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REPORT
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TO REDUCE THE FRACTIONATED OWNERSHIP OF INDIAN LANDS, AND FOR OTHER PURPOSES

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

REPORT

[To accompany S. 1586]

The Committee on Indian Affairs, to which was referred the bill (S. 1586) to reduce the fractionated ownership of Indian lands, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 1586 is to amend the Indian Land Consolidation Act to provide a comprehensive framework for addressing the probate and the fractionated ownership of Indian lands in a manner that is consistent with the policy of encouraging tribal self-determination.

BACKGROUND

Federal policy towards tribal governments has vacillated between two extremes. Since the founding days of the Republic, Federal policy has generally addressed tribal governments directly through a government-to-government relationship.[1] At various times since 1789, however, the Federal government has treated tribal governments with varying levels of apathy or antipathy. The "allotment era," associated with the period from 1887 through 1934, is widely regarded as the most concerted Federal assault on tribal authority.

[1] This principle was strongly re-affirmed by President Nixon in 1970, and confirmed by each subsequent Administration. See "Special Message to Congress on Indian Affairs," July 8, 1970 and the Executive Memorandum, on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994).

The cornerstone of this policy was the General Allotment Act (GAA) of 1887 [2] or the "Dawes Act" as it became known.

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

Through allotment the Federal government reduced collective tribal land ownership by patenting 40 to 160 acre parcels of reservation land to individual Indians. In some cases, a tribe's entire land base was allotted in this manner. At first, these allotments were subject to restraints on alienation for a twenty-five year period. During that period, tribal members could use their individual allotments, but they could not sell or encumber these lands. Federal law did not provide a mechanism for the lease or even the testamentary devise of these interests. The Dawes Act provided only that these interests were to descend pursuant to state intestacy rules. Under these rules, each of a decedent's heirs received an equal undivided share of each interest in land owned by the decedent. It was not until 1910 that Congress provided that individuals could devise these interests.[4] Because tribal members were unfamiliar with European-derived notions of land ownership, few Indians wrote wills, making explicit devise of such interests an exception rather than the rule. Thus, in each successive generation smaller and smaller interests descended to the next generation. As these interests have grown smaller, it is not uncommon for an interest holder's connection with the land to become more abstract. As far back as 1934 a member of Congress made the following observation:

> "[O]ne heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping." [5]

To this day, these interests continue to descend by intestate succession with interests growing increasingly smaller.[6] Even when partition is a legal option, it is rarely a practical alternative. As the Bureau of Indian Affairs (BIA) reported to the Senate Committee on Interior and Insular Affairs: "As most of the allotments were of

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

[3] *Williams* v. *Lee,* 358 U.S. 217, 220 (1959). Dussias, Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1 (1993). As Professor Dussias points out, the Supreme Court has moved away from historic and treaty-based approaches for analyzing tribal jurisdiction based on geography to an approach based on an "internal" versus "external" dichotomy. "As a result, the Court has expanded or contracted tribal sovereignty depending on whether the Court view the jurisdiction being asserted by the tribe as involving internal or external relations." Id. at 49.

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

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

[6] Indian Programs, Profile of Land Ownership at 12 Reservations, GAO, February 1992 (GAO/RCED–92–96BR).

not more than 160 acres of dry farming or grazing lands . . . it will readily be seen that it was not feasible to partition the land in kind."[7]

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

> "The majority of Indian lands passed from native ownership under the allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, a loss of 90 million acres. Of this, about 27 million acres, or two thirds of the total land allotted, passed from Indian allottees by sale between 1887 and 1934. An additional 60 million acres were either ceded outright or sold to non-Indian homesteaders and corporations as 'surplus' lands."[9]

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

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

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

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

[9] Cohen's Handbook of Federal Indian Law (1982) p. 138.

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

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

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

The IRA provided tools to reverse the effect of the allotment policy. First, the IRA formally ended the policy of allotting tribal lands,[13] indefinitely extended the trust period on lands held in trust or restricted status, and ended the widespread practice of issuing so-called "forced-fee patents."[14] Second, it directed the Secretary to restore tribal lands that the government had declared to be "surplus".[15] The IRA also authorized the Secretary to acquire lands and associated interests in lands.[16] Although the IRA thoroughly repudiated the allotment policy and provided some tools to ameliorate its effects, the IRA did not reverse all of its repercussions. In fact, even though the allotment policy was officially repudiated sixty-five years ago, many tribes continue to see significant amounts of land lose its trust status because of inheritance by non-Indians and further fractionation, which are self-executing effects of the GAA, and are much more prevalent than the salutary elements of the IRA, which all require some form of administrative approval or action.[17]

In the late 1940's and 1950's, Federal policy swung again to an extreme as Congress sought to terminate its relationship with specific Indian tribes. During this period, known as the "termination era," the Federal government made few efforts to address the effects of the GAA. The government sought to find ways to eliminate the Federal responsibility to tribes and their members rather than addressing the problems associated with former policies. On most reservations, Indian owners continued to inherit smaller and smaller shares of the undivided interests in each tract of allotted land. Also, interests were not necessarily inherited by residents, or even members of the reservation where an allotment was located. As it became more difficult to locate dozens of individuals with undivided interests in a tract, the Department of Interior simply relied

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

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

[13] 25 U.S.C. § 461.

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

[15] 25 U.S.C. § 463.

[16] 25 U.S.C. § 465.

[17] In some instances, even those who have inherited interests in allotments from Indians have later protested tribal jurisdiction over these lands. *Brendale* v. *Confederated Tribes*, 492 U.S. 408 (1989). Although Mr. Brendale was not a member of the tribe, he protested tribal jurisdiction over his on-reservation land, even though he inherited the land from an Indian relative. His land "was originally allotted to [his] great aunt * * * [and] passed by inheritance to [his] mother and grandfather, who were issued a fee patent in 1963, and then, on his mother's death in 1972, to [Mr.] Brendale." Thus, Mr. Brendale challenged the tribe's right to regulate his activities on reservation lands that he inherited from a member of the tribe.

on its authority to lease unused lands on behalf of their owners, discouraging Indian owners from becoming active in the leasing, management, or development of their own lands.[18]

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

The Indian Land Consolidation Act of 1983 (ILCA), P.L. 97–459 (25 U.S.C. §§ 2201 et seq.)

In 1983, Congress enacted the Indian Land Consolidation Act, which addressed land fractionation in the following ways:

1. It authorized Indian tribes to establish land consolidation plans (§ 204);

2. It authorized Indian tribes to acquire an entire parcel of trust land with the consent of the majority of the parcel's owners (§ 205);

3. It authorized the Secretary to approve tribal probate codes, including provisions that limit devise or descent to non-member Indians or non-Indians (§ 206); and

4. It provided that both devise and descent were inapplicable to any fractional interests in trust or restricted land if it was 2% of the total acreage in a tract or smaller and it had not produced $100 in income in the previous year. Such interests were to escheat to the tribe. (§ 207)

Although there was no disagreement about the need for legislation to address fractionation, provisions in the ILCA were immediately criticized. During the 98th Congress, the Senate Select Committee on Indian Affairs held two hearings on the 1983 version of the Act.[18a] Most participants directed their criticism at the escheat provision, § 207. In response to concerns that § 207 violated the 5th Amendment restriction on taking property without compensation, the Interior Department responded: "[A]s a legal point, section 207 does not take property away from anybody who currently owns it. What it does is set criteria for whether the property

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

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

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

can be further devised[.]" [19a] Thus, the amendments approved by Congress in 1984 continued to prevent either the devise or descent of many fractional interests.[20] However, the amendment sought to "loosen[] the restrictive language of the Act providing for the escheat of minor fractional interests in trust allotted lands or restricted lands." [21] It did this by: (1) permitting owners of escheatable interests to devise those interests to other owners of a parcel; (2) allowing some ineligible devisees to direct interests towards eligible individuals; and (3) assessing an interest's value using a 5 year "look-back" at the revenue produced by an interest and allowing a beneficiary to rebut the presumption that an interest is without significant economic value. The 1984 amendments also provided that the tribal probate codes adopted pursuant to the ILCA could take precedence over the escheat provisions of § 207.

JUDICIAL REVIEW OF THE ILCA

The challenge to the ILCA came before the Supreme Court at a point when its approach to Indian issues was in transition from jurisprudence based on Chief Justice Marshall's 19th century trilogy of opinions to what has been characterized by an leading Indian law scholar as a "subjectivist trend [that] has its roots in a series of cases decided between 1978 and 1989." [22] In 1987 the Supreme Court found the original version of the ILCA unconstitutional. *Irving* v. *Clark*, 758 F.2d 1260 (8th Cir. 1985) aff'd sub nom. *Irving* v. *Hodel*, 481 U.S. 704 (1987). The holding resulted from an alignment between property rights proponents on the Court and those who viewed Congress' action as insufficiently sensitive to "unique negotiations giving rise to the property rights and expectations at issue" in the case.[23] As a result, although each member of the Court agreed that the ILCA could not withstand constitutional scrutiny, there was no consensus on the appropriate basis for this result. In a concurring opinion, Justice Stevens criticized both the majority opinion and Congress, charging that the Congress enacted § 207 of the ILCA "abruptly with [a] lack of explanation." He then criticized the majority opinion for the "substantial gap [that] separates the claims that the Court allows the[] appellees to advance from the rationale that the Court ultimately finds persuasive." [24]

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

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

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

[21] Sen. Rep. 98–632, p. 7.

[22] Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573 (1996).

[23] *Hodel*, 481 U.S. at 718, Brennan, Marshall, and Blackmun concurring.

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

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

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

Like Justice Stevens, the Court's majority was concerned with how the ILCA was drafted. For example, Congress assumed § 207 would only "restrict the descendancy of some of these fractional interests if these interests are so small as to be financially meaningless."[25] But the provision included in the ILCA relied exclusively on past income generation to assess an interests's value. As the Court noted the ILCA's "income generation test" fell short of separating the valuable from de minimis interests. A better mechanism for determining the value of the 2% interests may have produced a different result before the Court. Indeed, the Court was willing to concede that a number of factors weighed in favor of the ILCA. The Court noted that Congress enacted the law "pursuant to its broad authority to regulate the descent and devise of Indian trust land [and] . . . as a means of ameliorating, over time, the extreme fractionation of certain Indian lands." Also, the Court noted that it was unlikely that the owners of the interest could point to "investment backed expectations" in property that had been held in trust for a century, and which was "overwhelmingly acquired by gift, descent, or devise." The Court also noted an "average reciprocity of advantage" weighed "weakly" in favor of the statute. As the Court explained:

> All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.[26]

The absence of a more discerning test for determining the value of each interest created several difficult choices, which the Supreme Court obviated when it ruled that §207 was unconstitutional. First, the Court would have to either devise a new test to replace ILCA's "income generation test" or articulate limits on the use of the test. Second, even if the Court could fashion a method for determining each fractional interest's value, it would then have to set the standard for which interests were "financially meaningless." Third, if the Court could resolve that difficult question, it would face a classical "slippery slope" dilemma. For example, if the Court decided that interests worth $50 or less could escheat, could it provide a principled basis for distinguishing these interests from

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

those worth $51? Especially when the majority's criticisms are viewed in light of Justice Steven's observation of § 207's origins, it is easy to understand why the Court did not trouble itself—or the rest of the Federal bench—with finding some dividing line where the statute might pass constitutional muster. Thus, Justice Stevens was arguably correct that the Court was concerned with issues that were not necessarily implicated by the facts before the Court in *Irving*. Nevertheless, it is not surprising that the Court did not decide the case in a fashion that would have required it to resolve these three issues, each of which fall within the province of the legislative rather than the judicial branch, especially in the field of Indian law.

The opinion in *Irving* may be characterized as an invitation for Congress to "go back to the drawing board" to address this issue. For example, Justice O'Connor suggested that Congress could achieve most of its objective by simply eliminating intestate descent of these interests. Second, contrary to the Court's ruling in *Allard* v. *Andrus,* 444 U.S. 41 (1979), the Court rejected the argument that § 207 did not "take" property because the owners of small fractional interests were still left with alternatives for both the use and disposition of this property. In the Court's words: "complex inter vivos transactions such as revocable trusts is simply not an adequate substitute" for the right to devise an interest in allotted land.[27] In other words, the Court did not accept two of the premises underlying the ILCA. First, even though no specific heir or potential devisee can claim a vested right to inherit an interest in property, it does not follow that all potential heirs and devisees may be prevented from acquiring the interest. Second, an interest may have appreciable value, even if it is not producing any income.

