

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS



REPORT ON DISCUSSIONS WITH INDIAN TRIBES AND INDIVIDUALS ON THE CONSOLIDATION OF FRACTIONATED OWNERSHIP INTERESTS IN ALLOTTED INDIAN LANDS & RECOMMENDATIONS FOR ADDRESSING FRACTIONATION

**Submitted to the
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Introduction

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) undertook an outreach program to dialogue with Indian Country and solicit recommendations on ways to address the wide range of issues confronting all affected parties arising from the fractionated ownership of allotted Indian land. ITMA met with tribes, landowners, national and regional organizations, and officials of the Department of the Interior to discuss the issues of land fractionation. This Report includes the outcome of work performed under a similar grant funded by the Office of the Special Trustee in FY2008.

In the course of preparing this report, ITMA studied the approaches that various tribes have undertaken to address the issue themselves to stem the rate of increase in fractionated ownership, and made on site visits to reservations to discuss with landowners and tribal officials regarding ways to address the issue. In addition, ITMA met with the Department's own Indian Land Consolidation Office (ILCO) who did a significant amount of successful work in the area of land consolidation, but was not refunded in FY2009 because it was concluded, ITMA was advised, that the land consolidation program was simply not making sufficient headway in addressing the underlying problem. On a national basis land was being fractionated through inheritance faster than it was being consolidated on targeted reservations through purchase by the ILCO.

ITMA participated in meetings with the Affiliated Tribes of Northwest Indians, with the National Congress of American Indians, with the Council of Large Land Base Tribes, and with tribal officers and members at the Coeur d'Alene Reservation, the Yakama Nation reservation, the Osage Reservation, and with representatives of tribes and landowners from the Great Plains Region in Rapid City, South Dakota. Discussions have included, but are not limited to: the costs to the federal government of administering these lands; the economic waste associated with the inability of anyone but trespassers to make economic use of these lands; the frustrations experienced by both tribes and landowners as a result of federal agency practices that some perceive to be driven more by concerns of liability than by any considerations of service or productivity; the reasons underlying the failure of previous federal attempts to address the problem of fractionation; and both the promise and the likely problems associated with the current statutory framework and agency policy.

For purposes of better understanding the land fractionation problem, within this report ITMA has provided historical research that takes us back further than most people thought the problem started. For purposes of better understanding the land fractionation problem, this report includes numerous references to actual documents reviewed to demonstrate both the long history of this problem and the extent to which efforts to address it have frustrated government and tribal officials for nearly one hundred years. ITMA applauds the efforts of the Special Trustee for American Indians for providing this opportunity to seek discussion and input directly from tribes and Indian individuals for his consideration as he fashions a response to the growing budgetary, administrative, and potential liability issues presented by the increasing fractionation of Indian land ownership.

Accordingly, ITMA's report and recommendations follow.

Overview of Recommendations

The recommendations at the end of this report can be grouped into five discrete categories. There is nothing mutually exclusive about these categories. Congressional authorization of tribal condemnation authority, or enactment of a lapse statute, would be new concepts in federal Indian land law even though condemnation authority has been discussed in ITMA consultation meetings. *A lapse statute has not been discussed at all, but is the result of research from suggestions at meetings that ITMA recommend involuntary conveyance of land held by individuals who exhibit none of the incidents of ownership.* Similarly, the four remaining categories could all be subsumed under the Category of including Indian land consolidation in a National Economic Recovery Effort. The following categories are offered for convenience only and not to suggest any order of priority.

- 1) *Include Land Consolidation in National Economic Recovery Effort*
- 2) *Education and Technical Assistance* in utilizing the tools available under the Indian Land Consolidation Act Amendments of 2000¹ and the American Indian Probate Reform Act of 2004²;
- 3) *Authorizing Involuntary Conveyances* such as involuntary sales and other forms of conveyance including but not limited to condemnation, forfeiture, and forced partition;
- 4) *Redesigning a Purchase Program* that puts Tribes in control of purchases on their behalf, expands authority of landowners to design transactions to consolidate fractionated interests in individual ownership, simplifies the valuation or appraisal process, forgives liens, and allows purchase of fee lands as part of consolidation efforts; and
- 5) *New Concepts for Indian Land Consolidation*, such as tax credits, lapse statutes, and forfeitures for illegal uses.

¹ 114 Stat. 1991 (2000) (Indian Land Consolidation Act Amendments of 2000) (ILCAA).

² 118 Stat. 1773 (2004) (American Indian Probate Reform Act of 2004 (AIPRA)).

Current Situation

The United States continues in the 21st Century to expend nearly one-half billion dollars per year not only to perpetuate, but to facilitate a failed³ and repudiated⁴ Indian land ownership policy that dates to the 18th Century.⁵

Today, the United States administers more than 4,000,000 separate ownership interests in some 11,000,000 acres of Indian trust lands. These 11 million acres represent approximately 128,000 tracts that were previously allotted to individuals from tribal lands. The average number of owners of these tracts is 17, but many have hundreds of owners and consultants to the Bureau of Indian Affairs have identified one tract that has 1,800 owners. The government spends \$432 million annually just to administer these fractionated ownership interests. Some 3,500 Indian trust land owners die each year and each probate case costs an average of \$7,800.00. That means the government spends more than \$27 million per year just to probate these often virtually infinitesimal ownership interests. In almost every case the result of probate is simply to fractionate ownership even further, thus exacerbating the problem and increasing the associated costs.⁶ One scholar has reported a December 5, 1996 interview with the BIA Director of the Division of Land Titles and Records in which that official advised that the lowest common denominator for expressing some fractionated ownership interests had already reached a googol.⁷

Previous attempts to address the problem and stem the increasing fractionation arising from the current situation have not offered prospects of timely success. The purpose of this report is to suggest new approaches that benefit from the lessons of history. The recommendations contained herein will be better understood with an appreciation of the background leading to the present situation.

³ “The failure of the allotment policy became even clearer as successive generations came to hold the allotted lands.” *Hodel v. Irving*, 481 U.S. 704, 707 (1987); “Congress finds that ... (2) as a result of the allotment acts ... over 90,000,000 acres of land have passed from tribal ownership; ... (4) ... allotment owners were subject to exploitation; ... (6) ... ownership of many of the trust allotments has become fractionated into hundreds or thousands of undivided interests; ... (9) the fractional interests described in this section often provide little or no return to the beneficial owners of those interests *and the administrative costs borne by the United States for those interests are inordinately high[.]*” (emphasis added). 114 Stat. 1991 (Indian Land Consolidation Act Amendments of 2000).

⁴ “[H]ereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive Order, purchase, or otherwise, shall be allotted in severalty to any Indians.” 48 Stat. 984 (1934) (Indian Reorganization Act of 1934).

⁵ “As early as 1798 tribal lands were allotted to individuals or families.” Cohen, *Handbook of Federal Indian Law* (GPO 1941), at 206, n.4 (citing Treaty of June 1, 1798 with the Oneida Nation, Archives No 28).

⁶ Source: BIA Indian Land Consolidation Office (2008). See Remarks of Majel Russell, former Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior at Couer d’Alene Reservation, transcript available at offices of Intertribal Monitoring Association on Indian Trust Funds.

⁷ A googol is a number containing 101 digits to the left of the decimal. See, Guzman, K., “*Give or Take an Acre*,” 85 Iowa L. Rev. 595, 598, n. 9 (Jan. 2000).

Background of “Fractionated Ownership” of Indian Trust Lands

Conventional wisdom often ascribes the origin of dividing tribal lands into individually owned parcels to the General Allotment Act of 1887.⁸ Courts, government officials, Congressional staff who have drafted legislation on the subject, tribal representatives, and even the *Cobell*⁹ plaintiffs often recite the General Allotment Act as the source of the problems attendant to the fractionated ownership of Indian land. As noted above, in fact, the federal government’s actual practice of providing individually owned land to Indians goes back more than 200 years.¹⁰

The practice of providing allotments of land reserved by Indian tribes in treaties with the United States continued throughout the 19th Century.¹¹ The western migration of American settlers following the Civil War led to increased pressure to open Indian lands for settlement or mining purposes. In addition, many private and official reports urged a policy of separating Indians from their tribal allegiances and converting them to agrarian individualists and farmers. These pressures combined to produce in 1887 a national policy of authorizing the President “in all cases where any tribe or band of Indians [is] located on any reservation ... to allot the lands in said reservation in severalty to any Indian located thereon[.]”¹² These allotments were to be held in trust for twenty-five years for the allottees or their heirs, who would be determined by the laws of the State or Territory where the land was located. The President was further authorized to acquire any lands not allotted to individual Indians and to make those lands available to settlers for homesteading.¹³

Thomas Jefferson had described a view of the superiority of agriculturalists one hundred years earlier.¹⁴ In 1901, President Theodore Roosevelt described the objective of the allotment policy to destroy tribal culture while transforming individual Indians into Jeffersonian husbandmen:

⁸ 24 Stat. 388 (1887).

⁹ *Cobell v. Kempthorne*, Civ. No. 96-1285 (D.D.C.)

¹⁰ See n. 5 *supra* and accompanying text.

¹¹ See, for example, Article IV of the Treaty with the Chippewa at Prairie du Chien of 1829 (7 Stat. 320), that provided for tracts ranging from one-quarter section to one section for named individuals, which “shall never be leased or conveyed by the grantees, or their heirs, without the permission of the President of the United States (*emphasis added*). Article 2, paragraph 7th, of the Treaty with the Chippewa at La Pointe of 1854 (10 Stat. 1109), provided for assigning eighty acres to each head of family and single adult. Article 6 of Treaty with the Omaha of 1854 (10 Stat. 1043) authorized the President to subdivide the treaty lands and “allotments” to individuals at his discretion. Article 6 of the Treaty with the Quinaielt of 1855 (12 Stat. 971) authorized the President to award allotments on the Quinault Reservation on the same terms as provided in the Omaha treaty.

¹² Act of Feb. 8, 1887, 24 Stat. 388 (1887) (Indian General Allotment Act). Certain tribes in the Indian Territory were excluded from application of the General Allotment Act, but they did not escape the allotment policy as their lands were allotted under specific agreements and Acts of Congress.

¹³ *Id.* at 24 Stat. 388, 389-390.

¹⁴ “[T]he proportion ... of the other classes of citizens ... to that of its husbandmen, is the proportion of its unsound to its healthy parts[.] ... While we have land to labour then, let us never wish to see our citizens occupied at a workbench, or twirling a distaff.” Thomas Jefferson, *Notes on the State of Virginia* (1787).

“In my judgment the time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. ... The effort should be steadily to make the Indian work like any other man on his own ground.”¹⁵

Not everyone at the turn of the 19th Century shared the view that the allotment policy was designed primarily to improve the moral and civic condition of the Indian. In 1889, Interior Secretary Carl Schurz had written that allotment would “open to settlement by white men the large tracts of land now belonging to the reservations, but not used by them.”¹⁶ Other contemporary reports were even more accusing:

“The real aim of this bill is to get at the Indian lands and open them up for settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them.”¹⁷

Whatever the actual motives for the national policy, it had unintended consequences for the United States as well as for the Indians, particularly in determining the descent and distribution of the lands of deceased allottees. In 1910, Congress directed the Secretary of the Interior to determine the heirs of deceased allottees, “and his decision shall be final and conclusive.”¹⁸ Living allottees were permitted to make disposition of their allotments by will, so long as such wills were approved by the Commissioner of Indian Affairs and the Secretary of the Interior.¹⁹

By 1913, the problems of managing these inherited interests that are overwhelming the Department today were already becoming unmanageable. In that year the Commissioner of Indian Affairs noted in his Annual Report that:

“[T]here are approximately 40,000 Indian heirship cases pending at the various agencies, representing inherited property, valued at \$60,000,000, which can not be sold or otherwise disposed of until the heirs are determined. The adjudication of these cases is one of the most important duties confronting the Indian Service.

