or individual owners of trust or restricted land, to other providers of such legal assistance;

that submit an application to the Secretary, in such form and manner as the Secretary may prescribe.

(4) AUTHORIZATION FOR APPROPRIATIONS.—There is authorized to be appropriated such sums as may be necessary to carry out the provisions of paragraph (3).

[(g) NOTIFICATION TO INDIAN TRIBES AND OWNERS OF TRUST OR RESTRICTED LANDS.—

[(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Indian Land Consolidation Act Amendments of 2000, the Secretary shall notify Indian tribes and owners of trust or restricted lands of the amendments made by the Indian Land Consolidation Act Amendments of 2000.

[(2) SPECIFICATIONS.—The notice required under paragraph (1) shall be designed to inform Indian owners of trust or restricted land of—

[(A) the effect of this Act, with emphasis on the effect of the provisions of this section, on the testate disposition and intestate descent of their interests in trust or restricted land; and

[(B) estate planning options available to the owners, including any opportunities for receiving estate planning assistance or advice.

[(3) REQUIREMENTS.—The Secretary shall provide the notice required under paragraph (1)—

[(A) by direct mail for those Indians with interests in trust and restricted lands for which the Secretary has an address for the interest holder;

[(B) through the Federal Register;

[(C) through local newspapers in areas with significant Indian populations, reservation newspapers, and newspapers that are directed at an Indian audience; and

[(D) through any other means determined appropriate by the Secretary.

[(4) CERTIFICATION.—After providing notice under this subsection, the Secretary shall certify that the requirements of this subsection have been met and shall publish notice of such certification in the Federal Register.

[(5) EFFECTIVE DATE—The provisions of this section shall not apply to the estate of an individual who dies prior to the day that is 365 days after the Secretary makes the certification required under paragraph (4).]

(h) APPLICABLE FEDERAL LAW.—

(1) IN GENERAL.—Any references in subsections (a) and (b) to applicable Federal law include—

(A) Public Law 91–627 (84 Stat. 1874);

(B) Public Law 92–377 (86 Stat. 530);

(C) Public Law 92–443 (86 Stat. 744);

(D) Public Law 96–274 (94 Stat. 537); and

(E) Public Law 98–513 (98 Stat. 2411).

(2) NO EFFECT ON LAWS.—Nothing in this Act amends or otherwise affects the application of any law described in paragraph (1), or any other Federal law that pertains to—

(A) trust or restricted land located on 1 or more specific Indian reservations that are expressly identified in such law; or

(B) the allotted lands of 1 or more specific Indian tribes that are expressly identified in such law.

(i) RULES OF INTERPRETATION.—In the absence of a contrary intent, and except as otherwise provided under this Act, applicable Federal law, or a tribal probate code approved by the Secretary pursuant to section 206, wills shall be construed as to trust and restricted land and trust personalty in accordance with the following rules:

(1) CONSTRUCTION THAT WILL PASSES ALL PROPERTY.—A will shall be construed to apply to all trust and restricted land and trust personalty which the testator owned at his death, includ-

ing any such land or personalty acquired after the execution of his will.

(2) CLASS GIFTS.—

(A) NO DIFFERENTIATION BETWEEN RELATIONSHIP BY BLOOD AND RELATIONSHIP BY AFFINITY.—Terms of relationship that do not differentiate relationships by blood from those by affinity, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships.

(B) MEANING OF "HEIRS" AND "NEXT OF KIN", ETC.; TIME OF ASCERTAINING CLASS.—A devise of trust or restricted interest in land or an interest in trust personalty to the testator's or another designated person's "heirs", "next of kin", "relatives", or "family" shall mean those persons, including the spouse, who would be entitled to take under the provisions of this Act for nontestamentary disposition. The class is to be ascertained as of the date of the testator's death.

(C) TIME FOR ASCERTAINING CLASS.—In construing a devise to a class other than a class described in subparagraph (B), the class shall be ascertained as of the time the devise is to take effect in enjoyment. The surviving issue of any member of the class who is then dead shall take by right of representation the share which their deceased ancestor would have taken.

(3) MEANING OF "DIE WITHOUT ISSUE" AND SIMILAR PHRASES.—In any devise under this chapter, the words "die without issue", "die without leaving issue", "have no issue", or words of a similar import shall be construed to mean that an individual had no lineal descendants in his lifetime or at his death, and not that there will be no lineal descendants at some future time.

(4) PERSONS BORN OUT OF WEDLOCK.—In construing provisions of this chapter relating to lapsed and void devises, and in construing a devise to a person or persons described by relationship to the testator or to another, a person born out of wedlock shall be considered the child of the natural mother and also of the natural father.

(5) LAPSED DEVISES.—Subject to the provisions of subsection (b), where the testator devises or bequeaths a trust or restricted interest in land or trust personalty to the testator's grandparents or to the lineal descendent of a grandparent, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the interest so devised or bequeathed per stirpes.

(6) VOID DEVISES.—Except as provided in paragraph (5), and if the disposition shall not be otherwise expressly provided for by a tribal probate code approved under section 206 (25 U.S. C. 2205), if a devise other than a residuary devise of a trust or restricted interest in land or trust personalty fails for any reason, such interest shall become part of the residue and pass, subject to the provisions of subsection (b), to the other residuary

devisees, if any, in proportion to their respective shares or interests in the residue.

(7) FAMILY CEMETERY PLOT.—If a family cemetery plot owned by the testator at his decease is not mentioned in the decedent's will, the ownership of the plot shall descend to his heirs as if he had died intestate.

(j) HEIRSHIP BY KILLING.—

(1) HEIRSHIP BY KILLING DEFINED.—As used in this subsection, "heir by killing" means any person who knowingly participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of the decedent.

(2) NO ACQUISITION OF PROPERTY BY KILLING.—Subject to any applicable Federal law relating to the devise or descent of trust or restricted land, no heir by killing shall in any way acquire any trust or restricted interests in land or interests in trust personalty as the result of the death of the decedent, but such property shall pass in accordance with this subsection.