The 106th Congress has the benefit of several appellate and Supreme Court decisions to guide its deliberations on the ILCA. However, the 98th Congress had no appellate rulings to guide its deliberations. Congress amended the ILCA in 1984, five months before the 8th Circuit found the ILCA unconstitutional, and more than three years before the Supreme Court affirmed that decision, albeit on different grounds. It is not surprising that Congress assumed that it could constitutionally prevent the devise or descent of some interests in trust lands. In fact, the *Irving* decision itself was not

[27] Comparing the result in *Allard* v. *Andrus,* 444 U.S. 41 (1979) with *Irving* indicates how the Court saw § 207 of the ILCA as a flawed means of reaching Congress' objective. In *Allard,* the Court upheld a statute that prohibited any sale of endangered eagle parts as a necessary component of a legislative scheme to protect eagles. An absolute prohibition on the sale of personal property is at least a comparable restriction on an owner's rights than a constraint on the right to devise an interest in property. However, to the Court's four member plurality, Section 207 significantly constrained property rights with no assurance that this would further the government's objective. "[Section 207] effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property." *Id.* at 716. This is not, however, the only way to account for the difference between *Allard* and *Irving.* While the two concurring opinions agree that a taking occurred, each offers a sharply divided interpretation of *Allard's* precedential status. Justice Scalia opined that *Allard* and *Irving* concerned "indistinguishable" constraints on property interests, thereby limiting *Allard* to its facts. *Irving,* at 719, Scalia, the Chief Justice, and Powell concurring. But Justices Brennan, Marshall, and Blackmun responded that *Irving* did not limit *Allard* to its facts. Relying on the decision of the 8th Circuit, they argued that *Irving* concerned property rights that were the result of "unique negotiations giving rise to * * * property rights * * * [that] make this case the unusual one." *Id.* at 718. Throughout its consideration of S. 1586, the Committee has been solicitous of each of these opinions. The restrictions on devise are drawn narrowly, so each "stick" is left in the bundle of property rights, even though it may be selectively "pruned" where this is necessary to accomplish the objectives described in the bill's Findings and Purposes sections.

anticipated nor embraced by commentators,[28] who view the case as something of an aberration. Also, Congress correctly assumed that courts would be highly sympathetic with the statute's objective.[29] The *Irving* Court conceded: "The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation."

When the original version of the ILCA reached the Court in 1987, § 207 was analyzed by the Court from three very different perspectives. To three Justices, the statute violated the 5th Amendment because it was insufficiently solicitous of Indian rights.[30] Four members of the Court found a 5th Amendment taking because the "character of the Government regulation" was "extraordinary," raising concerns that upholding the statute would expand the government's authority over property rights.[31] Finally, the statute was improperly constructed to please two members of the Court who may have been satisfied if the provision had simply conditioned retention of the interest upon "performance of a modest statutory duty * * * within a reasonable period of time."[32] Unfortunately, the Supreme Court refused to express any view on whether the 1984 amendments to the ILCA resolved any of its concerns.

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

> [As] amended section 207 differs from the original in three respects: it looks back five years instead of one to determine the income produced from a small interest, and creates a rebuttable presumption that this income stream will continue; it permits devise of otherwise escheatable interests to persons who already own an interest in the same parcel; and it authorizes tribes to develop their own codes governing the disposition of fractional interests.[33]

The Court noted that the Act still relied exclusively on the income generated by a parcel to assess its value, which could allow valuable interests to escheat if they were not producing income. Most important, although the modified statute allowed an owner to devise his interest, he could only devise it to another owner of an undivided interest in such parcel of trust or restricted land." this

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[28] Chester, Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving, 24 Sw. U.L. Rev. 1195 (1995) and Kornstein, Inheritance: A Constitutional Right? 36 Rutgers L. Rev. 741 (1984).

[29] In light of the Supreme Court's decision in *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976), Congress assumed that it had wide latitude to regulate the devise and descent of Indian property before it vested in a new owner. In *Hollowbreast,* the Supreme Court addressed mineral interests to allotments on the Norhtern Cheyenne Indian Reservation. A 1926 statute conferred the subsurface mineral estates to each allotment owner after fifty years. Before fifty years elapsed, a new law reserved the mineral rights for the benefit of the tribe. The Court upheld the statute and rejected the allottee claims that this constituted a taking of their vested property rights.

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

[31] *Hodel,* at 704, O'Connor announcing the opinion of the Court joined by the Chief Justice and Justices Scalia and Powell.

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

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

did not go far enough to satisfy the standard established in *Irving.* As the Court explained: "Congress" creation of an ever-so-slight class of individuals equipped to receive fractional interests by devise [i.e. existing interest holders] does not suffice, under a fair reading of *Irving,* to rehabilitate the measure." Quoting from the 9th Circuit Court of Appeal's observation, Justice Ginsburg pointed out that the class of current owners "is unlikely to contain any [of the testator's] lineal descendants."[34] Finally, the United States did not assert that the establishment of tribal code provisions was relevant in *Youpee.* In light of *Irving,* the result in *Youpee* is not surprising. In fact, several years before *Youpee* even reached the Court, the Department of Interior was soliciting input from tribes and individual owners of trust and restricted land on how to address land fractionation issues.[35]

ILCA and treaty rights

A discussion of the principles drawn from the Supreme Court's opinions on the ILCA would not be complete without addressing the concurring opinion in *Irving* authored by Justice Brennan, and joined by Justices Marshall and Blackmun. In their concurring opinion, these Justices aligned themselves with the decision of the 8th Circuit Court of Appeals. While the Court of Appeals ruled that a 5th Amendment taking had occurred, they based this conclusion on the nature of the property at issue. By contrast, the Supreme Court's majority found a taking based on the nature of the government's action. As Justice O'Connor wrote: "the character of the Government regulation here is extraordinary." According to the Court: "the regulation here amounts to virtual abrogation of the right to pass on a certain type of property * * * to one's heirs."

The Court pointed out that §207 eliminated an attribute of the Anglo-American legal system that has existed "since feudal times." Of course allotments did not exist in feudal Europe. With limited exceptions, these interests did not exist in the United States for more than a century after its founding. Thus, looking to European antecedents as a means of characterizing these interests is fraught with hazards. Furthermore, as Justice's Brennan's concurring opinion demonstrates, it might also be unnecessary.[36]

The crux of Justice Brennan's three sentence concurring opinion consists of the following statement: "largely for the reasons discussed by the [8th Circuit] Court of Appeals, I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case an unusual one." Specifically, the 8th Circuit decision referred to the treaty negotiations

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

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

[36] Obviously, the full nature of an individual's interest in an allotment can only be ascertained with reference to Anglo-American property for at least three reasons. First, the very notion of establishing allotments and the language employed to define these property interests originate in Western, rather than indigenous culture. Second, these allotments were the result of negotiations between a tribe and the United States. Thus, Anglo-American notions of property were the intellectual and cultural backdrop for one of the two parties and negotiated the relevant agreement. In light of the longstanding principle that treaties are to be interpreted in favor of Indian tribes and their members, it follows a fortiorari that the holders of these rights possess whatever beneficial attributes may be gleaned from the Anglo-American culture that chose to create and characterize them.

that led to the creation of the allotments at issue and concluded that the allottees bargained with the United States and "obtain[ed] patents to protect allotments from future governmental interference" including right to devise their interest." Pointing to the Supreme Court's decision in *Choate* v. *Trapp,* 224 U.S. 665 (1912), the 8th Circuit explained that treaty provisions can give rise to individual rights that may not be altered without just compensation. In *Choate,* the original allottees enjoyed an immunity from taxation that could not be altered by Congress without payment of just compensation.

Before the 8th Circuit Court of Appeals the *Irving* plaintiffs claimed that the ILCA violated two interests protected by *Choate*: a promise that interests in allotted land would continue to descend through family lines without governmental interference and that state law would be used to determine the inheritance of allotments. The 8th Circuit interpreted treaty provisions as a Federal guarantee that "lands allotted to individual Indians could not be taken from [the allottees or] their children [*i.e.* heirs or devisees]."[37] Thus, the panel of judges agreed that the ILCA ran afoul of *Choate* when it prevented either the devise or descent of an interest in allotted land. However, the 8th Circuit explicitly rejected the idea that heirs under state law enjoyed any vested rights under the treaty. The would-be heirs argued that the treaty guarantee the exclusive use of state law of intestacy to determine the descent of interests in trust land. As the 8th Circuit pointed out, this theory would require courts to find a taking if the law authorized the testamentary devise of allotted land.[38] Such a result would hinder Congressional authority "to alter and condition rights that have not yet vested in individual Indians[]." It would also elevate the rights of heirs above those of a living allotment owner. "[T]he existence of any vested rights in an allottee's heirs would mean that an Indian to whom land was allotted would have no power to dispose of that property by will."[39]

Although the Supreme Court decided *Irving* on different grounds, the continuing vitality of *Choate* is obvious; treaties give rise to interests and rights which may not be eliminated without the payment of compensation. Even though the 8th Circuit was solicitous of this principle, it would not accept an invitation to require the Federal government to compensate every would-be heir who was prevented from inheriting because of an adjustment in the rules governing the descent and devise of allotments. According to the *Irving* Court, Congress could even go so far as "abolishing the descent of such interests by rules of intestacy[.]"

THE NEED FOR LEGISLATION

Several decades after adopting a policy of breaking Indian reservations through allotments and other means, Congress ended and formally repudiated this policy through the Indian Reorganization Act of 1934. Congress also sought to reverse the effects of the allotment era. The effort to reverse the pervasive effects of the allot-

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

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

[39] *Irvin* v. *Clark,* 758 F. 2d 1260, 1265 (1985).

ment policy have achieved only limited success. All three branches of the Federal government are now actively engaged in an effort to untangle the Gordian knot of fractional interests in trust and restricted land. In a class-action lawsuit in the United States District Court for the District of Colombia brought on behalf of approximately 300,000 beneficiaries of Individual Indian Money (IIM) trust accounts, the government has admitted that it is unable to account for the money generated from the use of the (allotted) land owned by these individuals:

> It is entirely possible that tens of thousands of IIM trust beneficiaries should be receiving different amounts of money -their own money— than they do today. Perhaps not. But no one can say, which is the crux of the problem."[40]

In this suit, the plaintiffs seek an accounting of the funds held in trust by the government. The suit also involves a claim that the government has breached its trust responsibility with respect to the management of these assets. The Executive Branch of the government has responded to this situation in two ways. First, in 1998, the Department of Interior issued its first High Level Implementation Plan (HLIP) to reform its trust management activities. The HLIP was updated and republished in February 2000. Second, on April 3, 2000, the Department issued a Federal Register Notice that noticing a series of public meetings and soliciting comments to:

> (1) Develop a methodology, consistent with Congressional directives, to examine past account activity and discover information appropriate to enable beneficiaries and the Department to evaluate whether income from their trust assets was properly credited, maintained, and distributed to and from their IIM accounts before October 25, 1994;
>
> (2) Explore approaches to fairly compensate beneficiaries and finally resolve discrepancies.

65 Federal Register 17521 (April 3, 2000)

The Committee has dedicated substantial time to oversight of the Department's trust management activities, concerning the Department's compliance with the American Indian Trust Fund Management Reform Act, P.L. 103–412 (October 25, 1994). S. 1586 is the primary legislative contribution to this comprehensive, inter-governmental effort to address the three most destructive legacies of the allotment era: the continued fractionation of trust and restricted lands, and its effect on the Federal government's ability to fulfill its trust obligation to Indian tribes and their members; the continuing loss of trust lands as it is inherited by non-Indians; and the effect of the allotment policy on Indian tribes.

SUMMARY OF THE PROVISIONS

Section 1. Short title

This section provides that the Act may be cited as the Indian Land Consolidation Act Amendments of 2000.

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[40] *Cobell* v. *Babbitt,* 91 F. Supp. 1, 6 (1999).