During the year over 10,000 cases have been received pertaining to to heirship matters.”²⁰

¹⁵ Message to Congress, Dec. 3, 1901 in Messages and Papers of the Presidents, Vol. IX, p.6639, 6672 (Bureau of National Literature).

¹⁶ Report of the Secretary of the Interior (1889), at 12 (cited by Cohen, *supra*, at 209).

¹⁷ H. Rept. No. 1576, May 28, 1880, 40th Cong., 2d sess., at 10 (quoted by Cohen, *supra*, at 209).

¹⁸ Act of June 26 1910, 36 Stat. 855.

¹⁹ *Id.* at 856. Again, these provisions were not applicable to the State of Oklahoma.

²⁰ Report of the Commissioner of Indian Affairs, 1913 (GPO), at 30.

By 1918, disputes over the inheritance of Indian allotments had reached the Supreme Court of the United States.²¹ In 1926 the Interior Department requested a survey of conditions in Indian country by the Institute for Government Research. The report delivered in 1928 which became famously known simply as “the Meriam Report,” said of the allotment policy:

“It has largely failed in the accomplishment of what was expected of it. It has resulted in much loss of land and an enormous increase in the details of administration. ... The difficult problem of inheritance is one of its results.”²²

Commissioner of Indian Affairs John Collier advised Congress in a detailed report on the condition of Indian Affairs that:

“[In administering] hundreds of thousands of parcels of land and fragmented equities of parcels, and disbursing the proceeds (sometimes to more than a hundred heirs of one parcel, and again to an individual with an equity in a hundred parcels), the Indian Service is forced to expend millions of dollars a year. The expenditure does not and cannot save the land, or conserve the capital accruing from land sales or from rentals.”²³

Commissioner Collier reported to Congress that, besides opening “fictitiously designated surplus” lands to homesteading, the allotment statutes had permitted the sale of allotments by Indians after trust restrictions were removed, and through government sale of heirship land, “the total of Indian landholdings has been cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934.”²⁴

By 1934 allotments had been made on 219 reservations, and already 27 million acres of allotted lands had passed by sale or involuntary transfers into non-Indian ownership. In that year, Congress enacted the Indian Reorganization Act, which ended the practice of allotting Indian lands to individuals, but did little to address the problems already associated with the practice. As a result the problems already set in motion continued to metastasize, with the result that as of August 2008 the BIA reported that more than 4 million individual ownership interests were held by individual Indians in trust status.²⁵

While the increasing fractionation of individual land ownership interests in Indian trust land has been recognized as an expanding problem for nearly one hundred years, all efforts to address the matter have failed. These efforts have reflected an apparent unwillingness on the part of the government to make the budget outlays that would be required for outright purchase

²¹ *Johnson v. Fink*, 247 U.S. 288 (1918).

²² Meriam, *Problem of Indian Administration* (1928), at 41 (quoted by Cohen, *supra*, at 26).

²³ Quoted in Cohen, *supra*, at 217, cited to Hearings, Committee on Ind. Aff., 73d Cong., 2d sess., on H.R. 7902, pp. 15-18.

²⁴ *Id.*, Cohen at 216.

²⁵ Source: BIA Indian Land Consolidation Office (2008).

of tens of thousands, then hundreds of thousands, and now millions of undivided ownership interests.

The government has actively sought to address the problem for more than a generation, with very mixed results. At least two legislative efforts have been ruled unconstitutional by the U.S. Supreme Court.²⁶ Following a series of investigations,²⁷ Congress enacted the Indian Land Consolidation Act of 1983.²⁸ That statute provided that any undivided interest in allotted Indian land that represented 2 per cent or less of the tract acreage, and had generated less than \$100 in revenue in the preceding year, could not pass by will or intestacy to any heir, but instead would escheat to the tribe with territorial jurisdiction over the land.²⁹ The Supreme Court in *Hodel v. Irving* agreed that this forced escheat violated the Fifth Amendment prohibition against taking private property without just compensation.³⁰

Even before the Supreme Court had taken up the case of *Hodel v. Irving*, the Congress had reconsidered the basic fairness, as well as the possible Constitutional infirmity, of the 1983 measure. In 1984 Congress enacted amendments to the 1983 Indian Land Consolidation Act's escheat provisions.³¹ The 1984 amendments retained the escheat provision, but "looked back" five years for an annual revenue production of \$100, permitted a devise of an otherwise escheatable interest to a co-owner of the tract, and authorized tribes to develop superseding laws of descent subject to approval by the Secretary.³²

In 1997, the amended version of the Indian Land Consolidation Act reached the Supreme Court in the case of *Babbitt v. Youpee*.³³ The Court found that the 1984 revisions were insufficient to cure the Constitutional deficiency found in *Irving* and invalidated the 1984 escheat provision as well. In the intervening ten years between the Court's decision in *Youpee*, however, the Department of Interior had worked an escheat of scores of thousands of ownership interests under the authority of the 1984 Act.

As a result, the Bureau has had since 1997 not only the continuing burden of administering the more than 4 million undivided ownership interests in allotted lands, but also the even more daunting task of re-opening the probates of all those decedents whose estates had in some part escheated pursuant to an unconstitutional statute. In addition, Congress and the Executive Branch continued to wrestle with the problem of how to achieve a meaningful program of reconsolidating fractionated lands into tribal ownership without incurring the onerous expense of simply purchasing them, or paying just compensation for taking them.

²⁶ , *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997).

²⁷ e.g., House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong. 2d Sess. (Comm. Print 1961); Senate Committee on Interior and Insular Affairs, Indian Heirship Land Survey, 86th Cong., 2d Sess. (Comm. Print 1961), cited in *Hodel v. Irving*, 481 U.S. 704, 708-709 (1987).

²⁸ 96 Stat. 2515, 2517 (1983).

²⁹ *Id.*, at 2519.

³⁰ *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

³¹ Act of Oct. 30, 1984, 98 Stat. 3173.

³² *Id.*

³³ *Babbitt v. Youpee*, 519 U.S. 234 (1997).

In 1996 the Department requested funds for a pilot project to acquire highly fractionated interests in allotted lands through voluntary purchase and sale agreements. In 1999 Congress authorized a pilot program on three targeted reservations in the BIA's Great Lakes Agency jurisdiction.

Twenty-First Century Reform Efforts

Indian Land Consolidation Act Amendments of 2000

In 2000, more than eighty-five years after the Commissioner of Indian Affairs had reported a backlog of 40,000 heirship cases, Congress enacted a measure designed to reverse the fractionated ownership of Indian trust lands. With the Act of November 7, 2000 the Congress finally clearly expressed the policy of the United States *both* to prevent the further fractionation of trust allotments made to Indians, *and* to consolidate fractional interests and ownership of those parcels. The Act for the first time expressed in a statute that:

**“It is the policy of the United States ---
(1) to prevent the further fractionation of trust allotments made to Indians;
(2) to consolidate fractional interests and ownership of those interests into usable parcels;
(3) to consolidate fractional interests in a manner that enhances tribal sovereignty;
(4) to promote tribal self-sufficiency and self-determination;
and
(5) to reverse the effects of the allotment policy on Indian tribes.”³⁴**

The 2000 Act authorized tribes to adopt probate codes to govern the descent and distribution of trust lands within their jurisdiction, including rules of intestate succession and the authority to acquire trust lands otherwise devised to non-Indians.³⁵ The Act further provided that Indian trust lands could be devised only to other Indians or to the tribe with jurisdiction over the land. Non-Indians could receive only a life estate through intestacy. If there are no close Indian heirs, the tribe with jurisdiction will succeed to the inheritance. Co-owners in such tracts are authorized to prevent descent to the tribe by paying fair market value for such interests.³⁶ The 2000 Act further provides that any interest of 5% or more in a tract of Indian trust land that passes by intestacy to more than one person shall be taken by the heirs as tenants in common. Any interest of less than 5% of a tract of Indian trust land that passes by intestacy shall be taken as a joint tenancy with right of survivorship.³⁷

³⁴ 114 Stat. 1991, 1992 (Indian Land Consolidation Act Amendments of 2000, Sec. 102) (emphasis added).

³⁵ *Id.*, at 1993-1995.

³⁶ *Id.*, at 1995-1997.

³⁷ *Id.*, at 1997.

The Indian Land Consolidation Amendments Act of 2000 further provided legislative authority³⁸ and authorized appropriations³⁹ for a pilot program for a three year period in which the Secretary was authorized to acquire and hold in trust for Indian tribes interests in trust or restricted lands within the tribes' respective jurisdictions. The Secretary was directed to consult and coordinate with tribes in determining which tracts to acquire, and authorized to enter into agreements under which a tribe could administer the Secretary's land acquisition program. Individual co-owners were authorized to purchase interests acquired under the Secretary's program.⁴⁰

The 2000 Act specified that, although the Secretary would immediately hold acquired lands in trust for the tribe with jurisdiction over the land, rents and revenues from the land would go into an Acquisition Fund, a revolving government fund to be administered by the Secretary, until the purchase price was recovered. Tribes, in concert with co-tenants, are authorized to enter into leases and other agreements for use of the land, with revenues to be applied to the Acquisition Fund until the purchase price is recovered, unless the Secretary determines that the cost of administering the acquired interest exceeds the revenue or that repayment will not be likely within a reasonable period. The Secretary was authorized to determine the fair market value of lands to be acquired.⁴¹

The Act further expressed the policy of the United States to encourage consolidation of land ownership through various transactions among and between individuals, tribes, and co-owners of trust or restricted land. Gifts, sales and exchanges for no consideration or for less than fair market value were authorized, so long as the grantor is first provided an estimate of the fair market value. The requirement for a fair market value estimate could be waived in the event of transactions involving only persons in specified relationships with the grantor. Tribes with jurisdiction over the land, co-owners of trust or restricted lands, and others interested in using or consolidating trust or restricted lands were authorized to receive the names and addresses of all owners of trust or restricted interests in the land.⁴²

The Secretary was authorized to give priority to acquiring those fractional interests in trust or restricted lands that represent 2% per cent or less of the tract involved, and to those interests that would have escheated under previous land consolidation statutes, had those provisions not been ruled unconstitutional by the Supreme Court in *Babbitt v. Youpee*.⁴³

The American Indian Probate Reform Act of 2004 (AIPRA)

The original Indian Land Consolidation Act of 1983 had provided that an Indian tribe, subject to certain restrictions, could prohibit inheritance of any tribal member's interest in trust

³⁸ *Id.*, at 1999.

³⁹ *Id.*, at 2007.

⁴⁰ *Id.*, at 1999-2001. One category of ITMA's Recommendations below focuses on renewed emphasis on coordinating federal acquisition authority with tribal land consolidation programs, providing technical assistance in developing tribal programs, and enhancing opportunities for individual landowners to consolidate their own interests in trust or restricted lands.

⁴¹ *Id.*, at 2000-2002.

⁴² 2002-2003.

⁴³ *Id.*, at 2000.

or restricted lands within the tribe's reservation by non-members of the tribe or by non-Indians.⁴⁴ The 1984 amendments had replaced that provision entirely with revisions that provided that a tribe could "adopt its own code of laws" to restrict inheritance to tribal members, subject to ineligible heirs' right to take a life estate and authorizing a tribe to purchase out of probate interests devised to persons ineligible under such a tribal code or ordinance.⁴⁵ In 1990, Congress had provided further amendments to the Indian Land Consolidation Acts of 1983 and 1984's escheat provisions.⁴⁶ After the escheat provisions had been invalidated by the Supreme Court in the *Irving*⁴⁷ and *Youpee*⁴⁸ cases, Congress responded with the Indian Land Consolidation Act Amendments of 2000⁴⁹ described above.

