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AMENDING THE INDIAN LAND CONSOLIDATION ACT TO MODIFY CERTAIN REQUIREMENTS UNDER THAT ACT

JULY 26, 2006.—Ordered to be printed

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

REPORT

[To accompany S. 3526]

The Committee on Indian Affairs, to which was referred the bill (S. 3526), to amend the Indian Land Consolidation Act to modify certain requirements under that Act, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 3526 is to amend certain provisions of the Indian Land Consolidation Act relating to the uniform Indian probate code at 25 U.S.C. 2206. These amendments include, *inter alia*, clarifying amendments to certain defined terms in 25 U.S.C. 2201; amendments to the defined term "land" in that section that will have the effect of delaying the application of the uniform Indian probate code to permanent improvements until after July 20, 2007; and amendments in 25 U.S.C. 2206 that will have the effect of delaying the application of certain provisions of the uniform Indian probate code until after July 20, 2007.

BACKGROUND AND OVERVIEW

On October 27, 2004, the President signed S. 1721, the American Indian Probate Reform Act of 2005, Public Law 108–374 ("AIPRA"). The centerpiece of AIPRA is its uniform Indian probate code, which was intended in part to stem the phenomenon of Indian land "fractionation" caused in large part by the application of state laws of intestate succession to trust and restricted Indian lands. To achieve this end, AIPRA was deliberately structured to encourage the prac-

tice of estate planning and will-writing among Indian landowners and to discourage the pervasive historical tendency among Indian landowners to allow their interests in trust and restricted land to pass from one generation to the next by intestate succession.

To encourage estate planning, AIPRA amended the estate planning provisions in the ILCA (25 U.S.C. 2206(f)) to state that the Secretary's estate planning services "shall be designed to . . . *dramatically increase* the use of wills and other methods of devise among Indian landowners [and] . . . *substantially reduce* the quantity and complexity of Indian estates that pass intestate through the probate process" (emphasis added). AIPRA also amended this section to authorize a substantial grant program for Indian tribes, nonprofit legal service organizations and, on reservations where such organizations do not operate, other legal service providers to provide estate planning services in Indian country.

AIPRA also included provisions intended to discourage the tendency to allow interests in trust and restricted land to pass without a will. These provisions include a "single-heir rule" (25 U.S.C. 2206(a)(2)(D)) and the involuntary "purchase at probate" (25 U.S.C. 2206(o)(5), both of which only apply to small fractional interest *passing without a will*. Similarly, wills that would pass land to "all my children, share and share alike" or to "all my grandchildren, share and share alike," which would cause fractionation as surely as intestate succession, are discouraged with a rule that a testamentary devise of land to two or more people is presumed to create a joint tenancy with rights of survivorship rather than a tenancy in common, absent "clear and express language" that a tenancy in common was intended. See, 25 U.S.C. 2206(c). These provisions can all be avoided with careful estate planning, which is, again, one of the central goals of the AIPRA.

AIPRA was developed through considerable consultation with and collaboration among representatives of Indian tribes and Indian organizations as well as with various levels and components of the Department of the Interior. The Committee acknowledges that although not explicit, there was an implicit understanding among the rather divergent interests involved in the development of AIPRA that the consequences of provisions like the single-heir rule and the involuntary purchase option at probate would be avoided by a significant effort throughout Indian country to encourage estate planning and will writing among Indian landowners. However, on April 21, 2005, less than six months after the enactment of AIPRA, the Department announced its intent to "discontinue the practices of assisting Indians in preparing wills by acting as a scrivener and accepting wills for storage"[1]—services that the Department had been providing to Indian landowners for decades. The only reason given for this decision was that the Department "was not required by law to perform these services."[2] At the same time, to the Committee's knowledge the Department provided but one contract in FY 2005 for an estate planning pilot project for two of the twelve regions of the Bureau of Indian Affairs. While this pilot project, funded in the amount of $500,000,

[1] *See*, memorandum dated April 21, 2005, from Associate Deputy Secretary of the Interior James E. Cason and Special Trustee for American Indians Ross Swimmer to all "AS–IA/BIA Employees and OST Employees."