Section 2. Findings

This section describes the context that form the basis for S. 1586. Because of the pervasive and multifaceted effects of failed government policies, there is no single program that will address all of the effects of the allotment. In the absence of a "comprehensive remedial legislation, the number of fractional interests will continue to grow." A sustained Federal effort is needed to fulfill the bill's objectives. As the findings note, fractionation resulted from Federal policies and "cannot be solved by Indian tribes, [it] requires a solution under Federal law." Obviously, however, each tribe has the best understanding of how the allotment era has affected its land and people. Based on this understanding, each tribe should determine how to tailor these programs to address its particular needs.

Section 3. Declaration of policy

In its consideration of S. 1586, the Committee was able to draw on decades of evidence addressing the effects of the allotment policy on Indian tribes and their members. Based on this extensive record, including hearings, reports, testimonials, and other evidence, it is clear to the Committee that legislation directed at fractionation should accomplish certain objectives. These are included as the "Declaration of Policy." First, in almost all instances, further fractionation will not inure to the benefit of the owners of trust or restricted land. The Committee is aware of three instances where an Indian landowner may wish to devise an interest in trust or restricted land to more than one devisee. First, where physical partition between the devisees is an option. Second, where the land is being leased and a bequest of these interests to two or more devisees is merely a way of dividing the revenue among heirs. And third, where the deviser is in a position to confer "use rights" upon several heirs who are making use of the land. In almost every other circumstance, further fractionation will only serve to complicate land management without conferring proportionate benefits to the undivided interest holder. Thus, section 3(1) , establishes the prevention of further fractionation as a policy under this act.

In many cases, the ownership of undivided interests has grown so small that an affirmative Federal policy of consolidating those interests should be established. This is provided in section 3(2) and addressed in numerous sections of S. 1586 as reported by the Committee.

The Supreme Court has interpreted the Indian Reorganization Act (IRA) as a repudiation of the allotment policy. In addition, the IRA established Federal policies that are directed at reversing the effects of the General Allotment Act. The next three policies, sections 3 (3),(4), and (5), provide that Federal policy is directed at addressing fractionation in a manner that enhances tribal sovereignty, promotes tribal self-determination, and reverses the effect of the allotment policy on Indian tribes.

Section 4. Amendments to the Indian Land Consolidation Act

This section makes changes to the ILCA. Specifically, two sections of the ILCA are amended, section 202 and section 205, two sections of the act are replaced, sections 206 and 207, and eight new sections are added to the ILCA, sections 213–220.

Section 202. Definitions.—This section of the ILCA is amended by modifying the definition of "Indian" and by providing a definition for the "heirs of the first and second degree." The definition of "Indian" tracks existing definitions employed in other statutes. For example, under the Indian Child Welfare Act of 1978, an unmarried person under 18 years of age is considered an "Indian child" if he or she is "eligible for membership in the tribe" and the biological child of a member of a tribe. (25 U.S.C. § 1903(4)). For example, a number of tribes recognize membership based on lineal descendancy. Since these individuals are "eligible for membership" upon their birth, they are to be treated as Indians for purposes of this Act. The definition recognizes that in many instances a person may be eligible for membership or enrollment in a tribe before official action is taken to memorialize their membership or enrollment.

Section 205. Purchase of Trust or Restricted or Controlled Lands.—A technical amendment to this section resolves confusion over whether interests owned by an Indian tribe should be used in determining whether a "majority" of the owners of a tract consent to tribal acquisition of the parcel. As amended, such tribal interests will be included in determining whether a majority of the interest holders approve of the transaction. This section is also amended to make Secretarial approval unnecessary for tribal acquisition of fractional interests pursuant to a tribal land consolidation plan approved under section 204.

Section 206. Tribal Probate Codes.—This section is replaced.

Tribal Probate Codes.—Subsection 206(a). This section provides that tribal probate codes may include rules of intestate succession and any other provisions that promote the policies set forth in Section 3 of the ILCA. The Committee is aware that the vast variations in tribal culture and history produce differing approaches to probate. The Committee also recognizes tribal members are more likely to make use of a tribal probate code that conforms to their view of how property should be distributed at death. At the same time, the Secretary is to ensure that a tribe's probate code is consistent with the important policies set out in section 3 of the ILCA. There is one explicit limitation on tribal codes with respect to inheritance by an Indian who is the descendant of an original allottee. In most instances, allotments were made to the members of the tribe exercising jurisdiction over a reservation and also to unenrolled Indians who qualified for membership in that tribe. However, allotments were also made to individuals who did not qualify for membership in the tribe where the allotment was made. The Indian heirs of these individuals may continue to inherit interests in land on these reservations.

Unlike the existing provisions in section 206, the new section allows Indian tribes and the Secretary much greater latitude in establishing tribal probate codes, as long as these codes do not restrict inheritance by heirs or lineal descendants of an original allottee. One approach that several Indian tribes have taken, either under specific statutory authority or pursuant to § 206 of the ILCA, involves probate codes that prevent any further descent or devise of these interests except for those who are at least eligible for membership in the tribe that exercises jurisdiction over the reservation. This approach was sustained against a constitutional challenge by a three judge panel in *Simmons* v. *Seelatsee,* 244 F.

Supp. 808 (E.D. Wash. 1965) and affirmed by the Supreme Court, 384 U.S. 209 (1966) (per curiam). Similarly, pursuant to 25 U.S.C. § 372 and § 373, the Department of the Interior has determined that the Secretary may establish a preference for tribal acquisition of land. See, 1 Opinions of the Solicitor 783 (August 14, 1937). Tribes may also wish to adopt codes that provide a similar tribal preference for the acquisition of interests devised to non-Indians. Before adopting and approving a code, the tribe and the Secretary should be sure to provide adequate safeguards, such as the payment of compensation to the decedent's estate, to ensure that the Secretary's application of the tribal probate code is protected from constitutional challenges.

Secretarial Approval.—Subsection 206(b). Although existing law provides for Secretarial approval of tribal probate codes, this subsection establishes time-frames for Secretarial approval of proposed codes and amendments. The bill also provides that the codes and amendments become effective upon the expiration of these time-frames to the extent they are consistent with Federal law. This will allow the codes to become operational even if the BIA is unable to formally approve the codes. The requirement of Secretarial review is included because the Department is responsible for applying these probate codes to specific cases. This review is intended to ensure that inconsistencies or conflicts between the codes and Federal laws will be resolved before the code is widely circulated and used for probate planning. Under this section, the Secretary must either approve a tribal probate code or disapprove the code and provide a written explanation of the reasons for disapproval. If he fails to do either, the code becomes effective after 180 days. The Secretary is to look to the objectives of the ILCA, as specified in section 3, in deciding whether to approve the tribe's proposed code or any amendments. If the Secretary does not approve a proposed tribal probate code, he must provide a written explanation of this decision. Although a tribe may decide to rescind its code, no such rescission will become effective for 180 days. This will provide an opportunity for those affected by the codes to make any necessary adjustments to their estate plans.

Authority Available to Indian Tribes.—Section 206(c). Existing law authorizes Indian tribes to enact a tribal probate code that prevents non-Indians from acquiring interests in trust or restricted lands. Such codes must provide for appropriate compensation to the decedent's estate. In light of the Federal of policy preserving the trust status of Indian lands, the Secretary would presumably approve at least those sections of a tribal probate code. S. 1586 eliminates these requirements by providing that Indian tribes are not required to enact a probate code to exercise the authority to acquire allotment interests before they are inherited by non-Indians. The tribe must still pay the value of the interest into a decedent's estate, but the Secretary may provide a tribe with up to two years to pay for the interest. The effect of this provision on non-Indian heirs and devisees is tempered in several ways. First, S. 1586 allows an ineligible (non-Indian) heir or devisee to prevent tribal acquisition by devising the interest to an Indian. Second, a non-Indian heir or devisee may convey the interest to an Indian person and retain a life estate in the interest. Further, the person reserv-

ing the life estate may retain the right to receive the income derived from the share of the interest.

Use of Proposed Findings.—Subsection 206(d). This provision provides that the Secretary may provide for the use of findings of fact and conclusions of law, as rendered by tribal justice systems, as proposed findings in the adjudication of probate proceedings involving trust resources. In the Committee's view, the Department of the Interior may find some assistance in addressing its significant backlog of pending cases to be probated by making use of decisions rendered by tribal justice systems in their adjudication of non-trust assets. Tribal judges are as capable as their state and Federal counterparts to determine the heirs and the distribution of the property of a decedent. To the extent that tribal probate codes provide the applicable rules for probating an estate, tribal courts are the more appropriate institution.

Section 207. Descent and Distribution, Escheat.—This section is replaced. Throughout S. 1586, and in this section in particular, Congress is "acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands." *Hodel* v. *Irving,* 481 U.S. 704, 712 (1987), citing *Jefferson* v. *Fink,* 247 U.S. 288 (1918).

Testamentary Disposition.—Subsection 207(a). This section addresses the loss of trust or restricted land when it is inherited by non-Indians. Under this bill, a testator may devise an interest in trust or restricted land to an Indian. If the testator devises an interest to a non-Indian, the non-Indian devisee receives a "non-Indian estate in Indian land," an interest described in subsection 207(c). To address fractionation, in the absence of express language to the contrary, the devise of an interest in the same parcel of trust or restricted land is presumed to create a joint tenancy with the right of survivorship.

Intestate Succession.—Subsection 207(b). With respect to intestate succession of interests in trust or restricted land, section 207(b) provides that only heirs of the first or second degree will receive these interests by intestate devise. In addition, non-Indian spouses and heirs may only receive a non-Indian estate in Indian land in such interests.

Joint tenancy.—§ 207(b)(3). As with the subsection in testamentary devise, interests descending through intestate succession may be held as a joint tenancy with the right of survivorship. Specifically, interests of 5% or less that descend to more than one heir are held as joint tenancies. The Committee is aware that in some instances a decedent's heirs will include both Indian and non-Indian heirs. When this occurs, each of the Indian joint tenants will hold the equitable interest in the trust or restricted land while the non-Indians hold only a non-Indian estate in Indian land. As a result, whether the joint tenancy will pass as a full equitable interest or a non-Indian estate in Indian land depends on whether each heir of the last surviving joint tenant's heir is an Indian or non-Indian. A non-Indian survivor can devise the equitable estate to an Indian heir. Also, a full equitable interest will descend to a decedent's Indian spouse or Indian 1st or 2nd degree heirs. If the non-Indian survivor wishes to devise the interest to a non-Indian, he may devise such interest as a non-Indian estate in Indian land.

Non-Indian Estate in Indian Land.—Subsection 207(c). This subsection balances a number of interests. S. 1586 seeks to encourage

the testamentary devise of interests in trust or restricted lands by allowing owners to devise their interest to any person. If these interests could be devised to non-Indians, it would defeat the policy of preventing land from passing out of trust wherever possible. Under subsection 207(c), a non-Indian devisee will receive an interest similar to a life estate. The "non-Indian estate in Indian land" includes more rights than those associated with a life estate. For example, the interest holder will have access to some of the revenue that is traditionally reserved for the holder of the remainder of the interest. In addition, the holder of a non-Indian estate has more control over the disposition of the remainder interest than the holder of a life estate. If the non-Indian estate holder devises or conveys the interest to an Indian, the Indian will receive the full equitable interest that was owned by the last Indian owner of the property. (This section refers to the equitable interest as the "decedent's interest," which is defined as "the equitable title held by the last Indian owner of an interest in trust or restricted land.") However, a non-Indian estate holder may only devise another non-Indian estate in Indian land to a non-Indian devisee.

If the owner of a "non-Indian estate in Indian land" dies intestate with Indian heirs of the first or second degree, the equitable interest will descend to these Indian heirs. For example, where an Indian husband is married to a non-Indian wife and they have several children who qualify for membership in a tribe and the Indian husband/father dies, some or all of his interest in trust or restricted lands may be inherited by his non-Indian spouse, and she will only receive a non-Indian estate in Indian land. If she then dies intestate with children who qualify for membership in an Indian tribe, these children will inherit a full equitable interest—in trust—in the interest owned by their Indian father and then inherited by their non-Indian mother. To continue this example, if the holder of a "non-Indian estate in Indian land" dies without any Indian heirs of the first or second degree, and without having either devised or conveyed the interest, the equitable interest in the trust or restricted land will escheat to the tribe that exercises jurisdiction over the land. (207(c)(2)) Before the interest escheats, however, the Indian co-owners of the parcel may acquire the interest. (207(c)(3)) Also, the Secretary may acquire any interest devised to a non-Indian.