By 2004, it was clear that the policy of the United States, as finally expressed so clearly in the 2000 Act, not only to encourage consolidation of fractionated Indian land ownership, but "to reverse the effects of the allotment policy on Indian tribes,"⁵⁰ was simply not being achieved with the authorities provided to tribes and to the Secretary since 1983. In 2003, Congress had been advised by the BIA's witness before the Senate Committee on Indian Affairs that since 1999 the Bureau had purchased over 40,000 ownership interests on the three pilot reservations, but due to "the runaway growth of fractionation we still have the same number of outstanding interests as when the projects began."⁵¹ In addition, tribes had not responded to the authority provided to them since 1983 to enact their own laws of descent and distribution of trust lands on their reservations, with the result that the inheritance laws of the various states were still applied to the probate of Indian estates in trust or restricted land.⁵²

Congress responded with the American Indian Probate Reform Act of 2004,⁵³ which amended the 1887 Act and put into place a comprehensive federal probate code to govern the descent and distribution of Indian trust estates in place of the laws of the various states. This federal probate code deals with such matters as intestate succession, inheritance by will, joint tenancies, tenancies in common, definitions of terms of inheritance, adopted children, illegitimate children, prohibited inheritances from killing, predeceased heirs, afterborn heirs, life estates, pretermitted spouses and children, surviving spouses, effects of divorces or annulments or legal separations, disclaimers of inheritance, and provisions for consolidating real property interests at probate through gifts or exchanges or sales without regard to Secretarial rules or regulations regarding conveyances of trust property.⁵⁴ Tribes are still encouraged to produce tribal probate codes in accordance with the Indian Land Consolidation Act.⁵⁵

⁴⁴ 96 Stat. 2515, 2518 (1983).

⁴⁵ 98 Stat. 3171, 3172 (1984).

⁴⁶ 104 Stat. 4262, 4666 (1990).

⁴⁷ 481 U.S. 704 (1987).

⁴⁸ 519 U.S. 234 (1997).

⁴⁹ 108 US. 374 (2000).

⁵⁰ 114 Stat. 1991, 1992 (2000).

⁵¹ Statement of Wayne Nordwall, Regional Area Director, BIA Western Region, before the Senate Committee on Indian Affairs on S. 550, May 7, 2003, p.4

⁵² 24 Stat. 388, 389 (Sec. 5) (1887).

⁵³ 118 Stat. 1773 (2004).

⁵⁴ 118 Stat. 1773, 1774-87 (2004).

⁵⁵ 118 Stat. 1774.

In addition to providing a nationwide, federal Indian probate code, the 2004 Act also provides authority for the forced partition by sale of lands that are owned in highly fractionated interests upon application by a tribe or individual owning an undivided interest in the property.⁵⁶ The Secretary is required in such cases to secure an appraisal of the property, provide notice and due process to all owners of the parcel, and to conduct a competitive sale. Only the tribe with jurisdiction over the property, persons enrolled or eligible for enrollment with the tribe, any other Indian who is enrolled or eligible for enrollment with another tribe if that person already owns an undivided interest in the parcel, or is a lineal descendant of the original allottee of the land will be eligible to bid at the competitive sale. A tribal member or one eligible to be a tribal member who bids at the competitive sale, and who already owns more than 20 per cent of the parcel will be permitted to purchase the partitioned tract by matching the highest bid less the proportion attributable to his ownership interest. The Secretary is directed to award the purchased tract in trust to the purchaser.⁵⁷ If no bid is received that equals the appraised value, the Secretary is authorized to purchase the tract in trust for the tribe subject to the lien and other procedures authorized under the Indian Land Consolidation Act.⁵⁸ The Secretary is further authorized to provide grants and low interest loans to successful bidders for up to 20 per cent of the appraised value.⁵⁹

The 2004 Act also contains provisions by which co-owners might qualify themselves to execute leases of their trust lands for periods not to exceed ten years without any approval of the Secretary, or without any responsibility of the Secretary to enforce the lease terms or collect lease rentals or other consideration. Such owner-managed status can be terminated at will by the landowners, and owner-managed status does not affect tribal jurisdiction over the land.⁶⁰

A further significant change in Indian probate law in the 2004 Act authorizes the Secretary to sell undivided interests in trust land from Indian estates to co-owners or heirs taking an interest at probate or to the tribe with jurisdiction over the land. The consent of other heirs or surviving spouses would generally be required unless the interest to be sold is passing intestate and represents less than 5% of the entire undivided ownership of the land involved.⁶¹ The Secretary would be required to secure an appraisal and provide other eligible heirs, devisees, and the tribe with notice and due process before proceeding with a sale at probate. Like the gifts, exchanges, renunciations, and other conveyances authorized at probate, a sale from trust estates could avoid the years-long backlog as well as the expense involved in probate.

Cautionary Note with Regard to AIPRA and its Single Heir Rule

The escheat provisions of the 1983 and 1984 Acts regarding succession by devise or intestacy of undivided interests of less than 2% of trust or restricted land were struck down by

⁵⁶ *Id.*, at 1787-94.

⁵⁷ *Id.*, at 1792-93.

⁵⁸ *Id.*, at 1794.

⁵⁹ *Id.*

⁶⁰ *Id.*, at 1795-1797.

⁶¹ *Id.*, at 1797-1798.

the Supreme Court as violating the takings clause of the Fifth Amendment of the U.S. Constitution.⁶² Another court found a different escheat provision equally impermissible under the Constitution where Congress had attempted to prevent the intestate succession of interests of two and one-half acres or less on the Sisseton-Wahpeton Reservation.⁶³ In the *Irving* case, Mr. Justice Stevens concurred in the judgment that the escheat provision in the 1983 Act was unconstitutional, but he would have invalidated it not under the takings clause, but under the due process clause of the Fifth Amendment because landowners were given neither notice nor appropriate opportunity to avoid the escheat provision.⁶⁴

All the courts that reviewed these legislative efforts to prevent further fractionation of certain small undivided interests in trust or restricted land acknowledged the legitimate government purpose involved. They merely condemned the method selected to achieve that purpose. Mr. Justice Stevens, in fact, in concurring with the result in *Irving*, said:

“The Government has a legitimate interest in eliminating Indians’ fractional holdings of real property. Legislating in pursuit of this interest, the Government might constitutionally have consolidated the fractional interests affected by § 207 of the Indian Land Consolidation Act of 1983, ... in three ways: It might have purchased them; it might have condemned them for a public purpose and paid just compensation to their owners; or it might have left them untouched while conditioning their descent by intestacy or devise upon their consolidation by voluntary conveyances within a reasonable period of time.”⁶⁵

In the American Indian Probate Reform Act of 2004, Congress has replaced the escheat provision of the earlier statutes with a provision in the new federal Indian probate code (AIPRA). AIPRA provides that any interest of less than 5 % in a tract of trust or restricted land, if not disposed of by will, shall pass intestate only to the decedent’s oldest surviving child.⁶⁶ The Secretary’s authority to approve a superseding tribal probate code is conditioned on the requirement that any such tribal code must also contain a similar “single heir rule” governing intestate succession to an interest of less than 5% in a tract of trust land.⁶⁷

This Single Heir Rule contained in AIPRA resurrects a modified form of the ancient common law of primogeniture, which in feudal times generally provided that only the oldest male child could inherit. If there is any basis for the Congressional selection in AIPRA of the oldest child from among a decedent’s children, the law and the legislative record contain no

⁶² *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997).

⁶³ *Dumarce v. Norton*, 277 F. Supp. 2d 1046 (D.S.D. 2003), *rev’d* on other grounds, *Dumarce v. Scarlett*, 466 F. 3d 1294 (Fed. Cir. 2006), *cert. denied*, *Dumarce v. Kempthorne*, 127 S. Ct. 1335 (2007).

⁶⁴ *Irving*, 481 U.S. 704, 730 (1987) *Stevens, J., concurring*.

⁶⁵ *Irving, id.*, at 719.

⁶⁶ 118 Stat. 1773, 1776-1777 (2004). Other provisions permit a life estate to a surviving spouse living on such a parcel, further succession to a single heir in the event no oldest child lives to receive the inheritance, and authority for an eligible heir to renounce in favor of another eligible heir or to the tribe.

⁶⁷ *Id.*, at 1777.

record of such a reason. It appears that it was simply a convenient selection to write into the law.

Generally speaking, the law of primogeniture has been soundly rejected in American jurisdictions. A few examples should demonstrate the general attitude of American courts toward the doctrine. The Supreme Court of Pennsylvania had this to say in 1866:

*“If to execute a granted power of the Constitution, Congress should consider it necessary ... to substitute primogeniture for our systems of intestacy, or to do any other preposterous thing which may be imagined, the argument is, that the power must be implied, and the degree of the necessity is not subject to judicial cognisance [sic]. Not so thought Chief Justice Marshall and the Supreme Court of the United States.”*⁶⁸

The Supreme Court of Missouri has said similarly:

“The doctrine of primogeniture is contrary to the theory upon which this and other commonwealths were built.

No part of the common law which was ‘repugnant to’ or ‘inconsistent with’ our Federal Constitution or State laws, was ever adopted as a part of the jurisprudence of this State. The doctrine of primogeniture is radically opposed to the spirit, if not the letter of both[.] The idea that any such preference in the descent of real property could co-exist in the laws of any of the states, with the axioms of the Federal Constitution guaranteeing equal protection of the laws to all persons ... is an unthinkable absurdity.”⁶⁹

An appellate court in New York had this to say:

“[I]n America, ... the rule of primogeniture ... was repugnant to the American sense of equality and justice.

“What the American people thought of that rule may be gleaned from a statement by Thomas Jefferson in his autobiography. He said: ‘The abolition of primogeniture, and equal partition of inheritances, removed the feudal and unnatural distinctions which made one member of every family rich and all the rest poor, substituting equal partition, the best of all agrarian laws.’ (Jefferson’s Autobiography, 40).”⁷⁰

The Supreme Court of the United States also commented on the general American rejection of the English common law of descents, even where Congress otherwise provided for adoption of the common law in what were the Northwest Territories in 1787. In *Bates v.*

⁶⁸ *Shollenberger v. Brinton*, 52 Pa. 9, 35-36 (Pa. 1866) (emphasis added).

⁶⁹ *Gillian v. Gillian*, 278 Mo. 99, 112-113 (Mo. 1919).

⁷⁰ *Hewitt v. Cooper Union*, 20 A.D. 256, 260 (N.Y. App. Div. 1923).

Brown,⁷¹ the Court observed that although the Continental Congress had provided that inhabitants of the Northwest Territory should be entitled to “judicial proceedings according to the course of the common law,” the same ordinance had included a separate law of succession that provided that “Estates, both real and personal, ... shall descend to and be distributed to his or her children, and their descendants, in equal parts...”⁷² The Court went on to describe the function of the common law regarding inheritance as “monarchical and aristocratic,” designed to “conserve the splendor of the nobility and the ranks of the leading families[.]” But in America, the Court continued,

“With the close of the Revolution came a new state of things. There was no monarch, and no privileged class. The equality of the legal rights of every citizen was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has founded and shaped our institutions, State and National, and has impressed itself upon the entire jurisprudence of the country. One of its most striking manifestations is to be found in the legislation of the States upon [the law of succession].”⁷³

The Court further noted that even Britain’s Chancellor Kent had noted in his Commentaries that “In the United States the English common law of descents, in its most essential features has been universally rejected.”⁷⁴

In AIPRA Congress has rejected a fundamental principle of the law of succession in American jurisprudence in favor of a statutory preference for the oldest living child to receive small undivided interests in trust land by intestate succession. Even the courts that invalidated previous statutory preferences agreed that preventing further fractionation and promoting land consolidation are legitimate government objectives. Those prior legislative efforts failed because of the means chosen to achieve that end. Justice Stevens had even pointed out three perfectly permissible means that Congress might have chosen. In AIPRA Congress has chosen, instead, to employ a means that resurrects a slightly modified doctrine that has been universally rejected by American jurisdictions since the end of the Revolution.