[2] *Id.*

has had a very positive impact in disseminating information and provoking discussion about AIPRA, it cannot, by itself, possibly meet the AIPRA objective of "dramatically increas[ing] the use of wills" among Indian landowners.

As noted above, the more onerous provisions of the intestate provisions of the uniform probate code as well as the presumption of joint tenancy in devises to two or more persons can be avoided by careful estate planning. The Committee is deeply troubled by the prospect that, in light of the significant changes in the law brought by AIPRA, the combined effects of the Department's (1) decision to discontinue will-writing services and (2) failure to adequately fund alternative estate planning services through the grant program authorized by AIPRA or otherwise will result in an unfair hardship on landowners—especially on the many elderly landowners who reside in remote areas of Indian reservations where adequate estate planning services are simply unavailable. S. 3526 would provide some relief to Indian landowners by delaying until after July 20, 2007, the application of rules that can only be avoided through the execution of a proper will after receiving advice on how AIPRA works.

S. 3526 would make technical amendments to clarify an ambiguity in the definition of the term "trust or restricted interest in land" (25 U.S.C. 2201(4)) and the application of ILCA to permanent improvements (25 U.S.C. 2201(7)). In the latter case, the amendments would clarify that "land" includes such improvements only for purposes of intestate succession of a decedent's interest in the improvements under 25 U.S.C. 2206(a) and even there only when the decedent also owns a trust or restricted interest in the parcel of land to which the improvements are attached.[3] Although the Committee feels that both of these ILCA provisions can be interpreted in the same way that these amendments make clear, they are included in S. 3524 to eliminate doubt. The bill also amends the definition so as to delay the application of the uniform probate code to permanent improvements until after July 20, 2007, in order to provide additional time to study how permanent improvements should be handled under the code.

Finally, S. 3526 would amend the provisions relating to the purchase option at probate in three principal respects. First, under current law, where two or more persons express an interest in purchasing an interest during probate, the interest is to be sold by the Secretary at auction. Because so many interests are small and of low value, the cost and delay in the probate process associated with holding an auction will often be unjustified. Accordingly, S. 3526 would amend 25 U.S.C. 2206(o)(3) to allow the person who would otherwise be inheriting the interest to designate which party may purchase the interest. Second, with respect to the involuntary purchase option at probate, the bill amends 25 U.S.C. 2206(o)(5)(A)(iii) so that the 5% threshold is measured against the decedent's ownership interest in the land immediately before death and not against the interest passing to the heir. Third, this provision is amended so that the only purchasers that are eligible to cause an involuntary sale of a small interest are the Secretary as part of the frac-

[3] The reason improvements were addressed in AIPRA was to assure that permanent improvements are inherited by the same persons who inherit the underlying real estate.

tional interest acquisition program and the Indian tribe where the small interest is passing to a person who is not a member, or eligible to be a member, of the tribe.

LEGISLATIVE HISTORY

S. 3526 was introduced on June 15, 2006, by Senator John McCain and referred to the Committee on Indian Affairs. On June 22, 2006, in an open business session the Committee ordered S. 3526 to be reported favorably without amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on June 22, 2006, the Committee, by voice vote, ordered the bill, S. 3526, to be reported favorably to the Senate without amendment.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 sets forth the short title of the bill, the Indian Land Consolidation Act Amendments of 2006.

Section 2

Section 2 amends the definition of "trust or restricted interest in land" and "trust or restricted interest in a parcel of land" set forth at 25 U.S.C. 2201(4) and the definition of "land" insofar as it relates to permanent improvements. The amendment restricts the definition to a decedent's interest in permanent improvements permanently affixed to a parcel of trust or restricted land that was owned in whole or in part by the decedent immediately prior to the decedent's death. The amendment also states that it applies to decedents who die after July 20, 2007.