With respect to interests that are located off-reservation, as long as the interest is devised to or inherited by an Indian, including a person who is at least eligible for membership in an Indian tribe, the interest will pass in trust. (§ 207(c)(6)) If the heir or devisee is not eligible for membership in a tribe, the interest will pass in fee to the non-Indian. Because this provision only applies outside of Indian reservations, this provision includes a very broad definition for "Indian reservation" to limit the application of this provision, thereby ensuring that this provision will not apply to those interests in trust or restricted lands that are located in an area where a tribe has a basis for re-establishing its land base.

Approval of Agreements.—207(d) Under present law, the probate of an intestate Indian decedent who dies with an estate containing five interests in trust or restricted land will generally result in each heir taking a one-fifth interest in each of the five parcels. In many instances there is no reason to believe that a decedent was

either aware of this particular division of property or that he intended this result. Nevertheless, undivided co-tenancy with no right of survivorship is generally the result of intestate probate of an estate containing trust or restricted land. Subsection (d) of section 207 will provide the Department with an important opportunity to prevent any further needless fractionation. Under this provision, the official authorized to adjudicate the probate of trust lands will also have the authority to approve agreements involving the exchange of trust and restricted lands between a decedent's heirs and devisees. For example, when an Indian dies with an estate containing five interests in trust or restricted land, each of the heirs may agree to receive the decedent's full interest in one of the five parcels and disclaim his or her interest in the remaining parcels. Such agreements will allow each of the beneficiaries to decide for himself or herself which part of the estate is most valuable to them. It will also help reduce the needless, unintended, or unnecessary incidents of fractionation.

The Secretary is authorized to promulgate regulations for implementing this provision. Such regulations may provide for the appointment of guardians to select interests on behalf of minors or those adjudged incompetent. Such regulations may also address how this provision may be implemented with respect to heirs that cannot be located.

Estate Planning Assistance.—207(e) Probate may be characterized as the process of fulfilling the wishes of a decedent with respect to his or her estate. Obviously it is easiest to fulfill these wishes if the decedent leaves a document, such as a will, with explicit guidance concerning the division of his or her estate. In addition, the record before the Committee includes testimony urging the Federal government to provide greater assistance in the drafting of wills and similar testamentary devises. The Committee agrees that a comprehensive legislative approach towards the probate of trust or restricted lands should explicitly authorize estate planning assistance. The Committee recognizes that this estate planning assistance program must compete with the ongoing multifaceted effort to reform the Department's trust management programs; and that other Congressional committees, as well as the Executive Branch of the Federal government, have a role in deciding which priorities and programs are funded, and at what levels. Nevertheless, the Committee believes that as the Executive and Legislative Branches of government are considering options for reducing "needless" or unintended fractionation of trust or restricted lands, both branches should consider estate planning assistance along with the other pilot projects being pursued, including the program established by section 213.

To encourage innovative approaches towards estate planning assistance, S. 1586 includes provisions that authorize the Secretary to enter into contracts with other entities to establish or foster estate planning assistance in Indian country.

Notification.—Subsection 207(f) directs the Secretary to provide notice of the effects of the Indian Land Consolidation Act Amendments of 2000 on Indian landowners. The notice is also to provide information on estate planning options and, where available, opportunities for estate planning assistance. The Secretary is to certify that he has provided notice as required by this Act. Most of the

provisions of section 207 will not become effective until one year after the Secretary provides this notice and certifies that it was provided.

The amendment approved by the Committee amends the ILCA by adding eight new sections to the ILCA, sections 213–220.

Pilot Program.—Section 213. This section establishes a pilot program for the acquisition of fractional interests. A similar acquisition project was established by the Fiscal Year 2000 Appropriation for the Interior Department. Under this section, the Secretary will acquire interests in trust or restricted lands from their current owners. In almost all respects, the Secretary will hold the interest he acquires in trust for the tribe just like other land held in trust. However, the Secretary is to retain any income attributed to the interest until he collects the purchase price paid for the interest. After being reimbursed from such revenues or if the Secretary determines that it is unlikely the interest will produce enough revenue to repay the government, the interest will be treated like any other interest held in trust by the United States for the tribe.

The Interior Department testified that this pilot program will significantly reduce the costs associated with its responsibility to keep track of undivided fractional interests while fulfilling other Federal objectives. However, Indian tribes and Indian landowners have expressed concern that the program may become increasingly "bureaucratic," with resources directed at administering the program and not in acquiring land. They also point to some situations, particularly in the great plains, where revenue derived from lands acquired with Department of Agriculture loans is inadequate to repay these loans. These critics of this pilot project argue that the proceeds from this program may produce greater benefit if they were directed at other elements of the land consolidation effort, including estate planning, tribal probate code drafting, or a loan program to assist individuals and tribes who wish to acquire fractional interests. In response to these concerns, the bill reported by the Committee makes this program a three year pilot project. This will ensure that those concerned with land consolidation, including the Department, will continue to consider alternatives to this project. The Secretary is required to report back to the Congress on the feasibility of expanding the program to include individuals and tribes.

Requirements.—Section 213(b). As approved by the Committee S. 1586 directs the Secretary to consider the policies of the ILCA in implementing the program. In addition, the program is intended to give priority to the acquisition of interests of 2% or less. The Secretary is to consult with the tribal government and, where applicable, coordinate with a tribe's land acquisition program. The Secretary may enter into agreements with a tribe to implement parts of the program; however, under subsection (d), these contracts are not governed by the provisions of the Indian Self-Determination and Education Assistance Act. The Committee recognizes that some Indian tribes manage most or all of the administrative elements of the real estate program on their reservations. In these instances, the Committee assumes that the Secretary will prefer to contract with the tribe to provide some or most of the elements of the acquisition program. For example, the Secretary may contract with the tribe to provide valuations of allotments. Because the growing number of fractional interests is interfering with many of

the Department of Interior's programs and is seriously hindering the Federal government's ability to discharge its trust obligation, the Committee believes it is best to commit the resources appropriated for this program directly to the acquisition of fractional interests. By making the Self-Determination Act inapplicable to this program, the Secretary will have more discretion to decide where to acquire interests. This will also focus resources more directly on the acquisition program.

Sale of Interest to Landowners.—Section 213(c). S. 1586 attempts to balance the interest of Indian tribes, who wish to reconstitute their land-holdings, with Indian owners of trust or restricted lands, who may wish to consolidate the interests they own in trust or restricted lands. This subsection allows Indian co-owners to obtain the fractional interests acquired by the Secretary under the pilot project. In order to obtain such interests, the Indian co-owner must own 5% or more of the undivided interests in a parcel. Where a tribe is already trying to obtain all of the undivided interests in a parcel, a tribe must approve a transaction if it already owns 10% or more of the undivided interest in a parcel. Because tribes might object to a provision that allows private individuals to acquire such interests on the grounds that the pilot project will result in land passing out of trust, the Secretary is not authorized to approve applications to terminate the trust status or remove restrictions from a parcel acquired under this subsection.

Administration of Acquired Fractional Interests.—Section 214. This new section provides authority for the use and leasing of interests acquired pursuant to the acquisition program. Subsection (a) provides that an Indian tribe may approve leases for any interest acquired by the Secretary under section 213. In general, the tribe will be one of many joint owners in each of the parcels acquired by the Secretary pursuant to section 213. Subsection (b) provides that until the price paid for the interest has been recovered, all of the revenue attributed to the parcel shall be paid to the fund established by section 216. Also, the provision of the ILCA that provides for majority approval of leases, section 220(b), will apply to interests held for the tribe by the Secretary. Subsection (c) provides that the use of lands where a tribe possesses a fractional interest under section 213 does not make the tribe a party to the lease. This section employs very broad language to eliminate any argument that either a tribe's immunity, or its other governmental authority is altered by a lease that the Secretary approves on behalf of the tribe.

In some instances, it will be more efficient for the Secretary to immediately transfer the interest to the tribe. For example, if the interest is producing little or no income, it will probably be more cost-effective to immediately transfer the interest to the tribe that exercises jurisdiction over the parcel. This will save the Federal government from maintaining an account for the tribal interest. Similarly, changes in the value of land or commodities associated with the land may alter the economic assumptions made when the land was first acquired. In either of these circumstances, subsection (d) directs the Secretary to cease administering the interest under the acquisition program and transfer the interest directly to the tribe. This provision, section 207(b)(2), is included to address the Committee's concern that the BIA should not incur costs associ-

ated with carrying an interest on the books when it becomes clear that these costs will exceed the amount it is trying to recoup.

Establishing Fair Market Value.—Section 215. As the Committee has considered options for facilitating transactions involving trust and restricted lands, it is clear that the costs associated with appraising lands is one of the most significant impediments to the consolidation of these interests. For example, if an Indian wishes to exchange his interest in land with another Indian, each of the parcels of land may be appraised to ensure that Secretary is not violating his trust obligation by approving the transaction. Such appraisals may cost hundreds or over one thousand dollars for each parcel, even if each interest to be exchanged is worth only a fraction of that cost. If the Secretary had to acquire a full appraisal before acquiring each interest under Section 213, the cost of appraisals would probably exceed the cost of the acquired interests. To address this concern, section 215 allows the Secretary to employ a system based on an appropriate geographical unit for establishing the fair market value of lands or interests in land. This section does not give the Secretary license to adopt arbitrary land values based on speculation; obviously the procedures established by the Secretary must be rational and not produce arbitrary results. The Committee notes that the Department is actively engaged in an effort to update and modernize its processes for appraising and evaluating Indian lands. The Committee believes this process will assist its ability to establish the processes authorized by Section 215.

Section 216. Acquisition Fund.—This fund will be the depository for money appropriated for the acquisition of lands under Section 213. Funds will also be deposited into the fund from the proceeds from any lease or use of allotted lands, or their sale to Indian coowners. This section also provides that the Secretary will not deposit funds into the fund from an interest that exceeds the amount paid for the interest by the Secretary.

Section 217. Trust and restricted land transactions

Policy.—Subsection 217(a). The first subsection of this section states the Federal policy of consolidating interests in Indian lands. Such transactions include not only transactions involving Indians and Indian tribes, but also between individual Indians. This statement is important because the Committee believes that transactions between individual Indians, as well as transactions between Indians and tribal governments, can and should play a part in reconstituting the Indian land base. Such transactions should not be limited to interests in trust or restricted land owned by those individuals meeting the definition of Indian. To the extent that interests are still held in trust, this policy supports their acquisition by any person meeting the definition of Indian.

Sales and Exchanges.—Subsection 217(b). This subsection facilitates transactions by eliminating the requirement for an appraisal of an interest. Instead, Indians selling or exchanging an interest in land must be provided with an estimate of the value of the interest. In addition, a sale or exchange may be made for less than fair market value. The Committee recognizes that transactions involving allotted lands may involve a number of intangible factors. For example, individuals may own interests on reservations that are a great

distance from where they reside. Such individuals may be willing to sell or exchange these interests in order to acquire reservation lands near their home. Because the Secretary has general responsibility to obtain the best value for transactions involving trust lands, he may refuse to approve a transaction based solely on the disparity between the land's appraised value and the return consideration. The Secretary would still have the authority to disapprove questionable transactions. Nevertheless, the Secretary would have protection from breach of trust claims for transactions that are consistent with this Section. In order to ensure that this subsection does not result in the dissipation of trust lands, interests acquired under its provisions may not be taken out of trust for five years after a conveyance is approved.

Acquisition of Interest by Secretary.—Subsection 217(c) addresses situations where some or most of a parcel is held in trust, but some undivided interests in the same parcel have passed out of trust. In these situations, when the land is located within a reservation, the Secretary is to take these lands into trust forthwith. These provisions will facilitate greater consolidation and assist in the administration of interests in trust and restricted lands. In particular, having on-reservation parcels that are only partially held in trust interferes with a tribe's ability to consolidate such interests and each Indian owner's ability to exchange interests in order to consolidate their holdings. Since these undivided interests in these lands are already in trust and located within a reservation, implementing this provision should be relatively simple. Subsection (d) ensures that the trust status of trust or restricted lands is not affected by the sale or exchange.