(3) DESCENT, DISTRIBUTION, AND RIGHT OF SURVIVORSHIP.—The heir by killing shall be deemed to have predeceased the decedent as to decedent's trust or restricted interests in land or trust personalty which would have passed from the decedent or his estate to such heir—

(A) under intestate succession under this section;

(B) under a tribal probate code, unless otherwise provided for;

(C) as the surviving spouse;

(D) by devise;

(E) as a reversion or a vested remainder;

(F) as a survivorship interest; and

(G) as a contingent remainder or executory or other future interest.

(4) JOINT TENANTS, JOINT OWNERS, AND JOINT OBLIGEES.—

(A) Any trust or restricted land or trust personalty held by only the heir by killing and the decedent as joint tenants, joint owners, or joint obligees shall pass upon the death of the decedent to his or her estate, as if the heir by killing had predeceased the decedent.

(B) As to trust or restricted land or trust personalty held jointly by 3 or more persons, including both the heir by killing and the decedent, any income which would have accrued to the heir by killing as a result of the death of the decedent shall pass to the estate of the decedent as if the heir by killing had predeceased the decedent and any surviving joint tenants.

(C) Notwithstanding any other provision of this subsection, the decedent's trust or restricted interest land or trust personalty that is held in a joint tenancy with the right of survivorship shall be severed from the joint tenancy as though the property held in the joint tenancy were to be severed and distributed equally among the joint tenants and the decedent's interest shall pass to his estate; the remainder of the interests shall remain in joint tenancy with right of survivorship among the surviving joint tenants.

(5) LIFE ESTATE FOR THE LIFE OF ANOTHER.—If the estate is held by a third person whose possession expires upon the death

of the decedent, it shall remain in such person's hands for the period of time following the decedent's death equal to the life expectancy of the decedent but for the killing.

(6) PREADJUDICATION RULE.—

(A) IN GENERAL.—If a person has been charged, whether by indictment, information, or otherwise by the United States, a tribe, or any State, with voluntary manslaughter or homicide in connection with a decedent's death, then any and all trust or restricted land or trust personalty that would otherwise pass to that person from the decedent's estate shall not pass or be distributed by the Secretary until the charges have been resolved in accordance with the provisions of this paragraph.

(B) DISMISSAL OR WITHDRAWAL.—Upon dismissal or withdrawal of the charge, or upon a verdict of not guilty, such land and personalty shall pass as if no charge had been filed or made.

(C) CONVICTION.—Upon conviction of such person, and the exhaustion of all appeals, if any, the trust and restricted land and trust personalty in the estate shall pass in accordance with this subsection.

(7) BROAD CONSTRUCTION; POLICY OF SUBSECTION.—This subsection shall not be considered penal in nature, but shall be construed broadly in order to effect the policy that no person shall be allowed to profit by his own wrong, wherever committed.

(k) GENERAL RULES GOVERNING PROBATE.—

(1) SCOPE.—Except as provided under applicable Federal law or a tribal probate code approved under section 206, the provisions of this subsection shall govern the probate of estates containing trust and restricted interests in land or trust personalty.

(2) PRETERMITTED SPOUSES AND CHILDREN.—

(A) SPOUSES.—

(i) IN GENERAL.—Except as provided in clause (ii), if the surviving spouse of a testator married the testator after the testator executed the will of the testator, the surviving spouse shall receive the intestate share in the decedent's trust or restricted land and trust personalty that the spouse would have received if the testator had died intestate.

(ii) EXCEPTION.—Clause (i) shall not apply to a trust or restricted interest land where—

(I) the will of a testator is executed before the date of enactment of this subparagraph;

(II)(aa) the spouse of a testator is a non-Indian; and

(bb) the testator devised the interests in trust or restricted land of the testator to 1 or more Indians;

(III) it appears, based on an examination of the will or other evidence, that the will was made in contemplation of the marriage of the testator to the surviving spouse;

(IV) the will expresses the intention that the will is to be effective notwithstanding any subsequent marriage; or

(V)(aa) the testator provided for the spouse by a transfer of funds or property outside the will; and

(bb) an intent that the transfer be in lieu of a testamentary provision is demonstrated by statements of the testator or through a reasonable inference based on the amount of the transfer or other evidence.

(iii) SPOUSES MARRIED AT THE TIME OF THE WILL.—Should the surviving spouse of the testator be omitted from the will of the testator, the surviving spouse shall be treated, for purposes of trust or restricted land or trust personalty in the testator's estate, in accordance with the provisions of section 207(a)(2)(A), as though there was no will but only if—

(I) the testator and surviving spouse were continuously married without legal separation for the 5-year period preceding the decedent's death;

(II) the testator and surviving spouse have a surviving child who is the child of the testator;

(III) the surviving spouse has made substantial payments toward the purchase of, or improvements to, the trust or restricted land in such estate; or

(IV) the surviving spouse is under a binding obligation to continue making loan payments for the trust or restricted land for a substantial period of time,

except that, if there is evidence that the testator adequately provided for the surviving spouse and any minor children by a transfer of funds or property outside of the will, this clause shall not apply.

(B) CHILDREN.—

(i) IN GENERAL.—If a testator executed the will of the testator before the birth or adoption of 1 or more children of the testator, and the omission of the children from the will is a product of inadvertence rather than an intentional omission, the children shall share in the trust or restricted interests in land and trust personalty as if the decedent had died intestate.

(ii) ADOPTED HEIRS.—Any person recognized as an heir by virtue of adoption under the Act of July 8, 1940 (25 U.S.C. 372a), shall be treated as the child of a decedent under this subsection.

(iii) ADOPTED-OUT CHILDREN.—

(I) IN GENERAL.—For purposes of this Act, an adopted person shall not be considered the child or issue of his natural parents, except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person. If a natural parent shall have married the adopting parent, the adopted person for purposes of inheritance by, from and through him shall also be considered the issue of such natural parent.

(II) ELIGIBLE HEIR PURSUANT TO OTHER FEDERAL LAW OR TRIBAL LAW.—Notwithstanding the provi-

sions of subparagraph (B)(iii)(I), other Federal laws and laws of the Indian tribe with jurisdiction over the trust or restricted interest in land may otherwise define the inheritance rights of adopted-out children.