The question is whether the Single Heir Rule of AIPRA will survive an equal protection Constitutional challenge any better than did the previous escheat provisions survived Fifth Amendment challenges. The Special Trustee for Indian Affairs has indicated his view that this rule will almost certainly be challenged in court.⁷⁵ Probably because the doctrine of primogeniture has been so thoroughly rejected by every jurisdiction since the very early days of the Republic, there does not seem to be a great deal of recent judicial guidance on the constitutionality of such a legislative classification. Recent judicial treatment of a much more

⁷¹ *Bates v. Brown*, 77 U.S. 710 (1867).

⁷² *Id.*, at 717, quoting from An Ordinance for the government of the Territory of the United States northwest of the River Ohio (1787) (The Northwest Ordinance).

⁷³ *Bates v. Brown*, 77 U.S. 710, 716 (1867).

⁷⁴ *Id.*, citing Kent’s Commentaries, 412.

⁷⁵ See Remarks of Ross O. Swimmer, Special Trustee for American Indians, U.S. Department of the Interior at Couer d’Alene Reservation, transcript available at offices of Intertribal Monitoring Association on Indian Trust Funds.

common statutory classification of the rights of children of the same parent may offer some guidance, however.

The Supreme Court has indicated that while the equal protection clause of the Fourteenth Amendment is directly applicable only to the States, a Congressional classification that meets the equal protection test is likely consistent with the due process requirement of the Fifth Amendment that does apply to the federal government.⁷⁶ Many legislative classifications that discriminate among classes of children of the same parent have failed to meet that test. In a case for Social Security benefits arising from Georgia, the Court of Appeals for the Fifth Circuit ruled:

“We conclude, therefore, that the classification at issue, which works a total exclusion of claims by a class of illegitimate children, some of whose claims would be demonstrably valid, does not pass constitutional muster.”

“We agree ... that the Supreme Court ... has made it clear ‘that once dependency was established, the Constitution required that all dependents --- whether legitimate or illegitimate – must be treated equally[.]’”⁷⁷

The Eleventh Circuit has said:

“Under the insurmountable barrier test, a statutory scheme which makes the status of illegitimacy an insurmountable obstacle to the vindication of rights or the receipt of benefits constitutes a denial of equal protection.”⁷⁸

The Supreme Court has provided the guidance that the various lower federal courts have applied to these legislative classifications of children and their rights to benefits. Also in the same era that produced the first Indian Land Consolidation Act in 1983, then-Mr. Justice, later Chief Justice Rehnquist, wrote for the Supreme Court:

“This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the *Equal Protection Clause of the Fourteenth Amendment* prohibits the State from denying that same right to illegitimate children.”⁷⁹

“Moreover, this unrealistically short time limitation is not substantially related to the State’s interest in avoiding the prosecution of stale or fraudulent claims. ... We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of 12 months will appreciably increase the

⁷⁶ *Richardson v. Belcher*, 404 U.S. 78, 81 (1971), citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁷⁷ *Beatty v. Weinberger*, 478 F. 3d 300, 308 (5th Cir. 1973).

⁷⁸ *Handley v. Schweiker*, 697 F. 2d 999 (11th Cir. 1983).

⁷⁹ *Mills v. Habluetzel*, 456 U.S. 91, 92 (1982).

likelihood of fraudulent claims.

“Accordingly, we conclude that the one-year period for establishing paternity denies illegitimate children in Texas the equal protection of the law.”⁸⁰

This concern with the possible Constitutional infirmity of the Single Heir Rule of AIPRA is not merely an academic one. Of 4.2 undivided interests in trust or restricted lands as of August 2008, some 85% of them or 3.2 million interests were interests of 5% or less,⁸¹ subject to the Single Heir Rule if held intestate at the owner’s demise. As of 1999, the Department had identified 66,000 *Youpee* interests that must be re-vested in heirs that had been impermissibly denied their inheritance.

Presently, AIPRA commands the Department to proceed with the disinheritance of tens of thousands of heirs under the Single Heir Rule of AIPRA, and to require tribes to do likewise before approving tribal probate codes. Departmental representatives have suggested in consultation meetings that if these interests are held intestate upon their owners’ demise, these interests will be “consolidated” in a single heir by operation of law.

ITMA notes, on the other hand, if the Single Heir Rule of AIPRA is invalidated by the courts as was the escheat provision it replaced, the resulting expense and complexity of reopening and re-probating potentially millions of estates will be an expense of staggering proportions in terms of both time and money. Since the challenge that might produce such a result is both predictable and fully expected, prudence demands a careful review of possible alternatives to the unthinkable.

ITMA Tribal and Individual Outreach Regarding Fractionation

With this background in mind, ITMA accepted a grant from the Office of the Special Trustee to undertake a series of consultation meetings throughout Indian country in the second half of 2008 for the purpose of providing recommendations regarding future measures for carrying out the policy of the United States as expressed in the Indian Land Consolidation Act to consolidate fractionated interests in trust and restricted Indian land and to reverse the effects of the allotment policy on Indian lands. Those recommendations follow.

During the course of this consultation, ITMA met with tribe, Indian landowners, and tribal organizations from Puget Sound to the desert southwest, and throughout the plains states from Oklahoma to South Dakota. The recommendations gleaned from these sessions follow.

⁸⁰ *Id.*, at 101-102.

⁸¹ Source: BIA Indian Land Consolidation Program Office (2008).

RECOMMENDATIONS

Category 1: Include Indian Land Consolidation in any National Recovery Effort

Recommendation No. 1. Include Indian Land Consolidation in a National Economic Recovery Effort

Both the Legislative and Executive Branch leaders have expressed the need for a major initiative to stimulate the American economy, beginning early in 2009. The fractionation of Indian lands has been identified for nearly a century as a major economic waste in terms of annual federal expenditures required to maintain a failed and repudiated policy. In addition, the fractionated ownership of Indian lands prevents the economic utilization of valuable lands.

The success of the BIA's Indian Land Consolidation Office in demonstrating the increased economic use of consolidated lands is instructive in this regard. On the Rosebud Reservation, lands consolidated under the Indian Land Consolidation Office have provided the site for construction of ten housing units for previously homeless families and injected more than \$1.2 million into the local economy. On the Bad River Reservation, lands consolidated under the ILCO into majority tribal ownership have permitted a timber sale that is projected to return \$1.1 million over the next three years. On the Fond du Lac Reservation, consolidated lands have resulted in establishment of a tribal logging enterprise whereby the tribe itself will harvest timber on lands now under majority tribal control. Consolidated lands now under tribal control will generate \$1.4 million in stumpage payments on the Lac Courte Oreilles Reservation. Consolidated lands on the Red Cliff Reservation have resulted in two proposed timber sales. The Quapaw Tribe of Oklahoma has constructed a major casino/hotel complex on formerly allotted lands that are now consolidated into tribal ownership and control.⁸²

Experience of the Rosebud Land Enterprise and the Yakama Nation Land Enterprise have demonstrated over many years that tribes can make productive use of highly fractionated trust lands when ownership and control of those lands are consolidated in tribal enterprises. The Rosebud Land Enterprise operated for more than sixty years, and the Yakama Nation Land Enterprise for more than twenty years. Both tribal enterprises are self-sufficient.

The Rosebud Land Enterprise consolidates allotted and fractionated lands of tribal members and makes productive use of them as grazing land that otherwise might not be utilized at all, except in trespass. Both Indian and non-Indian cattlemen lease grazing land from the Rosebud Land Enterprise, and the tribe is encouraging more tribal members to participate in the industry. Lands consolidated in the Rosebud Land Enterprise also provide home sites for otherwise landless tribal members.⁸³

⁸² Source: BIA Indian Land Consolidation Program Office (2008).

⁸³ Consultation with the Rosebud Land Enterprise.

Lands consolidated by the Yakama Nation Land Enterprise are currently utilized as commercial crop land, range land, and orchard production. Other consolidated Yakama lands support an industrial park and commercial warehouse space.⁸⁴

Any national economic recovery plan adopted by the United States in 2009 should include a commitment to make Indian land consolidation an integral part of a larger national plan to stimulate the national economy:

Millions of dollars of unproductive federal expenditures would be eliminated; and

A federal policy of consolidating Indian land and reducing fractionated ownership of Indian lands, recognized as important by all three Branches of the federal government, would be advanced significantly, in place of a series of unfunded mandates; and

Very large numbers of jobs and greatly increased economic activity would be generated across huge expanses of some of the most economically deprived regions of the country.

Category 2: Education and Technical Assistance in Utilization of Tools of ILCA and AIPRA

Recommendation No. 2. Provide Information to Tribes, Landowners, and Tribal Members

Experiences of the BIA's Indian Land Consolidation Office, and the independent experience of the Crow Tribe both suggest that large numbers of land interest owners will agree to accept reasonable offers to acquire their landholdings if informed of the opportunity to do so. Both the Crow Tribe and the ILCO have reported to ITMA that willing sellers have outstripped available resources to purchase allotted and fractionated trust lands in areas where they have made public offers. Discussions with tribes and tribal members from both the Pacific Northwest and from the Great Plains regions indicated that many landowners have indicated willingness to entertain offers other than straight cash sales when presented with information.

In addition, representatives from the Northwest and from the Great Plains have advised that the rapidly and constantly shifting state of the law regarding Indian land law, title, probate, inheritance, and conveyances over the last twenty-five years has resulted in a general state of confusion and uncertainty regarding the rights and prerogatives currently available. The incredibly technical and detailed provisions of the Indian Land Consolidation Act and the American Indian Probate Reform Act are not well understood by the majority of landowners. The result is that the tools available to landowners to consolidate their landholdings are largely unused. Their present ability to realize economic benefits through gift, exchange, sale or owner management of their lands are not sufficiently understood for them to take advantage of the opportunities.

⁸⁴ Consultation with the Yakama Nation Land Enterprise.

Participants at all meetings reported that many Indian landowners today view with suspicion both their tribal and federal governments in matters regarding their land ownership. Too few landowners have opportunity to appreciate the problems of environmental protection, law enforcement, jurisdiction, fire and safety concerns, and other local government issues that confront tribal governments as a result of absentee and passive ownership of large proportions of reservation lands. Even fewer have occasion to appreciate the extent to which hundreds of millions of dollars in federal appropriations are annually directed to the administration of their idle and unproductive lands.

Tribal representatives and landowners suggested at every meeting that if these issues were better understood, more landowners would actively participate in the programs and prerogatives available under current law for consolidating Indian land ownership and making economic use of their own landholdings.

In particular, representatives at every meeting advised that if more landowners understood the importance of estate planning they would participate willingly in preparing wills and taking other steps that would avoid lengthy and expensive probate of their lands upon their demise. These representatives expressed a common view that most landowners believe that current law has been devised not to provide opportunities for them, but to solve a federal problem of the federal government's own making.

Consequently, they have remained indifferent to what they often view as a scheme simply to dispossess them and their heirs. Opportunities to participate in cooperative economic ventures with co-owners or tribal enterprises, to consolidate their own holdings, or otherwise to benefit from the provisions of recent Indian land law reform are forfeited because landowners remain unaware of them. Possibilities for entering into transactions such as gift deeds, transfers of ownership for less than cash values accompanied by other consideration, retained life estates, land exchanges to consolidate individual or family ownership interests, avoiding probate, or buying or selling land interests at probate to realize inheritances years earlier than the probate process otherwise permits are too often foregone simply because landowners are not aware of them.