Land Ownership Information.—Subsection 217(e) addresses another major impediment to transactions directed at consolidating interests in trust or restricted lands. In most instances, the Committee assumes that the BIA will readily provide information about land ownership, especially when the request comes from an Indian who is seeking information about land on the reservation where he or she resides, is a member, owns interests, or has some other connection. This subsection will eliminate any ambiguity or confusion about the Secretary's authority to provide such information.

Section 218. Reports to Congress.—Because of the urgency that Congress attributes to the problem of land fractionation, the Committee will closely monitor the implementation of the ILCA. The reporting requirements of this section will assist Congress in accomplishing this objective. First, the Secretary will report to Congress on the number of fractional interests acquired under the ILCA and the financial savings associated with those interests. In addition, the findings required by this section will assist the Congress in deciding whether and how the program may be extended to individuals and Indian tribes.

Section 219. Approval of Leases, Rights-of-Way, and Sales of Natural Resources.—This provision follows from a number of recent legislative efforts to make interests in trust and restricted lands more valuable and productive by eliminating the implication that the consent of each undivided interest holder is required for the Secretary to approve a lease, agreement, or the sale of natural resources associated with allotted lands. Such legislation is necessary because 19th and early 20th centuries statutes refer to the lease

or use of these lands upon the approval of "the owner." This raises the question of whether this requires the approval of each undivided interest holder, even when these individuals number in the thousands. Potential lessees are reluctant to incur the costs associated with obtaining the approval of these individuals when it is possible that a lease can be stymied by one owner of a small undivided interest. The Committee intends for this provision to apply to any land that is held in trust for individual Indians.

An increasing number of statutes now provide that the approval of each interest owner is not required for the Secretary to approve the lease or use of allotted lands. These statutes include P.L. 105–188, as amended, and the American Indian Agricultural Resources Management Act, 25 U.S.C. § 3701 et seq. As introduced, S. 1586 tracked these laws by providing for majority approval of leases. Because the BIA has yet to fully implement the majority lease approval provision contained within the Indian Agriculture Act, however, the Committee was responsive to recommendations that the bill should employ a more graduated approach. Thus, as approved by the Committee, the amendment requires unanimous approval of parcels owned by 5 or fewer interest holders; 80% approval of parcels owned by 6–10 owners; 60% for 11–19 owners; and majority approval of parcels owned by 20 or more owners. To assist the Department in implementing this Act, this section provides rules for determining when the number of owners and their undivided ownership interests are "fixed" for purposes of this provision. Also, authority is given for the Secretary to consent on behalf of certain heirs who have not been determined or located.

Subsection (d) provides that a lease approved under this section is binding on each of the parties. However, an Indian tribe that owns a fractional interest shall not be treated as a party to the lease or agreement. Also, no such lease, agreement, and no part of this section shall be construed to affect the sovereignty of the tribe. The broad reference to each tribe's sovereignty is intended to ensure that the provision is not interpreted to apply to a narrow segment of tribal authority, i.e. the tribe's immunity from suit. Instead, this provision contemplates the full array of tribal sovereign attributes. The Secretary will distribute the proceeds from the lease or use of each parcel based on the proportionate ownership of each interest holder.

Subsection (f) ensures that the sliding scale standard for approving non-unanimous leases does not apply to existing or future laws that provide specific standards for the percentage of ownership interests that must approve a lease or agreement.

Section 220. Application to Alaska.—This section makes the ILCA inapplicable to allotments made in Alaska. Neither the Department, Congress, nor academic entities have studied the issues surrounding Alaskan allotments. Thus, it would be premature to have the ILCA apply to these allotments.

Section 5. Judicial review

The notice requirements and grace periods included in the amendment approved by the Committee will provide the owners of undivided interests with the opportunity to alter their estate plans in response to the new law. It is possible, however, that these provisions will delay an interest owner's ability to mount a challenge

to provisions that do not take effect for the one year grace period. To prevent this, this section authorizes owners of trust or restricted lands to bring an administrative challenge to the Act as soon as the Secretary provides the required certification. At the conclusion of such an administrative challenge, a dissatisfied party may seek judicial review. This section is not intended to alter or enlarge the judicial review available in such situations.

Section 6. Authorization of appropriations

This section authorizes an appropriation of up to $8 million for any activities authorized by the ILCA that are not otherwise funded under any other provision of law.

Section 7. Conforming amendments

Irrelevant and discredited portions of the Dawes Act are repealed by this section. In addition, Section 5 of the Dawes Act (25 U.S.C. § 348) is amended by striking a provision that makes state partition law applicable to allotments. Also, a conforming amendment is added to clarify that state laws of intestate succession only apply to the descent of intestate interests to the extent they are inconsistent with the ILCA or an approved tribal probate code.

Subsection (b) includes conforming amendments to 25 U.S.C. §§ 372 and 373 to clarify that the determination of heirs, adjudication of wills, and promulgation of regulations for these functions shall conform with the ILCA.

Subsection (c) includes a conforming amendment to Section 4 of the Indian Reorganization Act, which makes state law of descent and devise applicable to reservations organized under the IRA. The amendment limits the application of such state law if it is inconsistent with the ILCA.

LEGISLATIVE HISTORY

S. 1586 was introduced on September 15, 1999 by Senator Ben Nighthorse Campbell and referred to the Committee on Indian Affairs. On November 4, 1999, the Senate Committee on Indian Affairs held a joint hearing with the Committee on Resources of the House of Representatives.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on March 23, 2000, the Committee on Indian Affairs, by voice vote, adopted an amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to the Senate. Before the bill was delivered to the Clerk of the Senate, the Committee in an open business session on June 14, 2000 adopted an amendment in the nature of a substitute, and ordered the bill reported to the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 cites the short title of the bill as the Indian Land Consolidation Act Amendments of 2000.

Section 2. Findings

Section 2 provides the Congressional findings that provide the context for the bill.

Section 3. Declaration of policy

Section 3 establishes five policies that Congress seeks to achieve with respect to interests of trust or restricted land.

Section 4. Amendments to the Indian Land Consolidation Act

Section 4 makes a number of changes to the existing provisions of the ILCA. This section makes the following changes.

(1) Section 202, Definitions, is amended with a technical amendment to the definition of "tribe;" a new definition of "Indian" that is necessary to conform the bill with redrafted section 207; and a definition for "heirs of the first or second degree."

(2) Section 205, Tribal Land Consolidation Plans, is amended with a technical amendment to the provision which concerns tribal land consolidation plans. Also, this provision is amended with the addition of a provision that makes Secretarial approval unnecessary for certain transactions involving trust and restricted land within a tribe's reservation and jurisdiction.

(3) Section 206, Trial Probate Codes, is rewritten. As with existing law, this section authorizes Indian tribes to establish probate codes for lands within their reservation or otherwise subject to their jurisdiction. Although Secretarial approval is still required, subsection (b) now places limits on the time the Secretary can take to review and approve such codes or amendments to such codes. In addition, the Secretary must now provide a written explanation for the disapproval of any code or amendment submitted by an Indian tribe. As rewritten, a tribe may acquire interests in probate before they are inherited by a non-Indian. Under this provision, subsection (c), a tribe is no longer required to submit a tribal probate code to acquire such interests. Before an interest is acquired by a tribe, the would-be heir or devisee may renounce the interest in favor of Indian and/or retain a life estate. Under a new provision, subsection (d), the Secretary is to establish regulations for the use of findings of fact and conclusions of law by tribal justice systems as proposed findings for use in Departmental adjudications.

(4) Section 207, Descent and Distribution, is rewritten. This section concerns the descent and distribution of interests in trust and restricted land. The first subsection addresses the devise or testamentary disposition of this land. This subsection limits the devise of trust and restricted land to non-Indians. A testator may devise an interest in trust or restricted land to a non-Indian, but that devisee will only obtain a "non-Indian estate in Indian land," an interest defined in subsection (c). Subsection (b) addresses intestate succession. Intestate succession is limited to heirs of the first or second degree, as defined. Non-Indian heirs of the 1st and 2nd degree only receive a "non-Indian estate in Indian land." Subsection (c) describes non-Indian estates in Indian land. The holders of these interests receive a proportionate share of the revenue produced by the parcel of land. Also, they may convey their limited estate, along with full equitable interest, as it was held by the last Indian owner, but only to an Indian. Similarly, if they devise their interest to an Indian or if they die intestate, their Indian heirs will receive

the full equitable estate held by the last Indian owner. If the estate is devised to a non-Indian, the non-Indian devisee obtains a non-Indian estate. The tribe that exercises jurisdiction over the parcel may purchase the interest before the non-Indian estate passes to the non-Indian devisee. To eliminate any question about where title is held while a non-Indian holds a non-Indian estate, §207(c)(5), provides that the Secretary is to be treated as the holder of the remainder interest until it vests in an Indian or an Indian tribe. To address further fractionation, subsections (a) and (b) both include provide for joint tenancy with the right or survivorship (joint tenancy). With respect to testate disposition, a presumption is created, in the absence of express language to the contrary, a devise is presumed to create a joint tenancy. Similarly, if an interest of 5% or less descends to more than one heir by intestate succession the heirs will hold the interest as joint tenancy. Under a new provision, subsection (d), the officials authorized to adjudicate Indian probate may approve agreements between a decedent's heirs and devisees. The Secretary is authorized to promulgate regulations concerning the implementation of the authority for such agreements. Also, subsection (e) provides that the Secretary is to provide probate planning assistance to the extent that amounts are appropriated by Congress for that purpose. Subsection (f) requires the Secretary to provide notice of the amendments, along with estate planning assistance, to Indian tribes and Indian landowners. After the Secretary provides notice in the manner required by the bill, he is to certify that this notice was required and publish notice of this certification in the Federal Register. The effective date of the probate provisions of the amendments is 365 days after this publication.

(5) Eight new sections are added to the ILCA. These are:

Section 213, Pilot Program for the Acquisition of Fractional Interests. The section establishes a three year program for the acquisition fractional interests by the Secretary. Subsection (b) provides requirements for implementing this program including, a requirement that the Secretary shall consult with tribal governments in determining where to direct acquisition resources. Subsection (c) identifies circumstances where the Secretary may convey interests acquired under this program to individual Indian landowners that own pre-existing interests a parcel of trust land.

Section 214, Administration of Acquired Fractional Interests. This section authorizes the leasing and use of interests in land acquired by the Secretary under the pilot project. An exception is provided when the costs of maintaining the interest exceeds its income generation potential. In such instances, the interest is simply to be transferred to the tribe.

Section 215, Establishing Fair Market Value. This section authorizes the Secretary to develop a system for determining how much he will offer to the owners of trust and restricted land for the interests the Department seeks to acquire under the pilot project.

Section 216, Acquisition Fund. This section provides for the creation of an account for the collection and disbursement of revenue appropriated or otherwise available for expenditure under the pilot project.

Section 217, Trust and Restricted Land Transactions. This section establishes a federal policy of facilitating land consolidation

through transactions involving the sale of trust and restricted land to Indians and Indian tribes. Subsection (b) provides that an estimate of value may be used in the place of an appraisal when an Indian owner is selling or exchanging an interest in trust or restricted land. Subsection (c) addresses situations where reservation lands include undivided trust and non-trust interests. Subsection (d) makes clear that the trust or restricted status of land is not affected by its sale or exchange under this section. Subsection (e) provides for gift deeds of trust and restricted land. The Secretary is not to approve an application for land conveyed by gift deed to an Indian for seven years. Subsection (g) provides that land ownership information is to be made available, in order to facilitate activities addressed by the bill, including the consolidation of interests by individual Indian landowners.

Section 218, Reports to Congress. This section directs the Secretary to consult with relevant parties and report to Congress before the pilot project expires. The report shall address the impact of the pilot project and contain findings on whether the program should be extended and/or altered to make resources available to individual Indians and/or Indian tribes.

Section 219, Approval of Leases, Rights of Way. This section clarifies that unanimous approval is not necessary for Secretarial approval of a lease or agreement of allotted land. Under these provisions, if the owners of the specified percentage of undivided interest in a parcel agree to the transaction.

Section 220, Application to Alaska. This section makes the Act inapplicable in the State of Alaska.

