

**Comments of the Montana Wyoming Tribal Leaders Council
The Crow Tribe of Indians and
On Probate Related Trust Regulations**

March 31, 2006

Michele Singer
Counsel to the Associate Deputy Secretary of Interior
1849 C. Street, NW
Mail Stop 4141
Washington, D.C. 20240

The Montana Wyoming Tribal Leaders Council and the Crow Tribe (hereinafter referred to as “TLC”) have reviewed the proposed CFR Regulations related to Probate, Life Estates and Fees. The Tribal leaders recognize that the Probate regulations must be adopted to insure implementation of the American Indian Probate Reform Act (AIPRA) by the statutory certification date of June 20, 2006. Further, TLC recognizes that the Probate related regulations have been developed to further the goals of the American Indian Probate Reform Act to streamline the trust estate probate process, address the serious backlog of probate cases and prevent further fractionation of Indian trust lands. However, the TLC is most concerned about the Department of Interior’s failure to provide comprehensive information to Tribes and individual Indians regarding the upcoming changes in Indian Probate law. Further, TLC is concerned about the lack of available technical assistance for Tribes to develop approvable probate codes. Finally, TLC is frustrated with the Department’s sudden unwillingness to draft or hold wills of individual trust landowners.

AIPRA has provisions that create major incentives for individual allottees and heirs of allottees to draft wills in order to avoid the passage of trust lands in accordance with the Act’s new intestacy rules. However, at a time when wills become of critical importance to individual landowners, DOI has determined that the BIA cannot assist with this process. TLC has adopted a Resolution requesting that the BIA reconsider this policy decision and assist Tribes with will drafting and to, at least, hold wills.

While TLC noted some inconsistencies in Title 43 and Part 15 of Title 25, the following comments express concern about substantive provisions of the draft regulations:

Comments on TITLE 43 – PUBLIC LANDS: INTERIOR
Part 4 – DEPARTMENT HEARINGS AND APPEALS PROCEDURES

1. Title 43 should include a brief explanation of OHA’s jurisdictional authority to probate Indian trust estates and a brief overview of the statutory authority governing Indian trust probates.

2. The definition of an Indian includes a person “who is an owner of a trust or restricted interest in land.” This definition infringes upon an Indian Tribe’s sovereign authority to determine membership in an Indian Tribe. Allowing a person who owns trust land but otherwise does not meet enrollment criteria of an Indian Tribe may create a class of Indians that are not affiliated with a particular Tribe. TLC recommends that the definition of an Indian not include a person “who is an owner of a trust or restricted interest in land.”
3. What will OHA do if it receives an incomplete probate file? This section allows several options to OHA if an incomplete probate file is received from the BIA including (a) request the missing information from BIA; (b) Dismiss the case and return the probate file to BIA for further processing; (c) Issues a subpoena or request for production as appropriate to obtain the missing information; or (d) Proceed with a hearing in the case. The TLC disagrees with the options (a) and (b) as they will likely allow significant delay in processing the probate case. If information is missing from the probate file, the probate judge should utilize a subpoena or witness testimony to complete the file and proceed with completing the case.
4. Purchase at Probate. Section 4.272 states that any interest in trust or restricted property, including a life estate that is part of the estate may be purchased at probate. It does not appear that the consent of the remaindermen to a life estate is required. Thus, the purchaser of a life estate, in accordance with the “without regard to waste” doctrine that allows for expanded uses of the life estate, may utilize the life estate in a manner that may damage or deplete the life estate for the remaindermen. TLC recommends that consent of the remaindermen, at least from those remaindermen who will be take more than a 5% interest, should be considered for purchases of life estates at probate.
5. Purchase at Probate. Section 4.274 states “if the interest an heir will receive in a tract represents less than 5 percent of the total interest in the tract, the heir’s consent is not required to allow a purchase of his or her interest at probate, unless the heir was residing on that tract at the time of the decedent’s death.” This provision seems to interpret the language of AIPRA to focus on the interest that an heir will receive rather than on the interest of the decedent. If the interpretation focuses on the interest that the heir will receive, more interests will be subject to purchase at probate. This provision would allow purchase at probate of every interest in a tract of land with 20 or more owners in equal, undivided interests without consent of the owner. For most reservations in the Rocky Mountain Region, trust lands are owned by an average of at least 48 owners. Thus, a significant portion of trust lands will fall within the less than 5% category and be subject to purchase at probate without the owner’s consent. If the tract of land is of significant acreage, 5% of the tract may actually be a rather large number of acres. TLC is concerned that the purchase at probate of interests of less than 5% without consent

deprives individual Indians of what may actually be significant and/or valuable acreage.