Few landowners we spoke with were aware of the details of the Single Heir Rule contained in AIPRA. Virtually all landowners consulted, on the other hand, expressed great interest in the possibilities of enhancing the economic potential of their landholdings through exchanges, consolidation agreements, or other voluntary arrangements if they were provided sufficient information and assistance. Few landowners we spoke with were aware that AIPRA contains a requirement for the Secretary to develop a pilot project to consult with tribes and landowner organizations for the creation of such entities as private or family trusts, partnerships, corporations, or other organizations to assist in efficient management of interests in trust or restricted lands owned by Indian family members or relatives.

In addition to the tribes, landowner organizations, advocacy organizations, and other interested parties the Secretary is directed to consult in developing the pilot project for the management of trust assets,⁸⁵ the BIA has a skilled and experienced asset already on the job

⁸⁵ AIPRA, 118 Stat. 1773, 1806.

with the staff of the Indian Land Consolidation Office that could be employed to provide education and training not only to landowners but also to the other organizations the Secretary is directed to consult in this pilot trust asset management program.

Meeting participants also identified education and training in development of tribal probate codes as a critical need in implementation of the new Indian Land Consolidation Act and the American Indian Probate Reform Act.

Recommendation No. 3. Provide Contract Assistance with Estate Planning (to Include Will Drafting)

The Indian Land Consolidation Act now provides that “The Secretary shall provide estate planning assistance[.]”⁸⁶ The 2004 Amendments to the ILCA further provide that this estate planning assistance shall be designed not only to advise and assist Indian landowners to facilitate the transfer of devisees of their choosing, but shall also be designed to “dramatically increase the use of wills and other methods of devise” and to “substantially reduce the quantity and complexity of Indian estates that pass intestate ..., while protecting the rights and interests of Indian landowners[.]”⁸⁷

Participants at ITMA meetings expressed frustration at the BIA’s withdrawal of authority from local officials to provide assisting with drafting wills and the BIA’s unwillingness to maintain custody of wills drafted to govern the succession of interests in trust lands. Departmental officials advised one meeting that this authority was withdrawn on advice of the Associate Solicitor for Indian Affairs that potential liability attached to the Department’s activities in this area. Meeting participants advised ITMA that any dramatic increase in the use of wills to govern devise of interests in trust land will not occur unless and until some form of assistance is provided in the preparation of wills.

Most Indian landowners are simply unaware of the increasingly detailed statutory scheme that will govern their estates upon their demise intestate. These individuals are equally unaware of the many possibilities now afforded them by recent statutes that were designed to permit, among other things, avoiding probate entirely or simplifying the probate process. When made aware of both the likely order of intestate succession of their trust estates and the authority available to them to ensure that their wishes are honored, these Indian landowners will be far more willing to participate in active estate planning.

Until the education process recommended above is undertaken on a widespread basis, these Indian landowners will continue to be suspicious of recommendations coming from their tribal or federal governments. They cannot be expected to undertake estate planning activities that are foreign to their experience. Indian landowners remain equally unaware of the intestate disposition of their estates and of the alternatives available to them to control the ultimate disposition of their trust estates.

⁸⁶ 114 Stat. 1991, 1998 (2000); 118 Stat. 1773, 1805 (2004)

⁸⁷ 118 Stat. 1806.

The Indian Land Consolidation Act specifically authorizes the Secretary to enter into contracts with appropriate entities to carry out the estate planning duties imposed by the Act.⁸⁸ Based on the comments received at the meetings, and considering the authorities and directives contained in law, ITMA recommends that the Department contract with a qualified entity to provide estate planning and will drafting assistance in a targeted region to carry out those statutory duties on behalf of the Secretary, and to gain experience in actually providing this assistance required by law.

Recommendation No. 4. Maintain the ILCO, Expand Function to Include Education and Technical Assistance

The BIA has developed an invaluable institutional capability in the experience and personnel of the Indian Land Consolidation Office. The current plan to discontinue funding this program would work a forfeiture of this expertise. Any program to address land consolidation will almost certainly require significant educational outreach and technical assistance. The existing Indian Land Consolidation Office could provide much of this educational outreach and technical assistance. Perhaps just as valuably, this office could provide leadership and direction to other organizations enlisted, contracted, or otherwise engaged to deliver this education and technical assistance on a national basis.

Consultation meeting participants had many questions and some criticisms regarding the operations of the Bureau's Indian Land Consolidation Office. By a large margin, however, the sentiment in these meetings ran directly counter to the current proposal to eliminate funding for this program and this office. In Fiscal Year 2007 alone, the ILCO acquired 100,000 separate undivided interests in Indian trust lands and actually reduced the number of fractionated interests remaining on each of the reservations where the program operated.⁸⁹ Annual appropriations for this office as a standing BIA program began in 2005.

As of August 2008, ILCO had acquired 393,282 undivided interests in Indian trust land on 15 reservations. About 85% of those interests represented 2% or less of the whole land tract, interests that would have cost more than \$7,000 each to probate. ILCO estimates that more than 800,000 new fractionated interests were avoided through purchase of 100% of the owner's interest. The ILCO has exceeded goals established under the Government Performance and Results Act every year fiscal year it has been in operation. The number of fractionated interests acquired has exceeded GRPA goals each year from FY 2004 through FY 2008 by margins ranging from 159% to 262%. More than 7,400 Indian landowners have surrendered 100% of their interests in trust lands to the ILCO. Avoided probate costs alone are \$44.7 million, estimated conservatively at \$6,000 per probate times the 7,400 individuals whose estates will not have to be probated by the Department.⁹⁰

The staff of ILCO have achieved a level of experience, expertise, efficiency, and knowledge that would take years to replicate. The performance metrics of the ILCO more than

⁸⁸ 114 Stat. 1998

⁸⁹ Source: BIA Indian Land Consolidation Program (2008)

⁹⁰ *Id.*

justify its continued existence. Any indications of only limited success are apparently as much or more a reflection of the resources provided to the program than to programmatic shortcomings. The mere fact that ILCO has achieved an actual reduction in the number of fractionated interests in a problem that has been projected to metastasize at a rate of 7 to 8% per year is an indication of a remarkably successful program.

Participants at ITMA's meetings indicated that the effectiveness of ILCO could be enhanced by closer participation and collaboration with tribal land use plans and tribal land consolidation efforts. The Rosebud Land Enterprise indicated a willingness to work closely with the ILCO, but reported that in recent years the two simultaneous operations on the Rosebud Reservation had sometimes been "in competition." A representative of the Crow Tribe advised that ILCO had acquired some lands on that reservation in tracts that did not advance the tribe's own aggressive land consolidation program, and these uncoordinated activities represented lost opportunities to put consolidated lands immediately to productive use.

Participants urged that the ILCO should be continued, but that its activities should be directed to work in closer coordination with tribal land consolidation programs. In addition, some participants suggested, ILCO's activities could be even more successful if it took advantage of local expertise that has been developed in tribal programs and offices.

The Indian Land Consolidation Office has already indicated an ability to work cooperative across office and agency programs to advance the policies of the United States to consolidate Indian land ownership and to reverse the effects of the allotment policy. In addition to its principal mission "To acquire as many fractionated interests as economically feasible and to consolidate these land interests into tribal ownership to promote and enhance Tribal self-determination, economic, social, and cultural development needs,"⁹¹ ILCO has developed effective business practices for working with the local offices of the BIA, with Land Title and Record Offices, with the Department's Office of Appraisal Services, with the Bureau's forestry and housing programs to put acquired lands immediately to economically productive use, and with Indian tribes to assist in the development of tribal enterprises capable of taking advantage of the economic potential of acquired lands.

In these activities, ILCO has been actively engaged in advancing the policy of the United States as set out in the Indian Land Consolidation Amendments Act of 2000.⁹² As noted in the Background discussion above,⁹³ ILCO has already assisted tribes in housing previously homeless families in newly constructed homes on consolidated lands; executing timber sale contracts covering newly consolidated lands; establishing a tribal logging enterprise for tribal harvest of timber from newly consolidated lands; and at least one tribe has financed and completed construction of a major hotel/casino complex on consolidated lands.

⁹¹ Source: Indian Land Consolidation Office of BIA (2008).

⁹² See, n. 28 *supra*, and accompanying text. This policy includes (1) prevent further fractionation, (2) consolidate fractional interests into usable parcels; (3) consolidate fractional interests in a manner to promote tribal sovereignty; (4) promote tribal self-sufficiency and self-determination; and (5) reverse the effects of the allotment policy. 114 Stat. 1991, 1992 (2000).

⁹³ See, n. 73 *supra*, and accompanying text

Depending on the estimate used, ILCO's activities have reduced the actual rate of growth of fractionated interests by 33% to 50%. On those reservations where it has operated, ILCO has actually reduced the number of fractionated interests, notwithstanding an national average growth rate of 7 to 8%.

ITMA recommends maintaining ILCO, and to redirect its mission to include affirmative duties to conduct outreach, educational, and technical assistance activities. In addition, ITMA recommends that ILCO should be directed to increase its level of actual coordination with tribal consolidation efforts, including providing technical assistance and contracting with tribes to conduct actual acquisition activities.

Recommendation No. 5. Provide Information on Transactions Authorized by AIPRA

Meeting participants expressed great interest in the many different forms of land transactions authorized for owners of fractionated interests in Indian trust land, especially the authorities for forced partition, purchase at probate, gift deeds, exchanges, and land consolidation agreements at probate, etc. They advised that these authorities have not been made widely known on reservations and throughout Indian country. Many individuals, they said, would be eager to protect their landholdings from further fractionation and to consolidate their present interests in allotted lands if they were aware of the options available to them under recent laws.

Session participants advised that many tribal members are not aware of the statutory preference for tribal land consolidation plans that might affect them. No one has advised them of the authority they now have to consolidate their own interests through sale, exchange, or gifts. In particular, many meeting participation expressed that great resentment of land consolidation efforts will result from involuntary sale as a result of forced partition by sale if they have not even been made aware of the possibility.

The meeting participants urged a vigorous information dissemination program to make these provisions of AIPRA known to landowners. They suggested that the consolidation measures contemplated by AIPRA such as a pilot program of family corporations, or the possibility of using family trusts, the even opportunity to sell through the federal purchase program, or the opportunity to purchase at probate simply cannot have the effect contemplated by Congress if they are not known by the individuals who might make use of them.

The Department and the Bureau should undertake an initiative to provide information on these new authorities in both written and electronic format. Pamphlets, brochures, web sites, conferences of Indian organizations, fact sheets, FAQ broadcasts, toll free telephone numbers, and a vigorous training program for BIA and tribal employees are all possible ways in which the Department could disseminate information regarding AIPRA-authorized transactions throughout Indian country. Meeting participants urged an aggressive campaign to make information available to landowners regarding all these transactions authorized by AIPRA.

ITMA recommends an aggressive program to disseminate information on the tools available to individuals and family units to protect their landholdings from further fractionation and to consolidate their present holdings into usable tracts by actually utilizing the tools available under AIPRA.