Section 5. Judicial review

Section 5 addresses judicial review of the Amendments. Under this section, an individual may bring an administrative challenge against the application of section 217 to their interest in trust and restricted land.

Section 6. Authorization of appropriations

Section 6 authorizes $8 million for provisions of the ILCA, as amended, where appropriations are not otherwise not provided for in Federal law.

Section 7. Conforming amendments

Section 7 makes several changes to existing law to conform those statutes with provisions in the Act.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1586, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 25, 2000.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1586, the Indian Land Consolidation Act Amendments of 2000.

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

Sincerely,

ROBERT A. SUNSHINE
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1586—Indian Land Consolidation Act Amendments of 2000

Summary: S. 1586 would amend laws that regulate how the ownership of interest in Indian allotments (certain parcels of land that are owned by individuals or groups of individuals) is transferred upon the death of the owner. The bill also would authorize the appropriation of $8 million a year, beginning in 2001, to acquire interests in such property from willing sellers and to collect any funds generated from any natural resource leases on this property. CBO estimates that implementing S. 1586 would cost $34 million over the 2001–2005 period, assuming the appropriation of the authorized amounts. Enacting S. 1586 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

S. 1586 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). Indian tribes might incur additional costs to purchase interests in trust or restricted lands as a result of the bill's enactment, but these costs would be voluntary. S. 1586 would impose new private-sector mandates but CBO estimates that the total direct costs of those mandates would not exceed the annual threshold established in UMRA ($109 million in 2000, adjusted annually for inflation) for any of the first five years that the mandates are in effect.

Major provisions: S. 1586 would make several changes to federal laws concerning the ownership of interests in Indian allotted land. In particular, the bill would:

- Authorize the Secretary of the Interior to acquire fractional interests in Indian trust and restricted lands from willing sellers at fair market value and to collect any revenue generated from the leasing of natural resources on that interest until the purchase price is fully recovered by the Secretary;
- Permit the Secretary of the Interior to develop a system for establishing the fair market value of certain Indian lands and improvements of such land;
- Allow any Indian with over 5 percent interest in a parcel of Indian trust or restricted land to purchase an interest acquired by the Secretary of the Interior if that individual reimburses the Secretary for the cost to acquire that interest;

Authorize the Department of the Interior (DOI) to provide estate planning assistance to owners of interest in Indian allotments;

Modify the conditions that the Secretary of the Interior must consider to approve a lease or agreement that affects interest owners of allotted land; and

Require DOI to notify individual Indians and Indian tribes of the changes in law that would occur from enacting S. 1586.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1586 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—				
	2001	2002	2003	2004	2005
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Authorization level	8	8	8	8	8
Estimated outlays	3	7	8	8	8

Basis of estimate: For this estimate, CBO assumes that S. 1586 will be enacted near the start of fiscal year 2001 and that the authorized amounts will be appropriated for each year. We also assume that outlays will follow the historical pattern for the Indian Land Consolidation Pilot Program.

The federal government originally allotted interests in trust and restricted land to individual Indians over a century ago. Over time, the number of owners of such allotted land has grown as owners have passed ownership on to their descendants. The cost to the Bureau of Indian Affairs (BIA) to administer ownership of this property has also grown. S. 1586 would attempt to prevent the further fractionalization of allotted land by amending the Indian Land Consolidation Act.

S. 1586 would authorize the appropriation of $8 million each year for BIA to acquire interest in Indian trust and restricted land, develop a system for establishing the fair market value of such interest, provide Indians with estate planning assistance, and notify individual interest owners and Indian tribes of the changes in this law.

In addition, S. 1586 would authorize BIA to collect any receipts generated from natural resource leases on the allotted land purchased by the Secretary, and to spend such funds in future years to acquire additional interests, subject to appropriation actions. CBO estimates that any receipts to the government under this bill would be insignificant over the next five years, and would depend on the appropriation of amounts necessary to acquire this property.

Under the bill, Indian tribes also could purchase interests that are pending before the Secretary. CBO expects that tribes would choose to purchase the interests in allotments that generate the greatest leasing income. In addition, CBO expects that owners of interest in allotted land that generates very little income would be more willing to sell their interests to the Secretary than owners of interests that generate a large amount of income from leases. Based on information from BIA and the experience of the Indian Land Consolidation Pilot Program, CBO estimates that, on average, interests purchased by the Secretary would generate a 4 per-

cent to 5 percent return from natural resource leases each year. Thus, we expect that any collections from this provision would not be significant in any of the next five years.

Based on information from BIA, CBO expects that implementing S. 1586 could result in an administrative cost savings to the agency because there would be fewer individual owners of interests in trust and restricted lands. Any such savings would be subject to appropriation action, and CBO estimates that savings would not be significant over the 2001–2005 period.

Pay-as-you-go considerations: None.

Estimated impact on State, local, and tribal governments: S. 1586 contains no intergovernmental mandates as defined in UMRA. The bill would allow all tribal governments to purchase interest in trust or restricted lands if those interests would otherwise be inherited by someone who is not an Indian. Under current law, only tribes with an approved probate code may make such purchases. Any additional expenditures resulting from this change would be voluntary.

Estimated impact on the private sector: By placing new eligibility requirements on the inheritance of fractional interests in Indian trust and restricted lands, S. 1586 would impose new private-sector mandates on those persons who might otherwise inherit such interests under current law. CBO expects that the mandates would affect only a limited number of such persons in the near term. At the earliest, mandates in the bill would take effect only upon the death of an owner of land interests and generally would not affect Indian family members as heirs. Further, to the extent that requirements in the bill would affect some heirs, many such cases would involve only a small fractional interest in land. Thus, CBO estimates that the costs of the mandates in the bill would not exceed the annual threshold established in UMRA ($109 million in 2000, adjusted annually for inflation) for any of the first five years that the mandates are in effect.

Estimate prepared by: Federal Costs: Lanette J. Keith; impact on State, local and tribal governments: Marjorie Miller; impact on the private sector: Natalie Tawil.

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

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1586 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received a letter in support of S. 1586 from the Department of the Interior on November 3, 1999, which letter is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, November 3, 1999.

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

DEAR MR. CAMPBELL: This letter sets forth the views of the Department of the Interior on S. 1586, a bill that will amend the Indian Land Consolidation Act to more fully address the problem of the fractionated ownership of Indian lands. The Department supports S. 1586.

Resolution of the problem of fractionated ownership of Indian lands is critical to the economic viability of Indian country and the successful implementation of the Department of the Interior's ongoing efforts to implement trust reform. The origin of the fractionation problem has been documented many times. Although several treaties provided for the allotment of Indian land, the process became a nationwide policy in 1887 with enactment of the General Allotment Act (GAA). The GAA directed that tribal lands be divided into small parcels and given or "allotted" to individual Indians. The purpose was to accelerate the civilization of the Indians by making them private landowners and, ultimately, to assimilate them into society, at large. Many Indians sold their land, but few assimilated into the surrounding non-Indian communities, resulting in wide-spread homelessness and impoverishment for Indians. By the 1930s it was widely accepted that the GAA had, for the most part, failed. In 1934 Congress, in Section 1 of the Indian Reorganization Act, stopped the further allotment of tribal lands. A direct result of the GAA was the loss of over 100,000,000 acres of land from the Indian trust land base between 1887 and 1934. An indirect result was fractionated ownership of land allotments.

As originally envisioned by the drafters of the GAA, allotments would be held in trust by the United States for their Indian owners for no more than 25 years. At the end of the 25 years, the land would be conveyed in fee simple to its Indian owners. Many allottees died during the 25 years trust period. In addition, it became evident that many allottees continued to need federal protection. As a consequence, Congress enacted limited probate laws and authorized the President to extend the trust period for those individuals who were not competent to manage their lands. The presumption was, however, that at some point in the foreseeable future the lands would be conveyed to their Indian owners free of federal restrictions. As a consequence, Congress did not amend the probate laws ever though it continued to extend the period of trust protection. As individuals died, their property descended to their heirs as undivided "fractional" interests in the allotment. In other words, if an Indian owning a 160 acre allotment died and had four heirs, the heirs did not inherit 40 acres each. Rather, they each inherited a 1/4th interest in the entire 160 acre allotment. As the years passed, fractionation has expanded exponentially to the point where there are hundreds of thousands of tiny fractional interests spread throughout Indian country.

The fractionated ownership of Indian lands is taxing the ability of the Department to administer and maintain records on Indian lands. Fractionated heirship also threatens the integrity and viabil-

ity of the Department's trust funds management. The Department is charged by statute with maintaining Federal Indian land records on these hundreds of thousands of fractional interests and with probating the estates of every Indian individual who owns a fractional interest in an allotment, regardless of how small that interest may be. The Department also maintains Individual Indian Money (IIM) accounts to receive, distribute, and account for income received from these fractional interests. In many cases, the fractions are so small that the cost of administering the fractional interests and maintaining the IIM account far exceeds both their value plus any income derived therefrom.

In 1984, Congress attempted to address the fractionation problem with passage of the Indian Land Consolidation Act (ILCA). The ILCA authorized the buying, selling and trading of fractional interests but, most importantly, it provided for the escheat to the tribes of land ownership interests of less than 2 percent. Over 55,000 of the 2 percent-or-less fractional interests escheated since passage of the ILCA in 1984. However, the problem of fractionation continues to worsen and in fact, since the Supreme Court declared the current escheat provision unconstitutional in *Babbitt* v. *Youpee*, 117 S. Ct. 727 (1997), is accelerating. This is because interests that would have escheated are now passing to the heirs and further fractionating, and because numerous estates will have to be reopened in order to revert the 55,000 escheated interests. The costs of maintaining heirship records and administered the land is inordinately expensive for the BIA. Approximately 50–75 percent ($33 million) of the BIA's realty budget goes to administering these fractional interests making funds unavailable for more productive investments in lands. Other programs such as trust funds management, forestry, range, transportation, and social services, are likewise adversely impacted. Utilization and/or conveyance of the fractionated property by the numerous owners is also difficult because of the need to secure the numerous consents which are required.

In 1994, the Department distributed a consultation package to tribal leaders to address the issue of fractionation and followed it with a letter to owners of trust and restricted Indian lands. The package included a proposal in the form of draft legislation and invited comments and suggestions for alternatives to the concepts contained in the draft legislation. The letter to landowners was sent to more than 126,000 individuals. The landowners letter described the proposal and included a questionnaire. More than 12,000 persons, 90 percent of whom reported themselves as members of federally recognized tribes, responded in writing during 1995. Sixty-five percent (65 percent) of the respondents in the survey of landowners agreed with the basic concepts of consolidating small fractional interests in the tribes through an acquisition program and preventing and slowing further fractionation.

In order for any initiative to have a measurable impact on the fractionated heirship problem, it must have two major components—first, it must eliminate or consolidate the number of existing fractional interests and, second, it must prevent or substantially slow future fractionation. S. 1586 accomplishes both of these objectives. S. 1586 provides an acquisition fund to eliminate existing fractional interests and contains limitations on the devise and

descent of trust property that will materially slow the future fractionation of allotted lands. Savings from the cost of probating Indian estates alone justifies the cost of the acquisition program. The average value of a less than 2 percent fractional interest in allotted lands on twelve reservations studied by the General Accounting Office (GAO) in 1992 was estimated to be less than $200. Comparatively, upon the death of an Indian owner, it costs the BIA between $1,500 and $2,000 to probate the landowner's estate. Additional costs are borne by the Department's Office of Hearings and Appeals. In many cases, the simple fact of the matter is that it will be cheaper to simply acquire the interests than it will be to probate them, allow them to further fractionate, and to pass them on to more heirs, which in turn allows them to continue to fractionate.

In FY 1999 the Congress authorized a fractionated heirship pilot project and appropriated $5 million for that purpose. Thirty-four tribes applied for the pilot. After reviewing the applications and examining such things as the severity of fractionation on the various reservations, the condition of the probate and realty records, the availability of appraisal data, and the tribe's willingness to contribute to the program, three tribes from Wisconsin were selected: Bad River, Lac Courte Oreilles, and Lac du Flambeau. All of these reservations have very old (1850s vintage) pre-GAA allotments. Approximately 85 percent of ALL of the interests on the reservations were less than 2 percent, and several 80 acre allotments had in excess of 1,000 owners. After meeting with the tribes, establishing procedures for determining value, how to make rapid payment to the landowners, and how to speed up the deed recording process, the project was initiated in April of this year.