(3) DIVORCE.—

(A) SURVIVING SPOUSE.—

(i) IN GENERAL.—An individual who is divorced from a decedent, or whose marriage to the decedent has been annulled, shall not be considered to be a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death of the decedent.

(ii) SEPARATION.—A decree of separation that does not dissolve a marriage, and terminate the status of husband and wife, shall not be considered a divorce for the purpose of this subsection.

(iii) NO EFFECT ON ADJUDICATIONS.—Nothing in clause (i) shall prevent the Secretary from giving effect to a property right settlement relating to a trust or restricted interest in land or an interest in trust personalty if 1 of the parties to the settlement dies before the issuance of a final decree dissolving the marriage of the parties to the property settlement.

(B) EFFECT OF SUBSEQUENT DIVORCE ON A WILL OR DEVISE.—

(i) IN GENERAL.—If, after executing a will, a testator is divorced or the marriage of the testator is annulled, as of the effective date of the divorce or annulment, any disposition of trust or restricted interests in land or of trust personalty made by the will to the former spouse of the testator shall be considered to be revoked unless the will expressly provides otherwise.

(ii) PROPERTY.—Property that is prevented from passing to a former spouse of a decedent under clause (i) shall pass as if the former spouse failed to survive the decedent.

(iii) PROVISIONS OF WILLS.—Any provision of a will that is considered to be revoked solely by operation of this subparagraph shall be revived by the remarriage of a testator to the former spouse of the testator.

(4) AFTER-BORN HEIRS.—A child in gestation at the time of decedent's death will be treated as having survived the decedent if the child lives at least 120 hours after its birth.

(5) ADVANCEMENTS OF TRUST PERSONALTY DURING LIFETIME; EFFECT ON DISTRIBUTION OF ESTATE.—

(A) The trust personalty of a decedent who dies intestate as to all or a portion of his or her estate, given during the decedent's lifetime to a person eligible to be an heir of the decedent under subsection (b)(2)(B), shall be treated as an advancement against the heir's inheritance, but only if the decedent declared in a contemporaneous writing, or the heir acknowledged in writing, that the gift is an advancement or is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(B) For the purposes of this section, trust personalty advanced during the decedent's lifetime is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever occurs first.

(C) If the recipient of the trust personalty predeceases the decedent, the property shall not be treated as an advancement or taken into account in computing the division and distribution of the decedent's intestate estate unless the decedent's contemporaneous writing provides otherwise.

(6) HEIRS RELATED TO DECEDENT THROUGH 2 LINES; SINGLE SHARE.—A person who is related to the decedent through 2 lines of relationship is entitled to only a single share of the trust or restricted land or trust personalty in the decedent's estate based on the relationship that would entitle such person to the larger share.

(7) NOTICE.—

(A) IN GENERAL.—To the maximum extent practicable, the Secretary shall notify each owner of trust and restricted land of the provisions of this Act.

(B) COMBINED NOTICES.—The notice under subparagraph (A) may, at the discretion of the Secretary, be provided with the notice required under subsection (a) of section (8) of the American Indian Probate Reform Act of 2004.

(8) RENUNCIATION OR DISCLAIMER OF INTERESTS.—

(A) IN GENERAL.—Any person 18 years of age or older may renounce or disclaim an inheritance of a trust or restricted interest in land or in trust personalty through intestate succession or devise, either in full or subject to the reservation of a life estate (where the interest is an interest in land), in accordance with subparagraph (B), by filing a signed and acknowledged declaration with the probate decisionmaker prior to entry of a final probate order. No interest so renounced or disclaimed shall be considered to have vested in the renouncing or disclaiming heir or devisee, and the renunciation or disclaimer shall not be considered to be a transfer or gift of the renounced or disclaimed interest.

(B) ELIGIBLE RECIPIENTS OF RENOUNCED OR DISCLAIMED INTERESTS, NOTICE TO RECIPIENTS.—

(i) INTERESTS IN LAND.—A trust or restricted interest in land may be renounced or disclaimed only in favor of

(I) an eligible heir;

(II) any person who would have been eligible to be devisee of the interest in question pursuant to subsection (b)(1)(A) (but only in cases where the renouncing person is a devisee of the interest under a valid will); or

(III) the Indian tribe with jurisdiction over the interest in question;

and the interest so renounced shall pass to its recipient in trust or restricted status.

(ii) TRUST PERSONALTY.—An interest in trust personalty may be renounced or disclaimed in favor of any

person who would be eligible to be a devisee of such an interest under subsection (b)(3) and shall pass to the recipient in accordance with the provisions of that subsection.

(iii) UNAUTHORIZED RENUNCIATIONS AND DISCLAIMERS.—Unless renounced or disclaimed in favor of a person or Indian tribe eligible to receive the interest in accordance with the provisions of this subparagraph, a renounced or disclaimed interest shall pass as if the renunciation or disclaimer had not been made.

(C) ACCEPTANCE OF INTEREST.—A renunciation or disclaimer of an interest filed in accordance with this paragraph shall be considered accepted when implemented in a final order by the decisionmaker, and shall thereafter be irrevocable. No renunciation or disclaimer of an interest shall be included in such order unless the recipient of the interest has been given notice of the renunciation or disclaimer and has not refused to accept the interest. All disclaimers and renunciations filed and implemented in probate orders made effective prior to the date of enactment of the American Indian Probate Reform Act of 2004 are hereby ratified.

(D) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to allow the renunciation of an interest that is subject to the provisions of section 207(a)(2)(D) (25 U.S.C. 2206(a)(2)(D)) in favor of more than 1 person.

(9) CONSOLIDATION AGREEMENTS.—

(A) IN GENERAL.—During the pendency of probate, the decisionmaker is authorized to approve written consolidation agreements effecting exchanges or gifts voluntarily entered into between the decedent's eligible heirs or devisees, to consolidate interests in any tract of land included in the decedent's trust inventory. Such agreements may provide for the conveyance of interests already owned by such heirs or devisees in such tracts, without having to comply with the Secretary's rules otherwise applicable to conveyances by deed of trust or restricted interests in land.