Section 3

Section 3(1) amends 25 U.S.C. 2206(a)(2)(D) to state that the paragraph, which sets forth the single heir rule, does not apply to any interest in the estate of a decedent who dies during the period beginning on the enactment date of the amendment and ending on July 20, 2007, and authorizes the Secretary to extend this period for up to 1 year.

Section 3(2) amends 25 U.S.C. 2206(c) by providing that the presumption that a devise of an interest in trust or restricted land to more than one person creates a joint tenancy with rights of survivorship absent clear language creating a tenancy in common will not apply to any will executed prior to July 21, 2007.

Section 3(3) amends 25 U.S.C. 2206(o) by eliminating the auction requirement where the Secretary receives multiple requests to purchase an interest and allowing the heir, devisee or surviving spouse to select the purchaser; providing that the 5% threshold for the involuntary purchase at probate is measured against the interest in the decedent's hands rather than the interest passing to the heir; limits the eligible purchasers of an interest in the context of an involuntary sale at probate to (1) the Secretary under the fractional interest acquisition program and (2) the Indian tribe, where the interest would otherwise be inherited by a nonmember; provides for

a period of nonapplicability of the involuntary purchase provisions to interests in the estates of decedents who die on or before July 20, 2007; and authorizes the Secretary to extend this period of nonapplicability for up to one year.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate dated July 13, 2006, was prepared for S. 3526:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 13, 2006.

Hon. JOHN MCCAIN,
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. 3526, the Indian Land Consolidation Act amendments of 2006.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Matthew Pickford (for federal costs), Marjorie Miller (for the impact on state, local, and tribal governments), and Amy Petz (for the impact on the private sector).

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure.

S. 3526—Indian Land Consolidation Act Amendments of 2006

S. 3526 would make technical and clarifying amendments to the Indian Land Consolidation Act (ILCA). The legislation would clarify that permanent improvements to land are covered by the provisions of the ILCA. It would delay implementation of certain interstate inheritance provisions of the probate code until July 20, 2007. Based on information from the Office of Special Trustee for American Indians, CBO estimates that implementing S. 3526 would have no significant impact on the federal budget.

S. 3526 contains one intergovernmental and two private-sector mandates as defined by the Unfunded Mandates Reform Act (UMRA), but CBO expects the aggregate cost of those mandates would be small and would fall well below the annual thresholds established in UMRA ($64 million for intergovernmental entities and $128 million for the private sector in 2006, adjusted annually for inflation).

The bill would impose an intergovernmental and private-sector mandate on certain Indian tribes and individuals because it would limit the right they now enjoy to bid without the consent of the heirs on small fractional property interests at probate. CBO expects that any costs imposed by this mandate on tribal governments or the private sector would not be significant. The bill would impose no other costs on state, local, or tribal governments.

The bill also would impose a private-sector mandate on certain individuals who would otherwise inherit small fractional interests in land under the "single heir rule." Under current law, if an Indian owning a small fractional interest in certain types of land dies

without a will, only one individual is eligible to inherit that interest based on the single heir rule. S. 3526 would suspend implementation of the single heir rule through July 20, 2007, which would allow a larger set of heirs to be eligible to receive an equal share of the property interest. CBO expects the suspension would result in a loss of a portion of inheritance for a limited number of individuals in the near term and would impose a small cost on those individuals in such cases. Consequently, the cost of the mandate would be very small relative to the annual threshold established by UMRA for private-sector mandates.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs), Marjorie Miller (for the impact on state, local, and tribal governments), and Amy Petz (for the impact on the private sector). This estimate was 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 each report accompanying a bill to evaluate the regulatory and paperwork impact to be incurred in carrying out the bill. The Committee believes that S. 3526 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received no official executive communications on S. 3526.