Initially it was anticipated that notices would be sent to landowners and advertisements placed in local newspapers and perhaps notice of the project announced on local radio stations. However, the opportunity to sell fractional interests spread quickly by word of mouth and the BIA has been inundated with requests to sell interests. To date, over 8,000 interests have been purchased and over 4,000 acres have been returned to the tribes. Over 600 deeds (combining multiple sales of fractional interests into one document) have been recorded and the need for over 250 probates and new IIM accounts have been eliminated. With over $1 million in additional acquisitions currently being processed, the entire $5 million for the pilot project will likely be used to purchase additional fractional interests by February 2000. The success of the pilot project demonstrates not only that the number of fractional interests can be dramatically reduced through an acquisition program, but, more importantly, that there are significant numbers of individual Indians that are in the market to voluntarily dispose of these interests.

S. 1586 addresses one of the most serious ramifications of the fractionated state of Indian land ownership. Before the Secretary can lease land for purposes such as grazing, drilling, mining or rights of way, the owners of that land must approve the lease. In some cases under federal law, such as agriculture, a majority in interest of the owners must approve the lease. In others, such as oil and gas drilling, all owners must approve the lease before it can go forward to the Secretary. With scores or even hundreds of owners on a single allotment, potential lessees simply find it too burdensome or costly to locate and obtain the approval of all owners.

As a result, land frequently goes unleased and the owners lose the economic benefit of their property.

S. 1586 would adopt a uniform standard for all leases, rights-of-way, sales of natural resources or similar transactions regardless of the use to which the property will be put. It would authorize the Secretary to approve such a transaction if it is supported by the owners of a majority of the interests in a parcel of land.

The Department would also like to bring *Sec. 221. Real Estate Transactions Involving Non-Trust Lands*, to your attention. There has been considerable confusion and litigation about whether 25 U.S.C. § 177 applies to lands acquired in fee by Tribes.

The Administration believes that Section 221, as proposed, should be amended to make it clear that § 177 automatically attaches to lands that are purchased in fee by a Tribe if those lands are within the boundaries of its current reservation. Such a provision would greatly enhance the federal and tribal goal, evidenced by statutes such as 25 U.S.C. § 465, of rebuilding the Tribal land bases that were decimated by the allotment of Tribal lands. We believe that such a provision is consistent with the goals of the majority of Tribes, who generally are interested in preserving lands within reservation boundaries in Tribal ownership for the benefit of future generations. The right to sell, mortgage or otherwise dispose of interests in land that are *outside* of current reservation boundaries without Congressional or Secretarial approval will better enable Tribes to pursue economic development and self-sufficiency.

In 1997, the Administration submitted a draft bill that was introduced and hearings were held. Representatives of some of the allottees, principally the Indian Land Working Group, testified on that bill and also presented their own legislative proposal to Committee staff.

Following the hearing, a meeting was held with Senate Committee staff, the Administration and the Indian Land Working Group to discuss the two proposals. The Senate Committee staff then took the comments received at that meeting and drafted S. 1586. The Committee staff has done a remarkable job in combining the best features of both proposals and are to be commended for their efforts. There will, no doubt, be concern expressed by some witnesses over the inclusion of an escheat provision in S. 1586 and emphasis placed on the fact that the Supreme Court has twice ruled that the escheat provisions in the existing version of ILCA are unconstitutional. To that argument we quote from the final paragraph of the Supreme Court's opinion in *Hodel* v. *Irving:*

> There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. [Citation omitted.] It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interest by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.

S. 1586 was drafted in full awareness of and in response to the quoted language. S. 1586 specifically addresses defects that rendered the earlier versions of the ILCA unconstitutional. First, it requires that notice of the amendments be given to the allottees within six months of passage of the amendments and gives them a minimum of eighteen months to comply with the amendments. Second, it also has liberal provisions of the devise of property and does not totally prohibit the devise of less than 2 percent interests as the earlier versions of the ILCA did.

The Administration wholeheartedly supports passage of S. 1586. We will submit a list of technical corrections and relatively minor suggestions to the Committee, shortly. Passage of S. 1586 is, in fact, imperative if the current trust reform initiative is to succeed. Without a legislative resolution of the fractionation problem, the ever quickening growth of fractionation will outpace any efforts to implement meaningful trust reform.

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

Sincerely,

KEVIN GOVER,
Assistant Secretary for Indian Affairs.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 1586 will result in the following changes in 25 U.S.C. 2201, et seq., and 25 U.S.C. §§ 331, 332, 333, 348, 373, and 464, with existing language which is to be deleted in black brackets and the new language to be added in italic:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Land Consolidation Act Amendments of 2000".

SEC. 2. FINDINGS.

Congress finds that—

(1) in the 1800's and early 1900's, the United States sought to assimilate Indian people into the surrounding non-Indian culture by allotting tribal lands to individual members of Indian tribes;

(2) as a result of the allotment Acts and related Federal policies, over 90,000,000 acres of land have passed from tribal ownership;

(3) many trust allotments were taken out of trust status, often without their owners consent;

(4) without restrictions on alienation, allotment owners were subject to exploitation and their allotments were often sold or disposed of without any tangible or enduring benefit to their owners;

(5) the trust periods for trust allotments have been extended indefinitely;

(6) because of the inheritance provisions in the original treaties or allotment Acts, the ownership of many of the trust allotments that have remained in trust status has become

fractionated into hundreds or thousands of interests, many of which represent 2 percent or less of the total interests;

(7) Congress has authorized the acquisition of lands in trust for individual Indians, and many of those lands have also become fractionated by subsequent inheritance;

(8) the acquisitions referred to in paragraph (7) continue to be made;

(9) the fractional interests described in this section 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;

(10) in Babbitt v. Youpee (117 S Ct. 727 (1997)), the United States Supreme Court found that the application of section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) to the facts presented in that case to be unconstitutional, forcing the Department of the Interior to address the status of thousands of undivided interests in trust and restricted lands;

(11)(A) on February 19, 1999, the Secretary of Interior issued a Secretarial Order which officially reopened the probate of all estates where an interest in land was ordered to escheat to an Indian tribe pursuant to section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206); and

(B) the Secretarial Order also directed appropriate officials of the Bureau of Indian Affairs to distribute such interests "to the rightful heirs and beneficiaries without regard to 25 U.S.C. 2206";

(12) in the absence of comprehensive remedial legislation, the number of the fractional interests will continue to grow exponentially;

(13) the problem of the fractionation of Indian lands described in this section is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal law.

(14) any devise or inheritance of an interest in trust or restricted Indian lands is based on Federal law; and

(15) consistent with the Federal policy of tribal self-determination, the Federal Government should encourage the recognized tribal government that exercises jurisdiction over a reservation to establish a tribal probate code for that reservation.

SEC. 3. DECLARATION OF POLICY.

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.

25 U.S.C. 2201

§ 2201. Definitions

For the purpose of this chapter—

[(1) "tribe"] *"Indian tribe" or "tribe"* means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

[(2) "Indian" means any person who is a member of a tribe or any person who is recognized as an Indian by the Secretary of the Interior;] *(2) "Indian" means any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe at the time of the distribution of the assets of a decedent's estate;*

(3) "Secretary" means the Secretary of the Interior; [and]

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

(5) "heirs of the first or second degree" means parents, children, grandchildren, grandparents, brothers and sisters of a decedent.

25 U.S.C. 2204

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

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

(b) *CONDITIONS APPLICABLE TO PURCHASE.—Subsection (a) applies on the condition that—*

(1) * * *

(2) [If] *if*, at any time within five years following the date of acquisition of such land by an individual pursuant to this section, such property is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date it is notified of such offer or petition to acquire such property by paying to the owner the fair market value as determined by the Secretary; *and*

[(3) all purchases and sales initiated under this section shall be subject to approval by the Secretary.] *(3) the approval of the Secretary shall be required for a land sale initiated under this section, except that such approval shall not be required with respect to a land sale transaction initiated by an Indian tribe that has in effect*

a land consolidation plan that has been approved by the Secretary under section 204.

25 U.S.C. 2205

§ 2205. [Descent and distribution of trust or restricted or controlled lands; tribal ordinance barring nonmembers of tribe or non-Indians from inheritance by devise or descent; limitation on life estate

[(a) DESCENT OR DISTRIBUTION.—Notwithstanding any other provision of law, any Indian tribe, subject to approval by the Secretary, may adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction, and may provide that nonmembers of the tribe or non-Indians shall not be entitled to receive by devise or descent any interest or trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction: Provided, That in the event a tribe takes such action—

[(1) if an Indian dies intestate, the surviving non-Indian or nonmember spouse and/or children may elect to receive a life estate in as much of the trust or restricted lands as such person or persons would have been entitled to take in the absence of such restriction on eligibility for inheritance and the remainder shall vest in the Indians or tribal members who would have been heirs in the absence of a qualified person taking a life estate;

[(2) if an intestate Indian descendent [FN1] has no heir to whom interests in trust or restricted lands may pass, such interests shall escheat to the tribe, subject to any non-Indian or nonmember spouse and/or children's rights as described in paragraph (1) of this section;

[(3) if an Indian decedent has devised interests in trust or restricted lands to persons who are ineligible for such an inheritance by reason of a tribal ordinance enacted pursuant to this section, the devise shall be voided only if, while the estate is pending before the Secretary for probate, the tribe acquires such interests by paying to the Secretary, on behalf of the devisees, the fair market value of such interests as determined by the Secretary as of the date of the decedent's death: Provided, That any non-Indian or nonmember spouse and/or children of such decedent who have been devised such interests may retain, at their option, a life estate in such interests.

Any ineligible devisee shall also have the right to renounce his or her devise in favor of a person or persons who are eligible to inherit.

[(b) LIFE ESTATE; LIMITATION.—The right to receive a life estate under the provisions of this section shall be limited to—

[(1) a spouse and/or children who, if they had been eligible, would have inherited an ownership interest of 10 per centum or more in the tract of land; or

[(2) a spouse and/or children who occupied the tract as a home at the time of the decedent's death.]

Tribal Probate Codes; Acquisitions of Fractional Interests by Tribes

"(a) TRIBAL PROBATE CODES.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust or restricted lands that are—

"(A) located within that Indian tribe's reservation; or

"(B) otherwise subject to the jurisdiction of that Indian tribe.

"(2) POSSIBLE INCLUSIONS.—A tribal probate code referred to in paragraph (1) may include—

"(A) rules of intestate succession; and

"(B) other tribal probate code provisions that are consistent with Federal law and that promote the policies set forth in section 3 of the Indian Land Consolidation Act Amendments of 2000.

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

"(b) SECRETARIAL APPROVAL.—

"(1) IN GENERAL.—Any tribal probate code enacted under subsection (a), and any amendment to such a tribal probate code, shall be subject to the approval of the Secretary.

"(2) REVIEW AND APPROVAL.—

"(A) IN GENERAL.—Each Indian tribe that adopts a tribal probate code under subsection (a) shall submit that code to the Secretary for review. Not later than 180 days after a tribal probate code is submitted to the Secretary under this paragraph, the Secretary shall review and approve or disapprove that tribal probate code.

"(B) CONSEQUENCE OF FAILURES TO APPROVE OR DISAPPROVE A TRIBAL PROBATE CODE.—If the Secretary fails to approve or disapprove a tribal probate code submitted for review under subparagraph (A) by the date specified in that subparagraph, the tribal probate code shall be deemed to have been approved by the Secretary, but only to the extent that the tribal probate code is consistent with Federal law and promotes the policies set forth in section 3 of the Indian Land Consolidation Act Amendments of 2000.

"(C) CONSISTENCY OF TRIBAL PROBATE CODE WITH ACT.—The Secretary may not approve a tribal probate code, or any amendment to such a code, under this paragraph unless the Secretary determines that the tribal probate code promotes the policies set forth in section 3 of the Indian Land Consolidation Act Amendments of 2000.

"(D) EXPLANATION.—If the Secretary disapproves a tribal probate code, or an amendment to such a code, under this paragraph, the Secretary shall include in the notice of disapproval to the Indian tribe a written explanation of the reasons for the disapproval.