(B) EFFECTIVE.—An agreement approved under subparagraph (A) shall be considered final when implemented in an order by a decisionmaker. The final probate order shall direct any changes necessary to the Secretary's land records, to reflect and implement the terms of the approved agreement.

(C) EFFECT ON PURCHASE OPTION AT PROBATE.—Any interest in trust or restricted land that is subject to a consolidation agreement under this paragraph or section 207(e) (25 U.S.C. 2206(e)) shall not be available for purchase under section 207(p) (25 U.S.C. 2206(p)) unless the decisionmaker determines that the agreement should not be approved.

(l) NOTIFICATION TO LANDOWNERS.—After receiving written request by any owner of a trust or restricted interest in land, the Secretary shall provide to such landowner the following information with respect to each tract of trust or restricted land in which the landowner has an interest—

(1) The location of the tract of land involved.

(2) The identity of each other co-owner of interests in the parcel of land.

(3) The percentage of ownership of each owner of an interest in the tract.

(m) PILOT PROJECT FOR THE MANAGEMENT OF TRUST ASSETS OF INDIAN FAMILIES AND RELATIVES.—

(1) DEVELOPMENT PILOT PROJECT.—The Secretary shall consult with tribes, individual landowner organizations, Indian advocacy organizations, and other interested parties to—

(A) develop a pilot project for the creation of legal entities such as private or family trusts, partnerships, corporations or other organizations to improve, facilitate and assist in the efficient management of interests in trust or restricted lands or funds owned by Indian family members and relatives; and

(B) develop proposed rules, regulations, and guidelines to implement the pilot project, including—

(i) the criteria for establishing such legal entities;

(ii) reporting and other requirements that the Secretary determines to be appropriate for administering such entities; and

(iii) provisions for suspending or revoking the authority of an entity to engage in activities relating to the management of trust or restricted assets under the pilot project, in order to protect the interests of the beneficial owners of such assets.

(2) PRIMARY PURPOSES; LIMITATION; APPROVAL OF TRANSACTIONS; PAYMENTS BY SECRETARY.—

(A) PURPOSES.—The primary purpose of any entity organized under the pilot project shall be to improve, facilitate, and assist in the management of interests in trust or restricted land, held by 1 or more persons, in furtherance of the purposes of this Act.

(B) LIMITATION.—The organization or activities of any entity under the pilot project shall not be construed to impair, impede, replace, abrogate, or modify in any respect the trust duties or responsibilities of the Secretary, nor shall anything in this subsection or in any rules, regulations, or guidelines developed under this subsection enable any private or family trustee of trust or restricted interests in land to exercise any powers over such interests greater than that held by the Secretary with respect to such interests.

(C) SECRETARIAL APPROVAL OF TRANSACTIONS.—Any transaction involving the lease, use, mortgage or other disposition of trust or restricted land or other trust assets administered by or through an entity under the pilot project shall be subject to approval by the Secretary in accordance with applicable Federal law.

(D) PAYMENTS.—The Secretary shall have the authority to make payments of income and revenues derived from trust or restricted land or other trust assets administered by or through an entity participating in the pilot project di-

rectly to the entity, in accordance with requirements of the regulations adopted pursuant to this subsection.

(3) LIMITATIONS ON PILOT PROJECT.—

(A) NUMBER OF ORGANIZATIONS.—The number of entities established under the pilot project authorized by this subsection shall not exceed 30.

(B) REGULATIONS REQUIRED.—No entity shall commence activities under the pilot project authorized by this subsection until the Secretary has adopted final rules and regulations under paragraph (1)(B).

(4) REPORT TO CONGRESS.—Prior to the expiration of the pilot project provided for under this subsection, the Secretary shall submit a report to Congress stating—

(A) a description of the Secretary's consultation with Indian tribes, individual landowner associations, Indian advocacy organizations, and other parties consulted with regarding the development of rules and regulations for the creation and management of interests in trust and restricted lands under the pilot project;

(B) the feasibility of accurately monitoring the performance of legal entities such as those involved in the pilot project, and the effectiveness of such entities as mechanisms to manage and protect trust assets;

(C) the impact that the use of entities such as those in the pilot project may have with respect to the accomplishment of the goals of the Indian Land Consolidation Act (25 U.S.C. 2201 et seq); and

(D) any recommendations that the Secretary may have regarding whether to adopt a permanent private and family trust program as a management and consolidation measure for interests in trust or restricted lands.

(n) NOTICE TO HEIRS.—Prior to holding a hearing to determine the heirs to trust or restricted property, or making a decision determining such heirs, the Secretary shall seek to provide actual written notice of the proceedings to all heirs. Such efforts shall include—

(1) a search of publicly available records and Federal records, including telephone and address directories and including electronic search services or directories;

(2) an inquiry with family members and co-heirs of the property;

(3) an inquiry with the tribal government of which the owner is a member, and the tribal government with jurisdiction over the property, if any; and

(4) if the property is of a value greater than $2,000, engaging the services of an independent firm to conduct a missing persons search.

(o) MISSING HEIRS.—

(1) For purposes of this subsection and subsection (m), an heir may be presumed missing if—

(A) such heir's whereabouts remain unknown 60 days after completion of notice efforts under subsection (m); and

(B) in the proceeding to determine a decedent's heirs, the Secretary finds that the heir has had no contact with other heirs of the decedent, if any, or with the Department relating to trust or restricted land or other trust assets at any

time during the 6-year period preceding the hearing to determine heirs.

(2) Before the date for declaring an heir missing, any person may request an extension of time to locate such heir. The Secretary shall grant a reasonable extension of time for good cause.

(3) An heir shall be declared missing only after a review of the efforts made in the heirship proceeding and a finding has been made that this subsection has been complied with.

(4) An heir determined to be missing pursuant to this subsection shall be deemed to have predeceased the decedent for purposes of descent and devise of trust or restricted land and trust personalty within that decedent's estate.