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. 3526 will result in the following changes in existing law, with existing law proposed to be omitted enclosed in black brackets, new language proposed to be added in italic, and existing law to which no change is proposed shown in roman:

25 U.S.C. 2201(4)

(4)(*i*) "trust or restricted lands" means lands, title to which is held in trust 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] *(ii) "trust or restricted interest in land"* or "trust or restricted interest in a parcel of land" means [an interest in land, title to which] a*n interest in land, the title to which interest* 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.

25 U.S.C. 2201(7)

[(7) "land" means any real property, and includes within its meaning for purposes of this act improvements permanently affixed to real property.]

(7) the term "land"—

(A) means any real property; and

(B) for purpose of intestate succession only under section 207(a), includes, with respect to any decedent who dies after

July 20, 2007, the interest of the decedent in any improvements permanently affixed to a parcel of trust or restricted lands (subject to any valid mortgage or other interest in such an improvement) that was owned in whole or in part by the decedent immediately prior to the death of the decedent.

25 U.S.C. 2206(a)(2)(D)(i)

(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)❚ *clauses (ii) through (vi).*

25 U.S.C. 2206(a)(2)(D)(v)

❚(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) of this section.❚

(v) Effect of subparagraph; nonapplicability to certain interests.—Nothing in this subparagraph—

(I) limits the right of any person to devise any trust or restricted interest pursuant to a valid will in accordance with subsection (b); or

(II) applies to any interest in the estate of a decedent who died during the period beginning on the date of enactment of this subclause and ending on July 20, 2007 (or the last day of any applicable period of extension authorized by the Secretary under clause (vi)).

(vi) Authority to extend period of nonapplicability.—The Secretary may extend the period of nonapplicability under clause (v)(II) for not longer than 1 year if, by not later than July 2, 2007, the Secretary publishes in the Federal Register a notice of the extension.

25 U.S.C. 2206(c)

(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 joint tenancy 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.❚ *July 21, 2007.*

25 U.S.C. 2206(o)(3), (4) and (5)

❚(3) Request to purchase; auction; consent requirements

No sale] *(3) Request to purchase; consent requirements; multiple requests to purchase.—*

(A) In general.—No sale of an interest in probate shall occur under this subsection unless—

[(A)] *(i)* 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)] *(ii)* 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 subparagraph (A) or (D) of subsection (a)(2) of this section consent to the sale.

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

(B) Multiple requests to purchase.—Except for interests purchased pursuant to paragraph (5), if the Secretary receives a request with respect to an interest from more than 1 eligible purchaser under paragraph (2), the Secretary shall sell the interest to the eligible purchaser that is selected by the applicable heir, devisee, or surviving spouse.

(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; *and*

(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[; and].

[(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, 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 the hearing.]

(5) Small undivided interests in Indian lands

(A) In general

Subject to paragraph (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], *at the time of the death of the applicable decedent, the interest of the decedent in the land represented*

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**[**.**]**; *and*

(iii)(I) the Secretary is purchasing the interest as part of the program authorized under section 213(a)(1); or

(II) after receiving a notice under paragraph (4)(B), the Indian tribe with jurisdiction over the interest is proposing to purchase the interest from an heir who is not a member, and is not eligible to be a member, of that Indian tribe.

[(B) Exception

Notwithstanding subparagraph (A), the consent of such heir**]**

(B) Exception; nonapplicability to certain interests.—

(i) Exception.—Notwithstanding subparagraph (A), the consent of an heir or surviving spouse shall be required for the sale at probate of the heir's interest if, at the time of the decedent's death, the heir *or surviving spouse* was residing on the parcel of land of which the interest to be sold was a part.

(ii) Nonapplicability to certain interests.—Subparagraph (A) shall not apply to any interest in the estate of a decedent who dies on or before July 20, 2007 (or the last day of any applicable period of extension authorized by the Secretary under subparagraph (C)).

(C) Authority to extend period of nonapplicability.—The Secretary may extend the period of nonapplicability under subparagraph (B)(ii) for not longer than 1 year if, by not later than July 2, 2007, the Secretary publishes in the Federal Register a notice of the extension.

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