Category 3. Involuntary Conveyances

Recommendation No. 6. Authorize Tribal Condemnation Proceedings of Fractionated Indian Land

The Fifth Amendment to the U.S. Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*” (emphasis added). The Fourteenth Amendment to the U.S. Constitution adds “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

In 1897, the Supreme Court of the United States ruled that the Fourteenth Amendment’s due process clause requires the states, too, to provide just compensation for any private property taken for a public use.⁹⁴ More recently, the Supreme Court, citing the 1897 decision as authority for the proposition, put this requirement much more plainly:

“The Fifth Amendment prohibition against the taking of public property for public use without just compensation applies against the States through the Fourteenth Amendment.”⁹⁵

In 1968, Congress recognized the authority of Indian tribes, as well as states and the federal government, to take private property within their jurisdictions by imposing on tribes the same limitations that apply to states and the federal government. Section II of the 1968 Indian Civil Rights Act provides that:

“No Indian tribe in exercising powers of self-government shall -- ...
(4) take any private property for a public use without just compensation[.]”⁹⁶

It is perfectly clear from this provision in the law that Congress has contemplated for 40 years that Indian tribes might exercise the power of condemnation of private property for public use within their jurisdictions. It is equally clear that Congress has declared that consolidation of fractionated interests in Indian land and reversing the effects of the allotment period are “the policy of the United States.”⁹⁷ The Supreme Court said in *Hodel v. Irving*, even while invalidating the means chosen to achieve the policy, “We agree with the Government that

⁹⁴ *Chicago, Burlington, & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 235-236 (1897).

⁹⁵ *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980).

⁹⁶ 82 Stat. 73, 77 (1968).

⁹⁷ ILCAA, 114 Stat. 1991, 1992 (2000).

encouraging the consolidation of Indian lands is a public purpose of high order.”⁹⁸ In a concurring opinion, Justice Stevens said even more directly:

“The Government has a legitimate interest in eliminating Indians’ fractional holdings of real property. Legislating in pursuit of this interest, the Government might constitutionally have consolidated the fractional land interests ... in three ways: It might have purchased them; it might have condemned them for a public purpose and paid just compensation to their owners[.]”⁹⁹

In *Babbitt v. Youpee*, the Court observed approvingly that the Ninth Circuit of Appeals had also said Congress had Constitutionally permissible options available “including ... condemnation for a public purpose attended by payment of just compensation[.]”¹⁰⁰

Congress has declared that consolidation of fractionated ownership of Indian lands is the policy of the United States. The Supreme Court has indicated condemnation accompanied by payment of just compensation would be a permissible means of carrying out that policy. Congress has further acknowledged the power of Indian tribes to condemn private property and limited that power by requiring the payment of just compensation of any private property taken in the exercise of tribal self-government. Congress authorized the condemnation of Indian allotments by the States and Territories in 1901.¹⁰¹ Any question whether Indian tribes can exercise this same authority to carry out the policy of the United States could easily be resolved by explicit Congressional authorization.

The General Allotment Act of 1887 provided that when allotments had been made and patents issued, those patents would “be of the legal effect, and declare that *the United States does and will hold the land ... in trust for the sole use and benefit*” of the allottee.¹⁰² The statute further provided that the United States would hold the land in trust in such a manner that upon the expiration of the trust period, the United States would convey the land to the allottee, “in fee, discharged of said trust and free of all charge or incumbrance [sic] whatsoever.”¹⁰³

As noted earlier, however, the 1934 Indian Reorganization Act provided that

“The existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof are hereby extended and continued *until otherwise directed by Congress*.”¹⁰⁴

Congress began to “otherwise direct” with respect to authorizing encumbrances of Indian allotments within four years of the General Allotment Act. In 1891, the Secretary was

⁹⁸ *Hodel v. Irving*, 481 U.S. 704, 712 (1987).

⁹⁹ *Id.*, at 719 (Stevens, J., concurring).

¹⁰⁰ *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997).

¹⁰¹ 31 Stat. 1058, 1084 (1901).

¹⁰² 24 Stat. 388, 389 (1887) (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ 48 Stat. 984 (1934).

authorized to lease certain allotments for farming, grazing or mining.¹⁰⁵ Ten years later, in 1901 Congress specifically authorized that allotted Indian lands “may be condemned for any public purpose under the laws of the State or Territory where located.”¹⁰⁶ As noted earlier,¹⁰⁷ in 1910 Congress placed responsibility on the Secretary to “ascertain the legal heirs” of allottees who die during the trust period¹⁰⁸ In the First of the Indian Land Consolidation Acts discussed here, the Congress provided explicitly in Section 206 of that 1983 Act that:

“The Secretary in carrying out his responsibility to regulate the descent and distribution of trust lands under section 1 of the Act of June 25, 1910 (36 Stat. 855; 25 U.S.C. 372) as amended, and other laws, *shall give full faith and credit to any tribal actions taken pursuant to section 206 of this title*, which provision shall apply only to estates of decedent’s [sic] whose deaths occur on or after the effective date of tribal ordinances adopted pursuant to this title.”¹⁰⁹

Along with many other provisions of the 1983 Code, in addition to the escheat provision which was invalidated by the Supreme Court, Section 206 of the 1983 Act was replaced in its entirety by the Indian Land Consolidation Act Amendments of 2000.

The 2000 Act provided that, in place of the Secretary’s sole “responsibility to regulate the descent and distribution of trust lands” under the 1910 Act, an Indian tribe could take on that responsibility for trust lands within its reservation:

“Notwithstanding any other provision of law, any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust and restricted lands that are –
(A) located within that tribe’s reservation; or
(B) otherwise subject to the jurisdiction of that Indian tribe.”¹¹⁰

The 2000 Act provided that a tribal probate code must be approved by the Secretary,¹¹¹ and that the Secretary may not approve such a code unless he determines that it “promotes the policies”¹¹² of the Indian Land Consolidation Act Amendments of 2000 as set forth to, among other things prevent further fractionation, consolidate fractionated interests, promote tribal self-sufficiency and self-determination; and reverse the effects of the allotment policy.¹¹³ The 2000 Act further provided that the Secretary may “provide for the use of findings of fact and

¹⁰⁵ Act of February 28, 1891, 26 Stat. 794, 795 (1891).

¹⁰⁶ 31 Stat. 1058, 1084 (1901).

¹⁰⁷ See notes 13,14 above and accompanying text

¹⁰⁸ 36 Stat. 855 (1910).

¹⁰⁹ 96 Stat. 2515, 2519 (1983), §208.

¹¹⁰ 114 Stat. 1991, 1993.

¹¹¹ *Id.*

¹¹² *Id.* at 1994.

¹¹³ *Id.*, at 1992; see, n. 28 *supra* and accompanying text.

conclusions of law, as rendered by a tribal justice system, as proposed [findings and conclusions in probate proceedings of the Department of Interior].”¹¹⁴

Congress has declared the policy of the United States to consolidate fractionated Indian lands into economically usable parcels.¹¹⁵ The Supreme Court has indicated that consolidation is a legitimate public purpose,¹¹⁶ and condemnation is a legitimate means to accomplish that purpose, so long as just compensation is paid.¹¹⁷ Congress has made the Secretary responsible for regulating descent and distribution of Indian lands¹¹⁸ and has further authorized Indian tribes to assume that responsibility, subject to the approval of the Secretary.¹¹⁹ Congress has authorized states and territories to condemn Indian allotments for a public purpose.¹²⁰ Indian tribes’ inherent powers of self-government have been limited by Congress, requiring they make just compensation for taking private property.¹²¹ There is no reason that Indian tribes cannot condemn fractionated lands, subject to the requirements of federal law. Any question whether this power exists in tribal governments today could be easily clarified by express Congressional authorization, with no real extension of existing law. Such an express Congressional authorization would provide both tribes and the Secretary with the confidence of clarity in the law, and provide the courts with clear evidence of Congressional consent in the matter. This Congressional authorization would not only promote the policy of reducing fractionated interests in trust lands, but would also advance the policy “to consolidate fractional interests in a manner that enhances tribal sovereignty.”¹²²

The Special Trustee has advised that the Office of the Solicitor has suggested that the Secretary would be required to proceed in federal court against all the owners of a fractionated parcel in order to condemn it.¹²³ The resources of U.S. Attorneys throughout the country are already heavily committed in prosecuting federal crimes, enforcing the civil regulatory laws of the nation, and in matters of national security. They are unlikely to reallocate the scarce resources available to them for the purpose of condemning very highly fractionated tracts of 40 to 160 acres with twice or three times as many owners. Indian tribes, however, are closer to the lands involved and better suited to make decisions on whether and when to proceed in such actions.

In clarifying or granting the authority of the Secretary or Indian tribes to institute condemnation proceedings of fractionated parcels, Congress might well want to consider imposing some limits, such as consenting to and authorizing such procedures only for highly fractionated lands. For other purposes, Congress has previously authorized and limited such

¹¹⁴ *Id.*, at 1995..

¹¹⁵ 114 Stat. 1991, 1992

¹¹⁶ *Hodel v. Irving*, 481 U.S. 704 at 712, 718 (1987).

¹¹⁷ *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997).

¹¹⁸ 36 Stat. 855 (1910).

¹¹⁹ 114 Stat. 1991, 1993 (2000).

¹²⁰ 31 Stat. 1058, 1084 (1901).

¹²¹ 82 Stat. 77 (1968).

¹²² 114 Stat. 1991, 1993 (2000).

¹²³ See Remarks of Ross O. Swimmer, Special Trustee for American Indians, U.S. Department of the Interior at Couer d’Alene Reservation, transcript available at offices of Intertribal Monitoring Association on Indian Trust Funds.

unilateral actions with respect to fractionated Indian lands. For leasing individually owned trust land, for instance, Congress has authorized the Secretary to approve leases with varying percentages of ownership consent, depending on the number of owners. The 2000 Indian Land Consolidation Act Amendments require the Secretary to obtain consent of 100% of the ownership interests if there are five or fewer owners; if there are from 6 to ten owners, the Secretary is authorized to approve leases with only 80% of the ownership consent; if there are from 11 to 19 owners, the required percentage of ownership consent is 60%; and a simple majority of the ownership interest may consent to a lease of the entire parcel with the Secretary's approval if there are more than 20 owners of undivided interests.¹²⁴ Congress has also shown a willingness to draw other equally arbitrary bright lines in provisions designed to encourage consolidation, while favoring some persons over others in the law of succession of Indian trust lands. The consent to sale of an otherwise eligible heir is not required under the new federal probate code, for instance, if an eligible purchaser offers to purchase at probate an interest of less than 5 percent of the entire undivided interest in the tract (unless the heir including a surviving spouse is actually living on the land).¹²⁵

Should Congress choose to do so, it might provide similar, bright line limits on a tribe's condemnation authority. Or it might choose to authorize the Secretary to prescribe such limits, as it did when it limited the authority of tribes to force involuntary sales of individually owned land to those tracts which "the Secretary has determined ... to be parcels of highly fractionated Indian land."¹²⁶ In other words, an express grant of authority for a tribe to condemn fractionated interests in Indian land might well include the duty to pay just compensation; might be specifically limited to interests of some prescribed percentage or less such as 5% or less of the entire interest, or might be limited to tracts with some specified minimum number of owners such as more than 10 owners, or more than 20, etc. Such requirements would also ameliorate the equal protection concerns expressed by some meeting participants.

ITMA recommends that Congress expressly authorize Indian tribes to institute condemnation proceedings of highly fractionated trust lands within their jurisdictions in order to carry out the policy of the United States as expressed in the federal Indian Land Consolidation Act. Such proceedings could be limited to trust parcels that are characterized by thresholds to be set forth in statute regarding such matters as number of owners, the proportion of total ownership in the tract represented by the interest to be condemned, or the size of the fractional interest to be condemned, etc. ITMA further recommends that Congress further direct the Secretary to honor tribal judgments and to make the appropriate entries on the land records and title system of the Bureau of Indian Affairs.

Recommendation No. 7. Enact a Lapse Statute

Participants in consultation meetings asked whether co-owners of fractionated tracts, or the tribes from whose reservation lands the allotments were carved, might succeed to

¹²⁴ ILCAA, 114 Stat. 1991, 2005-2006 (2000).

¹²⁵ AIPRA, 118 Stat. 1778, 1798 (2004).

¹²⁶ *Id.*, at 1787.

consolidated ownership of fractionated interests when the record owners have not indicated any interest in their landholdings for years. Some asked whether co-tenants who actually occupy and improve the land might claim full ownership through adverse possession when other co-owners have been absent for a number of years.