(p) PURCHASE OPTION AT PROBATE.—

(1) IN GENERAL.—The trust or restricted interests in a parcel of land in the decedent's estate may be purchased at probate in accordance with the provisions of this subsection.

(2) SALE OF INTEREST AT FAIR MARKET VALUE.—Subject to paragraph (3), the Secretary is authorized to sell trust or restricted interests in land subject to this subsection, including the interest that a surviving spouse would otherwise receive under section 207(a)(2)(A) or (D), at no less than fair market value, as determined in accordance with the provisions of this Act, to any of the following eligible purchasers:

(A) Any other eligible heir taking an interest in the same parcel of land by intestate succession or the decedent's other devisees of interests in the same parcel who are eligible to receive a devise under section 207(b)(1)(A).

(B) All persons who own undivided trust or restricted interests in the same parcel of land involved in the probate proceeding.

(C) The Indian tribe with jurisdiction over the interest, or the Secretary on behalf of such Indian tribe.

(3) REQUEST TO PURCHASE; AUCTION; CONSENT REQUIREMENTS.—No sale of an interest in probate shall occur under this subsection unless—

(A) an eligible purchaser described in paragraph (2) submits a written request to purchase prior to the distribution of the interest to heirs or devisees of the decedent and in accordance with any regulations of the Secretary; and

(B) except as provided in paragraph (5), the heirs or devisees of such interest, and the decedent's surviving spouse, if any, receiving a life estate under section 207(a)(2)(A) or (D) consent to the sale.

If the Secretary receives more than 1 request to purchase the same interest, the Secretary shall sell the interest by public auction or sealed bid (as determined by the Secretary) at not less than fair market value to the eligible purchaser submitting the highest bid.

(4) APPRAISAL AND NOTICE.—Prior to the sale of an interest pursuant to this subsection, the Secretary shall—

(A) appraise the interest at its fair market value in accordance with this Act;

(B) provide eligible heirs, other devisees, and the Indian tribe with jurisdiction over the interest with written notice,

sent by first class mail, that the interest is available for purchase in accordance with this subsection;

(C) if the Secretary receives more than 1 request to purchase the interest by a person described in subparagraph (B), provide notice of the manner (auction or sealed bid), time and place of the sale (or the time and place for submitting sealed bids), a description, and the appraised fair market value, of the interest to be sold—

(i) to the heirs or other devisees and the Indian tribe with jurisdiction over the interest, by first class mail; and

(ii) to all other eligible purchasers, by posting written notice in at least 5 conspicuous places in the vicinity of the place of hearing.

(5) SMALL UNDIVIDED INTERESTS IN INDIAN LANDS.—

(A) IN GENERAL.—Subject to subparagraph (B), the consent of a person who is an heir otherwise required under paragraph (3)(B) shall not be required for the auction and sale of an interest at probate under this subsection if—

(i) the interest is passing by intestate succession; and

(ii) prior to the auction the Secretary determines in the probate proceeding that the interest passing to such heir represents less than 5 percent of the entire undivided ownership of the parcel of land as evidenced by the Secretary's records as of the time the determination is made.

(B) EXCEPTION.—Notwithstanding subparagraph (A), the consent of such heir shall be required for the sale at probate of the heir's interest if, at the time of the decedent's death, the heir was residing on the parcel of land of which the interest to be sold was a part.

(6) DISTRIBUTION OF PROCEEDS.—Proceeds from the sale of interests under this subsection shall be distributed to the heirs, devisees, or spouse whose interest was sold in accordance with the values of their respective interests. The proceeds attributable to an heir or devisee shall be held in an account as trust personally if the interest sold would have otherwise passed to the heir or devisee in trust or restricted status.

25 U.S.C. 2212

[§ 2212. Pilot program for the acquisition of fractional interests]

§ 2212. Fractional interest acquisition program]

(a) ACQUISITION BY SECRETARY.—

(1) IN GENERAL.—The Secretary may acquire, at the discretion of the Secretary and with the consent of the owner, *or from an heir during probate in accordance with section 207(p) (25 U.S.C. 2206(p))*, and at fair market value, any fractional interest in trust or restricted lands.

[(2) AUTHORITY OF SECRETARY.—**]**

(2) AUTHORITY OF SECRETARY.—The Secretary shall submit—

(A) IN GENERAL.—The Secretary shall have the authority to acquire interests in trust or restricted lands under this

section during the 3-year period beginning on the date of certification that is referred to in section 207(g)(5).

(B) REQUIRED REPORT.—Prior to expiration of the authority provided for in subparagraph (A), the Secretary shall submit] the report required under section 218 concerning [whether the program to acquire fractional interests should be extended or altered to make resources] *how the fractional interest acquisition program should be enhanced to increase the resources made* available to Indian tribes and individual Indian landowners.

(3) INTERESTS HELD IN TRUST.—Subject to section 214, the Secretary shall immediately hold interests acquired under this Act in trust for the recognized tribal government that exercises jurisdiction over the land involved.

(b) REQUIREMENTS.—In implementing subsection (a), the Secretary—

* * * * * * *

[(4) shall minimize the administrative costs associated with the land acquisition program.]

(4) shall minimize the administrative costs associated with the land acquisition program through the use of policies and procedures designed to accommodate the voluntary sale of interests under under this section, notwithstanding the existence of any otherwise applicable policy, procedure, or regulation, through the elimination of duplicate—

(A) conveyance documents;

(B) administrative proceedings; and

(C) transactions.

(c) SALE OF INTEREST TO INDIAN LANDOWNERS.—

(1) CONVEYANCE AT REQUEST.—

(A) IN GENERAL.—At the request of any Indian who owns [at least 5 percent of the] *an* undivided interest in a parcel of trust or restricted land, the Secretary shall convey an interest *in such a parcel* acquired under this section to the Indian [landowner upon payment by the Indian landowner of the amount paid for the interest by the Secretary.] *landowner—*

(i) on payment by the Indian landowner of the amount paid for the interest by the Secretary; or

(ii) if—

(I) the Indian referred to in this subparagraph provides assurances that the purchase price will be paid by pledging revenue from any source, including trust resources; and

(II) the Secretary determines that the purchase price will be paid in a timely and efficient manner.