6. Questions exist as to the notice to Tribes and other eligible purchasers of interests available for purchase at probate. Notice requirements in the proposed regulations are not clear and should be revised to require actual notice to eligible purchasers.
7. Section 4.281 allows an “interested party” to disagree with the appraised market value of an interest subject to purchase at probate and provides a process to file an objection. However the judge’s determination of market value “is final and may be reviewed only for abuse of discretion.” Often trust landowners and Tribes disagree with the appraisal values of trust lands. TLC disagrees with eliminating appeal opportunities for the judge’s determination of market value of trust lands subject to purchase at probate.

Comments on Part 15 - PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE FIVE CIVILIZED TRIBES

1. TLC restates the above concern with the definition of an Indian and also notes the conflict of the definition with the definition in AIPRA which does not state “federally” recognized Indian Tribe.
2. Section 15.3 allows only an Indian over the age of 18 do make a will. TLC believes this provision should be inclusive of persons under age 18 who have legally married or who have heirs. Although the regulations are based upon federal statutes that allow only Indians over the age of 18 to make wills, the regulations could address persons who are legally emancipated.
3. Section 15.14 allows the BIA to assume custody or control of all tangible land of a deceased Indian including sale of the land, charging all expenses of caring for livestock against the estate. TLC disagrees with the broad discretion granted BIA to dispose of the estate while the probate is pending. Instead TLC proposes that BIA’s priority should be to preserve the estate at least for a specified period of time.
4. Section 15.106 should have language that allows the judge to take testimony or issue subpoenas to address missing documents rather than delay the probate process to search for missing documents.
5. Section 15.108 should have a deadline after notice of death for the BIA to complete the probate file. Presently, the BIA has no time limit to finalize the file and forward it to the Office of Hearings and Appeals.

6. Language should be included in this part that allows the BIA to hold wills of individual Indians. The BIA is mandated to prepare the probate file including finding and including the last will. If the BIA has authority to hold a will, this mandate will be much easier to fulfill.

Comments on Part 179 – LIFE ESTATES AND FUTURE INTERESTS

1. First and foremost, DOI must make an immediate and comprehensive effort at educating individual Indians about the 100% spousal life estate share for intestacy succession. Most Indians accustomed to State law in testate succession rules will be devastated by the surprise of the 100% spousal life estate rule. Further, DOI needs to inform individual Indians that the new rules of intestacy can be avoided by drafting a valid will.
2. The “without regard to waste” provision entitles the life estate holder to all income, including bonuses and royalties for such land to the exclusion of the remaindermen. TLC objects to the expanded rights of the life estate holder that may diminish the property for the remaindermen. First, the definition of “without regard to waste” should be reconsidered and clarified to insure some protection of the estate for the remaindermen. TLC proposes that the language 179.4 be modified to allow the remainderman to share in the income from mineral development, timber harvests and other natural resource harvest.
3. Section 179.4 further allows a life estate holder to sell or mortgage the life estate without consent of the remaindermen. TLC is concerned that a mortgage of the life estate may result in the loss of the estate and deny the remainderman of the property. TLC suggest that this provision be modified to require the consent of the remaindermen prior to a sell or mortgage of a life estate.
4. Section 179.5 includes an actuary table to determine the value of life estate. TLC recommends deleting the actuary table and instead refer to a widely used, but often amended, actuary table.

Comments on New Section for Tribal Probate Codes

1. Section 18.3 states that a Tribal Probate Code must promote the policies of the Indian Land Consolidation Act Amendments of 2000. However, no specific guidance is provided regarding what type of intestacy provisions will be approved. Thus, a question arises about a Tribal Probate Code has rules of in testate succession that will allow heirs to equally share in the decedent’s estate.
2. Section 18.6 state that if the Regional Director does not take action on the probate code within 180 days, the tribal probate code will be deemed to

have been approved “but only to the extent that it is consistent with federal law and promotes the policies of the ILCA Amendments of 2000”. However, without specific guidance on the ILCA Amendments, questions will arise about a probate code that is approved through the inaction of the Regional Director.

3. Section 18.8 states that a tribal probate code will not become effective sooner than 180 days after the date of approval. Thus, a Tribe may submit a probate code, wait 180 days for the approval, then upon approval wait another 180 days before the probate code becomes effective. TLC recommends that the language be revised to state that the probate code shall be effective immediately upon approval.

New Provision for FEES

The TLC opposes the authority granted to DOI to collect fees in the new proposed section. Although TLC understands that statutory authority to collect fees has existed for some time, TLC believes that services provided by DOI to manage and maintain IIM accounts for individuals and tribes is consistent with DOI’s special trust relationship with tribes. Thus, a fee for this service diminishes this special trust relationship.

Further, the fees collected are not deposited into accounts that would be used to provide additional or improve current services to beneficiaries.

Finally, development of a fee schedule, collecting the fees and managing the fees would constitute additional administrative burdens.