Until recently, the BIA generally prevented such use and occupancy without the consent all of co-owners. This practice had the effect of making much allotted land unusable at all when co-owners cannot be located, or refuse to consent.

Recent amendments to the law now permit forced partition in some instances, but only by sale. These amendments also permit the Bureau to lease allotted lands without consent of all the owners if specified percentages of ownership interests do consent, such percentages decreasing as the number of owners increases. What this means is that Congress has extinguished rights, or at least some settled expectations, that some individuals previously enjoyed with respect to their real property interests. Further, these amendments were effective against the previous rights or expectations of Indian landowners regardless of how long they had held their ownership interests in fractionated land. Both the state and federal governments have long used various forms of “lapse statutes” to prevent or to reverse exactly the kinds of problems that highly fractionated Indian lands now create. Many American jurisdictions still permit interests in land to pass from one owner to another through operation of law, without incurring the obligation to make just compensation that would be required if the land were affirmatively “taken” from the previous owner. In 1982, just one year before the first Indian Land Consolidation Act was passed, the Supreme Court said:

“From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time.”¹²⁷

In that case, Indiana had enacted a statute that caused mineral interests to revert to surface owners if the mineral owner had not taken certain steps to assert his ownership in one of several possible ways. As the Supreme Court described the Indiana Dormant Mineral Interest Act, commonly called the Mineral Lapse Law:

“The statute provides that the unused interest shall be ‘extinguished’ and that its ‘ownership shall revert to the owner of the interest out of which it was carved.’”¹²⁸

Of course, in the case of fractionated interests in allotted Indian lands, the interest out of which those interests were carved is the tribal reservation or tribal land base which had been “carved up” to create the allotments in the first place.

The statute “does not require that any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate.”¹²⁹ In that case, persons who had lost their mineral

¹²⁷ *Texaco v. Short*, 454 U.S. 516, 526 (1982).

¹²⁸ *Id.*, at 518, quoting Ind. Code § 32-5-11-1 (1976).

¹²⁹ *Id.*, at 520.

interests under Indiana's Mineral Lapse Law complained that the statute deprived them of their property without due process and resulted in a taking of their private property without just compensation. They also claimed that because those with more than ten mineral interests were given more opportunity to retain mineral claims than those with fewer than 10 such interests, that the statute violated their right to the equal protection of the laws. The Supreme Court denied all the claims and upheld the lapse provisions of the Indiana statute.

In upholding the Indiana statute, the Supreme Court pointed out that the state had not "taken" the private property. It had simply imposed some reasonable and minimal conditions for keeping it. Consequently, it wasn't the state's "taking" that caused the owners to lose their property, but their own failure to make use of the property or to make a current statement of plans for the property.

The Supreme Court concluded:

"We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."¹³⁰

The Federal Government, too, has adopted similar statutory requirements for retaining property interests acquired under federal law. In 1985, the Supreme Court addressed the Constitutionality of provisions of the Federal Land Policy Management Act (FLPMA) of 1976.¹³¹ Nineteenth Century mining laws had permitted individuals to go upon the public lands and secure the right to produce minerals "located" there. These individuals could actually purchase the lands and receive a patent if mineral requirements were met, or choose instead simply to remain on the land and produce the minerals without a patent. These unpatented mining claims were recognized as conveying an exclusive possessory interest. By the 1970's, the government estimated that as many as 6 million unpatented mining claims burdened the public lands outside the national forests, and that more than half the land inside national forests was also subject to unpatented mining claims. No one knew how many or where all these interests were, or how much of the public domain was thus burdened.¹³²

In FLPMA Congress imposed two conditions on the retained ownership of these mining claims. First, the claimant was required to file notice of location of the claim, and every year thereafter to file a statement of intention to hold the claim. The federal statute further provided that failure to meet these requirements would be deemed conclusively to constitute an abandonment of the mining claim.¹³³ Abandoned claims would escheat to the government.

Mining claimants who missed an annual filing deadline by one day were advised their claims had been deemed abandoned under the law and forfeited to the government.

¹³⁰ *Id.*, at 526.

¹³¹ 90 Stat. 2743 (1976).

¹³² *U.S. v. Locke*, 471 U.S. 84, 87 (1985).

¹³³ *Id.*, at 89.

Addressing their claims that such a result was an unconstitutional taking of their property without due process, and without compensation, the Supreme Court upheld the statute. Addressing the filing deadline, the Court pointed out that it was simply the nature of self-executing statutes like statutes of limitations and other laws with filing deadlines that they operated harshly on those who fall “just on the other side of them.” But unless the courts enforced such deadlines, the statutes would be meaningless.¹³⁴

Regarding the argument that FLPMA resulted in a taking of their property without just compensation, the Supreme Court relied on its ruling in *Texaco v. Short, supra*, and ruled that “Congress is authorized to ‘provide that property rights of this character shall be extinguished if their owners do not take the affirmative action required by the’ statute.”¹³⁵ The retroactive application to claims that had existed for many years before the statute was passed was also Constitutional, the Court said. In fact, the whole purpose of the law was to apply to pre-existing claims and to get rid of as many of them as possible, leaving qualified claimants with only minimal requirements to preserve their claims. This was a legitimate government objective and the means chosen to accomplish it was reasonably related to that objective. The penalty of extinguishment for noncompliance did not violate any command of the Constitution.¹³⁶ To the argument that the statute took their property without just compensation, the Court again referred to *Texaco*, its decision on the Indiana Mineral Lapse Law, and said the government had not taken their property at all. They had lost it, forfeited it, by not informing themselves of the filing deadline required by law and complying with it. It was their failure, not action by Congress, that caused their property rights to be extinguished. Quoting from *Texaco*, the Court said, “this Court has never required [Congress] to compensate the owner for the consequences of his own neglect.’ ”¹³⁷

The more than 4 million undivided interests in allotted Indian lands that the Department of Interior presently administers is actually a larger administrative nightmare than the 6 million unpatented mining claims were in the 1970’s. No one knew where the mining claims were, and the federal government owed their owners no particular duties, certainly no fiduciary duties. The government holds the Indian lands, on the other in trust or restricted status and has a duty to protect them and provide an accounting for them. The government spends \$432 million a year attempting to carry out these duties.

The Indian owners of these 4 million separate ownership interests, for their part, currently have no duties at all respect to their trust landholdings. Congress could consider imposing some minimal level of responsibility on the landholders to demonstrate some level of interest and to perform some act of dominion over their lands in order to retain their ownership. The Supreme Court has provided considerable guidance in what would be an acceptable lapse statute for fractionated Indian lands.

¹³⁴ *Id.*, at 82.

¹³⁵ *Id.*, at 82.

¹³⁶ *Id.*, at 82-84.

¹³⁷ *Id.*, at 84.

Recommendation No. 8. In rem Forfeiture Proceedings for criminal activity and Whereabouts Unknown

Because the Special Trustee indicated that advice from the Office of the Solicitor effectively prevents federal judicial action to condemn fractionated lands, Congress should authorize forfeiture to the tribe in cases where such lands are used for certain criminal activity or where the owners cannot be located for some specified period of time. Congress has previously authorized forfeiture to the government of real property and improvements to the government where the property is used for violations of the federal drug laws.¹³⁸ Congress could similarly authorize forfeiture of allotted Indian lands when they are used for crimes involving the drug, immigration, or human trafficking laws, etc. Because “It makes sense to scrutinize governmental action more closely when the State stands to benefit,”¹³⁹ such a law should specify due process notice and opportunity to challenge the government action. Where the owners of allotted Indian lands cannot be located for some specified period of time, and because the tax and other laws of other jurisdictions do not apply to Indian trust lands, Congress could also authorize in rem proceedings subject to notice by publication and other attempts to locate Indian owners before proceeding against their property.

Category 4: Redesignated Purchase Program (incl. other forms of Voluntary Conveyance)

Recommendation No. 9. Accept Fair Market Valuation Methodologies Short of Formal Appraisals

Representatives at every meeting raised the issue of appraisals in connection with Indian land use. Likely, no term has been used more frequently in Indian legislation of the Twenty-First Century than the phrase “fair market value,” but nowhere is it defined or explained.¹⁴⁰ The references to fair market value cited in just the two 21st Century statutes in

¹³⁸ See 21 U.S.C. § 881(a)(7).

¹³⁹ *U.S. v. Good Real Property*, 510 U.S. 43 (1993).

¹⁴⁰ See, e.g., ILCAA, 114 Stat. 1991 (2000), §§ 206(c)(1) (tribe can purchase interest devised to non-Indian for fair market value as determined by Secretary); 207(a)(5) (co-owner can prevent descent to tribe by paying fair market value; 207(b)(5) (co-owner can prevent descent when no heir of first or second degree by paying fair market value; 213(a)(1) Secretary can make consensual acquisition of any fractional interest at fair market value; 215 (Secretary authorized to develop a system for establishing fair market value of lands and improvements to govern amounts offered for purchase fractional interests; 217 (b)(1)(A) (grantor must first be provided an “estimate of the value” of land before offering it for exchange, gift, or sale for nominal consideration); 217(b)(1)(A)(i) (after receiving “estimate of the value” Indian may convey trust or restricted land for less than fair market value).

See, also, AIPRA, 118 Stat. 1773 (2004), at 1775 (Indian co-owner can prevent descent to tribe by paying fair market value; at 1775 (Contiguous owners can acquire interests descended to U.S. by paying fair market value), at 1789 (in accordance with provisions for establishing fair market value Secretary to cause an “appraisal of the fair market value” of parcel to be partitioned by sale; at 1791 (consistent with provisions for establishing fair market value, Secretary to review comments and approve or order new appraisal; at 1792 (after complying with requirements, Secretary to sell land to be partitioned for “not less than the final appraised fair market value”); at 1794 (if no bid for final appraised value, Secretary may purchase land to be partitioned by sale for “its appraised fair market value”); at 1797 (Secretary authorized to sell at probate for “no less than fair market value, as determined in accordance with the provisions of this Act”); at 1798 (Secretary to sell by public auction “at not less than the appraised fair market value” if more than one offer received for same parcel for purchase at probate); at 1800 (certain provisions inapplicable if devisee agrees tribe can acquire for fair market value if interest is offered to non-

the accompanying footnote below make would be striking, even if the term were defined somewhere in either of the statutes. Strikingly, AIPRA does contain definitions of terms that are used virtually nowhere in the statutes, except in the section containing their definition.¹⁴¹

Regardless of what is meant by the term “fair market value,” participants advised that the Secretary requires appraisals for many transactions that should not require an appraisal. In particular, some participants stated that they have been required to request appraisals of their interests in land before the Secretary would approve a gift deed. They regard this as a great disincentive to avoid probate or otherwise to consolidate their lands in their children since value is not a matter of interest to them when their intent is to make a gift of their lands regardless of value in order to assure that they control its future ownership, and to avoid lengthy probate proceedings.

Some individuals pointed out that the Indian Land Consolidation Act now provides the Secretary with authority to “develop a system for establishing the fair market value of various types of lands and improvements.”¹⁴² They further point out that the provision requiring that they be “provided with an estimate of the value of the interest” can be waived if they plan to make a gift of their interest to certain closely related persons, such as a spouse, child, sibling, or even a collateral heir.¹⁴³ Similarly, if a landowner intends to sell his interest for a nominal sum, there should be no requirement for a formal appraisal. Individual landowners and tribal representatives alike advised that transactions between willing sellers and willing buyers should be permitted and approved without a requirement for an appraisal.