(B) LIMITATION.—With respect to a conveyance under this subsection, the Secretary shall not approve an application to terminate the trust status or remove the restrictions of such an interest *unless the interest is subject to a foreclosure of a mortgage in accordance with the Act of March 29, 1956 (25 USC 483a).*

* * * * * * *

(3) LIMITATION.—If an Indian tribe that has jurisdiction over a parcel of trust or restricted land owns [10 percent or more of the undivided interests] *an undivided interest* in a parcel of such land, such interest may only be acquired under paragraph (1) with the consent of such Indian tribe.

(d) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section $75,000,000 for fiscal year 2005, $95,000,000 for fiscal year 2006, and $145,000,000 for each of fiscal years 2007 through 2010.

25 U.S.C. 2213

§ 2213. Administration of acquired fractional interests, disposition of proceeds

* * * * * * *

[(b) CONDITIONS.—

[(1) IN GENERAL.—The conditions described in this paragraph are as follows:

[(A) Until the purchase price paid by the Secretary for an interest referred to in subsection (a) has been recovered, or until the Secretary makes any of the findings under paragraph (2)(A), any lease, resource sale contract, right-of-way, or other document evidencing a transaction affecting the interest shall contain a clause providing that all revenue derived from the interest shall be paid to the Secretary.

[(B) Subject to subparagraph (C), the Secretary shall deposit any revenue derived under subparagraph (A) into the Acquisition Fund created under section 216.

[(C) The Secretary shall deposit any revenue that is paid under subparagraph (A) that is in excess of the purchase price of the fractional interest involved to the credit of the Indian tribe that receives the fractional interest under section 213 and the tribe shall have access to such funds in the same manner as other funds paid to the Secretary for the use of lands held in trust for the tribe.

[(D) Notwithstanding any other provision of law, including section 16 of the Act of June 18, 1934 (commonly referred to as the 'Indian Reorganization Act') (48 Stat. 987, chapter 576; 25 U.S.C. 476), with respect to any interest acquired by the Secretary under section 213, the Secretary may approve a transaction covered under this section on behalf of a tribe until—

[(i) the Secretary makes any of the findings under paragraph (2)(A); or

[(ii) an amount equal to the purchase price of that interest has been paid into the Acquisition Fund created under section 216.

[(2) EXCEPTION.—Paragraph (1)(A) shall not apply to any revenue derived from an interest in a parcel of land acquired by the Secretary under section 213 after—

[(A) the Secretary makes a finding that—

[(i) the costs of administering the interest will equal or exceed the projected revenues for the parcel involved;

[(ii) in the discretion of the Secretary, it will take an unreasonable period of time for the parcel to generate revenue that equals the purchase price paid for the interest; or

[(iii) a subsequent decrease in the value of land or commodities associated with the land make it likely that the interest will be unable to generate revenue that equals the purchase price paid for the interest in a reasonable time; or

[(B) an amount equal to the purchase price of that interest in land has been paid into the Acquisition Fund created under section 216.]

(b) APPLICATION OF REVENUE FROM ACQUIRED INTERESTS TO LAND CONSOLIDATION PROGRAM.—

(1) IN GENERAL.—The Secretary shall have a lien on any revenue accruing to an interest described in subsection (a) until the Secretary provides for the removal of the lien under paragraph (3), (4), or (5).

(2) REQUIREMENTS.—

(A) IN GENERAL.—Until the Secretary removes a lien from an interest in land under paragraph (1)—

(i) any lease, resource sale contract, right-of-way, or other document evidencing a transaction affecting the interest shall contain a clause providing that all revenue derived from the interest shall be paid to the Secretary; and

(ii) any revenue derived from any interest acquired by the Secretary in accordance with section 213 shall be deposited in the fund created under section 216.

(B) APPROVAL OF TRANSACTIONS.—Notwithstanding section 16 of the Act of June 18, 1934 (commonly known as the "Indian Reorganization Act") (25 U.S.C. 476), or any other provision of law, until the Secretary removes a lien from an interest in land under paragraph (1), the Secretary may approve a transaction covered under this section on behalf of an Indian tribe.

(3) REMOVAL OF LIENS AFTER FINDINGS.—The Secretary may remove a lien referred to in paragraph (1) if the Secretary makes a finding that—

(A) the costs of administering the interest from which revenue accrues under the lien will equal or exceed the projected revenues for the parcel of land involved;

(B) in the discretion of the Secretary, it will take an unreasonable period of time for the parcel of land to generate revenue that equals the purchase price paid for the interest; or

(C) a subsequent decrease in the value of land or commodities associated with the parcel of land make it likely that the interest will be unable to generate revenue that equals the purchase price paid for the interest in a reasonable time.

(4) REMOVAL OF LIENS UPON PAYMENT INTO THE ACQUISITION FUND.—The Secretary shall remove a lien referred to in paragraph (1) upon payment of an amount equal to the purchase price of that interest in land into the Acquisition Fund created

under section 2215 of this title, except where the tribe with jurisdiction over such interest in land authorizes the Secretary to continue the lien in order to generate additional acquisition funds.

(5) OTHER REMOVAL OF LIENS.—In accordance with regulations to be promulgated by the Secretary, and in consultation with tribal governments and other entities described in section 213(b)(3), the Secretary shall periodically remove liens referred to in paragraph (1) from interests in land acquired by the Secretary.

25 U.S.C. 2214

§ 2214. Establishing fair market value

For purposes of this chapter, the Secretary may develop a system of establishing the fair market value of various types of lands and improvements. Such a system may include determinations of fair market value based on appropriate geographic units as determined by the Secretary. Such system may govern the amounts offered for the purchase of interests in trust or restricted lands under ❚section 2212 of this title❚ *this Act.*

25 U.S.C. 2215

§ 2215. Acquisition fund

(a) IN GENERAL.—The Secretary shall establish an Acquisition Fund to—

(1) disburse appropriations authorized to accomplish the purposes of section 213; and

❚(2) collect all revenues received from the lease, permit, or sale of resources from interests in trust or restricted lands transferred to Indian tribes by the Secretary under section 213 or paid by Indian landowners under section 213(c).❚

(2) collect all revenues received from the lease, permit, or sale of resources from interests acquired under section 213 or paid by Indian landowners under section 213.