Departmental representatives at the sessions advised that they are required to secure actual formal appraisals in order to determine value, and that appraisers are in turn required to follow the procedures prescribed by the Uniform Standards of Professional Appraisal Practice (USPAP) in order to comply with their own professional obligations and licensing authorities. Comments at the meetings also pointed out that appraisals do not seem to be required in order for probate judges to approve consolidation agreements at probate, including agreements that involve conveyances of lands other than those not involved in the probate.¹⁴⁴ In fact, such consolidation agreements at probate may be made “without having to comply with the Secretary’s rules and requirements otherwise applicable to conveyances by deed of trust or restricted interests in land.”¹⁴⁵

Besides the observation that an appraisal should not be required for many transactions, participants pointed out the unavailability of appraisers locally; that authority to make assignments and assign priorities for appraisal work has been withdrawn from local agency superintendents; and that the time required to secure an appraisal actually prohibits the execution of many transactions by landowners and the and loss of business opportunities.

family member or non-owner); at 1803 (tribe to have opportunity to meet high bid or purchase for fair market value before Secretary removes restrictions or removes restrictions or terminates trust.

¹⁴¹ See, e.g., 118 Stat. 1781, for a definition of the phrase “Die Without Issue.”

¹⁴² 114 Stat. 1991, 2002 (2004).

¹⁴³ *Id.*, at 2003.

¹⁴⁴ AIPRA, 118 Stat. 1773, 1787 (2004).

¹⁴⁵ *Id.*

The Secretary has been provided with statutory authority “to develop a system for establishing fair market value,” and at least three provisions of the 2004 Act make reference to determinations of fair market value “in accordance with provisions of this Act.”¹⁴⁶ The Secretary should make use of this authority to provide determinations of fair market value short of formal appraisals in instances where a formal appraisal should not be required. Unnecessary appraisal requirements frustrate the policy objectives of land consolidation and reversing the effects of allotment and land fractionation.

Recommendation No. 10. Coordinate acquisition activities with tribal efforts

Meeting participants urged continued funding and aggressive operation of the federal program for the acquisition of fractionated lands previously authorized by Congress. As noted earlier, these participants urged that federal acquisition efforts should be coordinated with tribal land consolidation efforts. Some participants urged that the federal program should be limited to those reservations where tribes themselves have adopted and made available a land consolidation or land use plan so that interested and concerned landowners can make intelligent plans for the protection and retention of their own landholdings.

Some meeting participants indicated that a federal program that is not coordinated with tribal land consolidation or land use plans might serve the federal government’s purpose of reducing the number of fractionated interests to be administered, but might not do anything to further the other policies of the Indian Land Consolidation Act of doing so in a manner that facilitates consolidation of this land into usable parcels, or in a manner that enhances tribal sovereignty.

Meeting participants further suggested that the federal acquisition program should undertake a review of the reservation-wide assessment of land values in the Secretary’s determination of fair market value. The Secretary should exercise the authority provided by the Indian Land Consolidation Act to devise a “system” for determining fair market value in concert with tribal land consolidation programs. The government and tribes should establish a common method for determining fair market values for purchase offers so that landowners are offered a “reasonable purchase price” that provides an incentive to sell highly fractionated interests, but tribal and federal programs are not competing with each other.

The federal program should further make a proactive effort to identify those tracts that have the greatest income producing potential for commercial, agricultural, or other economic use. In order to accomplish this, the technical assistance function of the federal Indian Land Consolidation Program should include assisting tribes and individuals with developing land use and land consolidation programs.

¹⁴⁶ See n. 78, *supra*.

Recommendation No. 11. Provide low interest loans or loan guarantee

Federal credit programs should be efforts to encourage the consolidation of fractionated Indian land ownership. The loan, loan guarantee, and interest subsidy programs of all federal agencies should be administered with a preference for applications that advance the policies of the United States as expressed in the Indian Land Consolidation Act. Information regarding the availability of these programs to eligible Indian individuals, as well as to tribes, should be widely disseminated throughout Indian country.

Recommendation No. 12. Eliminate Current and Future Liens Against Acquired Lands

The current statutory requirement of maintaining a lien against fractionated lands acquired by the Indian Land Consolidation Program should be eliminated. The bookkeeping and other expenses associated with the current administration of these interests on behalf of individuals is not ameliorated by a program that requires the same activities to be carried out on behalf of the federal government.

Category 5: New Concepts for Indian Land Consolidation

Recommendation No. 13. Early Amendment of Single Heir Rule or Determination of Validity

Because of the uncertain Constitutional viability of the Single Heir Rule contained in AIPRA, the government should consider its amendment or seek an early judicial determination of its validity. This provision will almost certainly be challenged eventually on the grounds that it denies equal protection to otherwise eligible heirs who happened not to be the firstborn or oldest surviving child. The statutory preference for the oldest child will probably be challenged as a statutory scheme that imports a modified version of a feudal doctrine of law that has been expressly and uniformly rejected in this country at least since 1787. While the Single Heir Rule of AIPRA might survive these challenges, prudence dictates that the government seek an early determination of its validity. The experience of the Department in having to re-open more than 60,000 probates after the previous escheat rule was invalidated by the Supreme Court should not be repeated. The government should take all reasonable steps to make sure that does not happen. The most efficient way to do that seems to be either to amend the Single Heir Rule to eliminate these potential challenges, or to seek an early judicial determination of its validity.

Recommendation No. 14. Authorize Electronic Storage of Indian Wills by the BIA

The Special Trustee advised at one meeting that another problem arises in the custody and storage of Indian wills. Even if technical assistance were provided in estate planning and legal assistance were made available for will drafting, the uncertain storage and retrieval of these documents at probate makes the effectiveness of such assistance problematic. ITMA recommends that the BIA provide storage and retrieval services for wills drafted to govern the

devise of Indian trust lands. Electronic storage of these documents should be authorized. The Secretary should be authorized and directed to develop a method for storing electronically copies of executed wills that will be accepted by his Office of Hearings and Appeals, or to develop a means of capturing electronic signatures that are accepted as valid for purposes of establishing the validity of signatures of testators and witnesses.

ITMA recommends that the Federal government address the concern expressed by the Special Trustee with regard to the storage and retrieval of Indian wills in the same manner Congress has addressed the issue of storage and retrieval of documents required for compliance with the Immigration and Nationality Act. Employers in the United States are required to complete and retain Employment Eligibility Verification Forms (Forms I-9) for each individual they hire for employment in the United States. To complete the Form I-9, the employer must identify the documents presented for review by the employee to verify employment eligibility, and verify review of these documents. Employers are not required to submit these forms to the government, but must keep them available for inspection by the U.S. Immigration and Customs Enforcement, the Civil Rights Division of the U.S. Department of Justice, and by the U.S. Department of Labor.

Congress noted a number of difficulties imposed by this requirement. Storage space itself had become a major problem for many employers with large numbers of employees and high turnover rates. The highly personal information regarding each employee raised significant privacy concerns and posed expensive physical security considerations for safeguarding paper records.

Congress responded by authorizing the electronic completion and storage of these forms.¹⁴⁷ The House Report accompanying this measure noted additional advantages of the measure. "Centralized electronic storage would also facilitate review of the documents."¹⁴⁸ Inspection of nation-wide employers often had to be conducted on a site-by-site basis, and availability of documents varied widely from site to site. Electronic storage would permit inspection of the company as a whole as easily as for any individual site.

These advantages for the probate of Indian estates are obvious. Many individuals have trust or restricted land on several reservations that are widely dispersed geographically. An officer presiding over an Indian probate could request from a BIA centralized electronic storage facility an electronic version of wills, codicils, and other instruments manifesting instructions for the disposition of the trust estate before him.

ITMA recommends that the Department seek similar authority for the utilization of electronic records in recording, storing, and retrieving Indian wills for probate.

Recommendation No. 15. Amend Indian Tribal Governmental Tax Status Act

The Internal Revenue Code should be amended to provide a deduction or a transferable tax credit to a taxpayer that provides purchase money for transactions resulting in

¹⁴⁷ Act of Oct. 30, 2004, Pub. L. 108-390, 118 Stat. 2242, 8 U.S.C. § 1324a(b).

¹⁴⁸ H. REP. 108-731

the consolidation of fractionated Indian land. Consolidation might be in either tribal or individual ownership, so long as the acquisition of undivided interests results in a consolidation of fractionated interests.

Title II of the Indian Tribal Governmental Tax Status Act¹⁴⁹ authorizes the treatment of a tribal government as a State for certain purposes, including determining whether and in what amount a transfer to such government is deductible under various provisions of the Internal Revenue Code.

Considering the perpetual annual expenses to the federal government of administering undivided ownership interests in previously allotted Indian lands, a transferable, marketable tax credit should be extended to the eligible purchasers of such undivided interests in Indian trust land. This would amount to a one-time tax expenditure (foregone revenue in the amount of the purchase price) and a perpetual, annual savings in budget outlay (appropriated dollars spent), plus a minimum of \$7,500 saved in federal outlays for every individual probate avoided. Since some 85% of the undivided interests in Indian trust land are for 5% or less of the total interests in the tract, a vast majority of such transactions will be for nominal amounts. The resulting one-time reductions in tax revenue will be more than offset by actual cost savings.

This would provide an incentive to landowners to transfer their interests in land to the tribes where the land is located and to take a deduction for the transaction from their own individual federal income taxes. Individuals who either do not itemize their deductions, or otherwise have no tax liability, would be authorized to monetize the tax credit in the marketplace. Tribes could encourage their own business partners to provide a local market for such tax credits. The valuation set by the market for such transactions should not be overturned, except in cases of egregious conduct rising to the level of fraud. Given the current cost of administering these ownership interests and probating each of them upon death of the owner, such a regime might well result in actual cost savings to the government.

A tax credit program such as this would provide a significant incentive for individuals to realize an economic benefit from the ownership of land that otherwise provides no value to them, and further provide Indian landowners with a means to avoid the inequities imposed by the single heir rule now imposed by the American Indian Probate Reform Act.

The current cost of administering the fractionated ownership of Indian lands is estimated at \$432 million. The annual cost of probate alone is some \$27 million, and probate by its very nature exacerbates the problem of increased fractionation of Indian land. The more successful and efficient the probate process, the faster the problem of fractionated ownership multiplies under the current circumstances. Even with a vigorous land purchase program that acquired 300,000 fractionated interests from 2003 to 2008 on a few targeted reservations, the number of fractionated interests on a national basis increased at a rate of more than 4% from 2005 to 2008.¹⁵⁰

¹⁴⁹ Act of January 14, 1983, Pub. L. 97-473, 96 Stat. 2607-11

¹⁵⁰ Source: BIA Indian Land Consolidation Program (2008)

This tax credit program would have the effect of providing a source of funding for consolidating the ownership of fractionated land interests in fewer hands, and no doubt would greatly increase the number of purchases at probate as recently authorized by law for precisely this purpose. In the case of condemnation or tribal purchase, this tax credit program would have the effect of returning ownership of previously allotted lands to the tribes from whom the land was taken without compensation by the government at the time of allotment and without actual budget outlay at the time of restoring the land to tribal ownership.

ITMA recommends the Secretary of the Treasury or the Congress clarify and declare that the taxpayer who provides purchase money for fractionated Indian trust lands that are returned to tribal ownership or otherwise conveyed in a manner that avoids further fractionation upon the death of the grantor shall be entitled a deduction or a transferable tax credit under the Internal Revenue Code. Congress or the Secretary of the Treasury should clarify that consolidation of fractionated ownership interests in trust lands on its own reservation is an essential government purpose for a tribal government whose reservation has been allotted.

This source of funding would not visit upon the tribes themselves the cost of redressing a failed government policy, nor would it require federal budget outlays to fund the land transfers. The private sector would be enlisted to provide much of the cash outlay required to return fractionated interests to tribes, or to consolidate individual holdings into fewer hands. The savings to government outlays of probate costs alone would more than offset any foregone tax revenue.

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