(b) DEPOSITS; USE.—

(1) IN GENERAL.—❚Subject to paragraph (2), all❚ *All* proceeds from leases, permits, or resource sales derived from an interest in trust or restricted lands described in subsection (a)(2) shall—

(A) be deposited in the Acquisition Fund; ❚and❚

(B) as specified in advance in appropriations Acts, be available for the purpose of acquiring additional fractional interests in trust or restricted lands❚.❚ *; and*

(C) be used to acquire undivided interests on the reservation from which the income was derived.

❚(2) MAXIMUM DEPOSITS OF PROCEEDS.—With respect to the deposit of proceeds derived from an interest under paragraph (1), the aggregate amount deposited under that paragraph shall not exceed the purchase price of that interest under section 213.❚

(2) USE OF FUNDS.—The Secretary may use the revenue deposited in the Acquisition Fund under paragraph (1) to acquire

some or all of the undivided interests in any parcels of land in accordance with section 205.

25 U.S.C. 2216

§ 2216. Trust and restricted land transactions

* * * * * * *

(b) SALES, EXCHANGES AND GIFT DEEDS BETWEEN INDIANS AND BETWEEN INDIANS AND INDIAN TRIBES.—

(1) IN GENERAL.—

* * * * * * *

[(B) WAIVER OF REQUIREMENT.—The requirement for an estimate of value under subparagraph (A) may be waived in writing by an Indian selling, exchanging, or conveying by gift deed for no or nominal consideration an interest in land with an Indian person who is the owner's spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir.]

(B) WAIVER OF REQUIREMENT.—The requirement for an estimate of value under subparagraph (A) may be waived in writing by an owner of a trust or restricted interest in land either selling, exchanging, or conveying by gift deed for no or nominal consideration such interest—

(i) to an Indian person who is the owner's spouse, brother, sister, lineal ancestor, lineal descendant, or collateral heir; or

(ii) to an Indian co-owner or to the tribe with jurisdiction over the subject parcel of land, where the grantor owns a fractional interest that represents 5 percent or less of the parcel.

* * * * * * *

(e) LAND OWNERSHIP INFORMATION.—[Notwithstanding any other provision of law, the names and mailing addresses of the Indian owners of trust or restricted lands, and information on the location of the parcel and the percentage of undivided interest owned by each individual, or of any interest in trust or restricted lands, shall, upon written request, be made available to—] *Notwithstanding any other provision of law, the names and mailing addresses of the owners of any interest in trust or restricted lands, and information on the location of the parcel and the percentage of undivided interest owned by each individual shall, upon request, be made available to—*

(1) other [Indian] owners of interests in trust or restricted lands within the same reservation;

* * * * * * *

(3) [prospective applicants for the leasing, use, or consolidation of] *any person that is leasing, using, or consolidating, or is applying to lease, use, or consolidate* such trust or restricted land or the interest in trust or restricted lands.

[(f) NOTICE TO INDIAN TRIBE.—After the expiration of the limitation period provided for in subsection (b)(2) and prior to considering an Indian application to terminate the trust status or to remove the restrictions on alienation from trust or restricted land sold, ex-

changed or otherwise conveyed under this section, the Indian tribe that exercises jurisdiction over the parcel of such land shall be notified of the application and given the opportunity to match the purchase price that has been offered for the trust or restricted land involved.]

(f) PURCHASE OF LAND BY INDIAN TRIBE.—

(1) IN GENERAL.—Except as provided in paragraph (2), before the Secretary approves an application to terminate the trust status or remove the restrictions on alienation from a parcel of, or interest in, trust or restricted land, the Indian tribe with jurisdiction over the parcel shall have the opportunity—

(A) to match any offer contained in the application; or

(B) in a case in which there is no purchase price offered, to acquire the interest in the parcel by paying the fair market value of the interest.

(2) EXCEPTION FOR FAMILY FARMS.—

(A) IN GENERAL.—Paragraph (1) shall not apply to a parcel of, or interest in, trust or restricted land that is part of a family farm that is conveyed to a member of the family of a landowner (as defined in section 206(c)(2)(A)(iv)) if the conveyance requires that in the event that the parcel or interest is offered for sale to an entity or person that is not a member of the family of the landowner, the Indian tribe with jurisdiction over the land shall be afforded the opportunity to purchase the interest pursuant to paragraph (1).

(B) APPLICABILITY OF OTHER PROVISION.—Section 206(c)(2)(A) shall apply with respect to the recording and mortgaging of any trust or restricted land referred to in subparagraph (A).

25 U.S.C. 2218

§ 2218. Approval of leases, rights-of-way, and sales of natural resources

* * * * * * *

(b) APPLICABLE PERCENTAGE.—

(1) PERCENTAGE INTEREST.—The applicable percentage referred to in subsection (a)(1) of this section shall be determined as follows:

(A) If there are 5 or fewer owners of the undivided interest in the allotted land, the applicable percentage shall be [100] *90* percent.

* * * * * * *

(g) OTHER LAWS.—Nothing in this Act shall be construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land.

25 U.S.C. 2220

§ 2220. Owner-managed interests

(a) PURPOSE.—The purpose of this section is to provide a means for the co-owners of trust or restricted interests in a parcel of land to enter into surface leases of such parcel for certain purposes without approval of the Secretary.

(b) MINERAL INTERESTS.—Nothing in this section shall be construed to limit or otherwise affect the application of any Federal law requiring the Secretary to approve mineral leases or other agreements for the development of the mineral interest in trust or restricted land.

(c) OWNER MANAGEMENT.—

(1) IN GENERAL.—Notwithstanding any provision of Federal law requiring the Secretary to approve individual Indian leases of individual Indian trust or restricted land, where the owners of all of the undivided trust or restricted interests in a parcel of land have submitted applications to the Secretary pursuant to subsection (a), and the Secretary has approved such applications under subsection (d), such owners may, without further approval by the Secretary, enter into a lease of the parcel for agricultural purposes for a term not to exceed 10 years.

(2) RULE OF CONSTRUCTION.—No such lease shall be effective until it has been executed by the owners of all undivided trust or restricted interests in the parcel.

(d) APPROVAL OF APPLICATIONS FOR OWNER MANAGEMENT.—

(1) IN GENERAL.—Subject to the provisions of paragraph (2), the Secretary shall approve an application for owner management submitted by a qualified applicant pursuant to this section unless the Secretary has reason to believe that the applicant is submitting the application as the result of fraud or undue influence. No such application shall be valid or considered if it is received by the Secretary prior to the date that is 1 year after the date on which notice is published pursuant to section 8(a)(4) of the American Indian Probate Act of 2004.

(2) COMMENCEMENT OF OWNER-MANAGED STATUS.—Notwithstanding the approval of 1 or more applications pursuant to paragraph (1), no trust or restricted interest in a parcel of land shall acquire owner-managed status until applications for all of the trust or restricted interests in such parcel of land have been submitted to and approved by the Secretary pursuant to this section.

(e) VALIDITY OF LEASES.—No lease of trust or restricted interests in a parcel of land that is owner-managed under this section shall be valid or enforceable against the owners of such interests, or against the land, the interest or the United States, unless such lease—

(1) is consistent with, and entered into in accordance with, the requirements of this section; or

(2) has been approved by the Secretary in accordance with other Federal laws applicable to the leasing of trust or restricted land.

(f) LEASE REVENUES.—The Secretary shall not be responsible for the collection of, or accounting for, any lease revenues accruing to any interests under a lease authorized by subsection (e), so long as such interest is in owner-managed status under the provisions of this section.

(g) JURISDICTION.—

(1) JURISDICTION UNAFFECTED BY STATUS.—The Indian tribe with jurisdiction over an interest in trust or restricted land that becomes owner-managed pursuant to this section shall continue to have jurisdiction over the interest to the same extent and in

all respects that such tribe had prior to the interest acquiring owner-managed status.

(2) PERSONS USING LAND.—Any person holding, leasing, or otherwise using such interest in land shall be considered to consent to the jurisdiction of the Indian tribe referred to in paragraph (1), including such tribe's laws and regulations, if any, relating to the use, and any effects associated with the use, of the interest.

(h) CONTINUATION OF OWNER-MANAGED STATUS; REVOCATION.—

(1) IN GENERAL.—Subject to the provisions of paragraph (2), after the applications of the owners of all of the trust or restricted interests in a parcel of land have been approved by the Secretary pursuant to subsection (d), each such interest shall continue in owner-managed status under this section notwithstanding any subsequent conveyance of the interest in trust or restricted status to another person or the subsequent descent of the interest in trust or restricted status by testate or intestate succession to 1 or more heirs.

(2) REVOCATION.-Owner-managed status of an interest may be revoked upon written request of the owners (including the parents or legal guardians of minors or incompetent owners) of all trust or restricted interests in the parcel, submitted to the Secretary in accordance with regulations adopted under subsection (l). The revocation shall become effective as of the date on which the last of all such requests has been delivered to the Secretary.

(3) EFFECT OF REVOCATION.—Revocation of owner-managed status under paragraph (2) shall not affect the validity of any lease made in accordance with the provisions of this section prior to the effective date of the revocation, provided that, after such revocation becomes effective, the Secretary shall be responsible for the collection of, and accounting for, all future lease revenues accruing to the trust or restricted interests in the parcel from and after such effective date.

(i) DEFINED TERMS.—

(1) For purposes of subsection (d)(1), the term "qualified applicant" means—

(A) a person over the age of 18 who owns a trust or restricted interest in a parcel of land; and

(B) the parent or legal guardian of a minor or incompetent person who owns a trust or restricted interest in a parcel of land.

(2) For purposes of this section, the term "owner-managed status" means, with respect to a trust or restricted interest, that—

(A) the interest is a trust or restricted interest in a parcel of land for which applications covering all trust or restricted interests in such parcel have been submitted to and approved by the Secretary pursuant to subsection (d);

(B) the interest may be leased without approval of the Secretary pursuant to, and in a manner that is consistent with, the requirements of this section; and

(C) no revocation has occurred under subsection (h)(2).

(j) SECRETARIAL APPROVAL OF OTHER TRANSACTIONS.—Except with respect to the specific lease transaction described in paragraph (1) of subsection (c), interests that acquire owner-managed status

under the provisions of this section shall continue to be subject to all Federal laws requiring the Secretary to approve transactions involving trust or restricted land (including leases with terms of a duration in excess of 10 years) that would otherwise apply to such interests if the interests had not acquired owner-managed status under this section.

(k) EFFECT OF SECTION.—Subject to subsections (c), (f), and (h), nothing in this section diminishes or otherwise affects any authority or responsibility of the Secretary with respect to an interest in trust or restricted land.

25 U.S.C. 2221

§ 2221. Annual notice and filing; current whereabouts of interest owners

On at least an annual basis, the Secretary shall include along with other regular reports to owners of trust or restricted interests in land and individual Indian money account owners a change of name and address form by means of which the owner may confirm or update the owner's name and address. The change of name and address form shall include a section in which the owner may confirm and update the owner's name and address.

25 U.S.C. 348

§ 348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: ❚*Provided*, That the law of descent in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as provided by the Indian Land Consolidation Act (25 U.S.C.A. § 2201 et seq.) or a tribal probate code approved under such Act and except as herein otherwise provided:❚ *Provided, That the rules of intestate succession under the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act) shall apply to that land for which patents have been executed and delivered*:

* * * * * * *

§ 464. Transfer of restricted Indian lands or shares in assets of Indian tribes or corporation; exchange of lands

Except as provided herein, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised**[**, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located,**]** to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or**[**, except as provided by the Indian Land Consolidation Act (25 U.S.C.A. § 2201 et seq.), any other Indian person for whom the Secretary of Interior determines that the United States may hold land in trust:**]** *in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act):*

* * * * * * *

○