"(E) AMENDMENTS.—

"(i) IN GENERAL.—Each Indian tribe that amends a tribal probate code under this paragraph shall submit the amendment to the Secretary for review and ap-

proval. Not later than 60 days after receiving an amendment under this subparagraph, the Secretary shall review and approve or disapprove the amendment.

"(ii) CONSEQUENCE OF FAILURE TO APPROVE OR DISAPPROVE AN AMENDMENT.—If the Secretary fails to approve or disapprove an amendment submitted under clause (i), the amendment shall be deemed to have been approved by the Secretary, but only to the extent that the amendment is consistent with Federal law and promotes the policies set forth in section 3 of the Indian Land Consolidation Act of 2000.

"(3) EFFECTIVE DATES.—A tribal probate code approved under paragraph (2) shall become effective on the later of—

"(A) the date specified in section 207(f)(5); or

"(B) 180 days after the date of approval.

"(4) LIMITATIONS.—

"(A) TRIBAL PROBATE CODES.—Each tribal probate code enacted under subsection (a) shall apply only to the estate of a decedent who dies on or after the effective date of the tribal probate code.

"(B) AMENDMENTS TO TRIBAL PROBATE CODES.—With respect to an amendment to a tribal probate code referred to in subparagraph (A), that amendment shall apply only to the estate of a descendant who dies on or after the effective date of the amendment.

"(5) REPEALS.—The repeal of a tribal probate code shall—

"(A) not become effective earlier than the date that is 180 days after the Secretary receives notice of the repeal; and

"(B) apply only to the estate of a decedent who dies on or after the effective date of the repeal.

"(c) AUTHORITY AVAILABLE TO INDIAN TRIBES.—

"(1) APPLICATION.—The recognized tribal government that has jurisdiction over an Indian reservation (as defined in section 207(c)(5)) may exercise the authority provided for in paragraph (2).

"(2) AUTHORITY TO MAKE PAYMENTS IN LIEU OF INHERITANCE OF INTEREST IN LAND.—

"(A) PROHIBITION.—An individual who is not an Indian shall not be entitled to receive by devise or descent any interest in trust or restricted land, except by reserving a life estate under subparagraph (B)(ii), within the reservation over which a tribal government has jurisdiction if, while the decedent's estate is pending before the Secretary, the tribal government referred to in paragraph (1) pays to the Secretary, on behalf of such individual, the value of such interest. The interest for which payment is made under this subparagraph shall be held by the Secretary in trust for the tribal government.

"(B) EXCEPTION.—

"(i) IN GENERAL.—Subparagraph (A) shall not apply to any interest in trust or restricted land if, while the decedent's estate is pending before the Secretary, the ineligible non-Indian heir or devisee described in such

subparagraph renounces the interest in favor of a person or persons who are otherwise eligible to inherit.

"(ii) RESERVATION OF LIFE ESTATE.—The non-Indian heir or devisee described in clause (i) may retain a life estate in the interest and convey the remaining interest to an Indian person.

"(iii) PRESUMPTION.—In the absence of any express language to the contrary, a conveyance under clause (ii) is presumed to reserve to the life estate holder all income from the lease, use, rents, profits, royalties, bonuses, or sales of natural resources during the pendency of the life estate and any right to occupy the tract of land as a home.

"(C) PAYMENTS.—With respect to payments by a tribal government under subparagraph (A), the Secretary shall—

"(i) upon the request of the tribal government, allow a reasonable period of time, not to exceed 2 years, for the tribal government to make payments of amounts due pursuant to subparagraph (A); or

"(ii) recognize alternative agreed upon exchanges of consideration between the ineligible non-Indian and the tribe in satisfaction of the payment under subparagraph (A).

"(d) USE OF PROPOSED FINDINGS BY TRIBAL JUSTICE SYSTEMS.—

"(1) TRIBAL JUSTICE SYSTEM DEFINED.—In this subsection, the term 'tribal justice system' has the meaning given that term in section 3 of the Indian Tribal Justice Act (25 U.S.C. 3602).

"(2) REGULATIONS.—The Secretary by regulation may provide for the use of findings of fact and conclusions of law, as rendered by a tribal justice system, as proposed findings of fact and conclusions of law in the adjudication of probate proceedings by the Department of the Interior."

25 U.S.C. 2206

§ 2206.[Escheat to tribe of trust or restricted or controlled lands; fractional interest; Indian tribal code

[(a) ESCHEAT TO TRIBE; REBUTTABLE PRESUMPTION.—No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

[(b) ESCHEATABLE FRACTIONAL INTEREST.—Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

[(c) ADOPTION OF INDIAN TRIBAL CODE.—Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.]

Descent and Distribution; Escheat of Fractional Interests

"(a) TESTAMENTARY DISPOSITION.—

"(1) IN GENERAL.—Except as provided in this section, interests in trust or restricted land may be devised only to—

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

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

"(2) NON-INDIAN ESTATE.—Any devise not described in paragraph (1) shall create a non-Indian estate in Indian land as provided for under subsection (c).

"(3) JOINT TENANCY WITH RIGHT OF SURVIVORSHIP.—If a testator devises interests in the same parcel of trust or restricted land to more than 1 person, in the absence of express language in the devise to the contrary, the devise shall be presumed to create a joint tenancy with right of survivorship.

"(b) INTESTATE SUCCESSION.—

"(1) IN GENERAL.—Subject to paragraphs (2) and (3), with respect to an interest in trust or restricted land passing by intestate succession, only a spouse or heirs of the first or second degree may inherit such an interest.

"(2) NON-INDIAN ESTATE.—Notwithstanding paragraph (1), a non-Indian spouse or non-Indian heir of the first or second degree may only receive a non-Indian estate in Indian land as provided for under subsection (c).

"(3) JOINT TENANCY.—

"(A) IN GENERAL.—Unless modified by a tribal probate code that is approved under section 206—

"(i) any heirs of the first or second degree that inherit an interest that constitutes 5 percent or more of the undivided interest in a parcel of trust or restricted land, shall hold such interest as tenants in common; and

"(ii) any heirs of the first or second degree that inherit an interest that constitutes less than 5 percent of the undivided interest in a parcel of trust or restricted land, shall hold such interest as joint tenants with the right of survivorship.

"(B) RENOUNCING OF RIGHTS.—The heirs who inherit an interest as tenants in common with a right of survivorship under subparagraph (A)(ii) may renounce their right of survivorship in favor of one or more of their co-owners.

"(4) ACQUISITION OF INTEREST BY INDIAN CO-OWNERS.—An Indian co-owner of a parcel of trust or restricted land may prevent the escheat of an interest in Indian lands for which there is no legal heir by paying into the decedent's estate, the fair

market value of the interest in such land. If more than 1 Indian co-owner offers to pay for such interest, the highest bidder shall obtain the interest. If no such offer is made, the interest will escheat to the tribe that exercises jurisdiction over the land.

"(c) Non-Indian Estates.—

"(1) RIGHTS OF NON-INDIAN ESTATE HOLDERS.—

"(A) IN GENERAL.—An individual who receives a non-Indian estate in Indian land under subsection (a)(2) or (b)(2)—

"(i) shall receive a proportionate share of the proceeds of any lease, use, rents, profits, royalties, bonuses, or sale of natural resources based on their share of the decedent's interest in such land; and

"(ii) may—

"(I) convey or deed by gift the decedent's interest in trust or restricted land to an Indian or the tribe with jurisdiction over the land; or

"(II) devise the decedent's interest to either an Indian or an Indian tribe as provided for in subsection (a)(1) or a non-Indian as provided for in subsection (a)(2).

"(B) DECEDENT'S INTEREST.—In this section, the term 'decedent's interest' means the equitable title held by the last Indian owner of an interest in trust or restricted lands.

"(2) ESCHEAT AND INTESTATE SUCCESSION.—If the holder of a non-Indian estate in Indian land dies without having devised or conveyed the interest of the individual under paragraph (1)(A)(ii), the decedent's interest in the trust or restricted land involved shall—

"(A) descend to the non-Indian estateholder's Indian spouse or Indian heirs of the first or second degree as provided for in subsection (b)(3); or

"(B) in the case of a decedent that does not have an Indian spouse or heir of the first or second degree, descend to the Indian tribe having jurisdiction over the trust or restricted lands.

"(3) ACQUISITION OF INTEREST BY INDIAN CO-OWNERS.—An Indian co-owner of a parcel of trust or restricted land may prevent the escheat of an interest to the tribe under paragraph (2) by paying into the estate of the owner of a non-Indian estate in Indian land the fair market value of the interest. If more than 1 Indian co-owner offers to pay for such interest, the highest bidder shall obtain the interest.

"(4) DEVISE OF INTEREST.—If the owner of a non-Indian estate in Indian land devises the interest in such land to a person who is not an Indian, at the discretion of the Secretary and subject to the availability of appropriations, the Secretary may, pursuant to section 213, acquire such interest, with or without the consent of the devisee, by depositing the value of the interest in the estate of the owner of the non-Indian estate in Indian land.

"(5) RULE OF CONSTRUCTION.—

"(A) IN GENERAL.—With respect to a decedent's interest in trust or restricted lands under this subsection, until such time as an Indian or an Indian tribe acquires such interest

through inheritance, escheat, or conveyance, the Secretary shall be treated as the holder of the remainder from the life estate.

"(B) LIMITATION.—Subparagraph (A) shall not be construed to authorize the Secretary to retain any of the proceeds from the lease, use, rents, profits, royalties, bonuses, or sale of natural resources with respect to the trust or restricted lands involved.

"(6) DESCENT OF OFF-RESERVATION LANDS.—

"(A) INDIAN RESERVATION DEFINED.—For purposes of this paragraph, the term 'Indian reservation' includes lands located within—

"(i)(I) Oklahoma; and

"(II) the boundaries of an Indian tribe's former reservation (as defined and determined by the Secretary);

"(ii) the boundaries of any Indian tribe's current or former reservation; or

"(iii) any area where the Secretary is required to provide special assistance or consideration of a tribe's acquisition of land or interests in land.

"(B) DESCENT.—Upon the death of an individual holding an interest in trust or restricted lands that are located outside the boundaries of an Indian reservation and that are not subject to the jurisdiction of any Indian tribe, that interest shall descend either—

"(i) by testate or intestate succession in trust to an Indian; or

"(ii) in fee status to any other devises or heirs.

"(d) APPROVAL OF AGREEMENTS.—The official authorized to adjudicate the probate of trust or restricted lands shall have the authority to approve agreements between a decedent's heirs and devisees to consolidate interests in trust or restricted lands. The agreements referred to in the preceding sentence may include trust or restricted lands that are not a part of the decedent's estate that is the subject of the probate. The Secretary may promulgate regulations for the implementation of this subsection.

"(e) ESTATE PLANNING ASSISTANCE.—

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

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

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

"(B) assist Indian landowners in accessing information pursuant to section 217(g).

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

"(f) NOTIFICATION TO INDIAN TRIBES AND OWNERS OF TRUST OR RESTRICTED LANDS.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Indian Land Consolidation Act Amendments

of 2000, the Secretary shall notify Indian tribes and owners of trust or restricted lands of the amendments made by the Indian Land Consolidation Act Amendments of 2000.

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

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

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

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

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

"(B) through the Federal Register;

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

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

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

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

25 U.S.C. 2212

"§ 2212. Pilot Program for the Acquisition of Fractional Interests

"(a) ACQUISITION BY SECRETARY.—

"(1) IN GENERAL.—The Secretary may acquire, at the discretion of the Secretary and with the consent of the owner, except as provided in section 207(c)(4), and at fair market value, any fractional interest in trust or restricted lands.

"(2) AUTHORITY OF SECRETARY.—

"(A) IN GENERAL.—The Secretary shall have the authority to acquire interests in trust or restricted lands under this section during the 3-year period beginning on the date of certification that is referred to in section 207(f)(5).

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

"(3) INTERESTS HELD IN TRUST.—Subject to section 214, the Secretary shall immediately hold interests acquired under this

Act in trust for the recognized tribal government that exercises jurisdiction over the reservation.

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

"(1) shall promote the policies provided for in section 3 of the Indian Land Consolidation Act Amendments of 2000;

"(2) may give priority to the acquisition of fractional interests representing 2 percent or less of a parcel of trust or restricted land, especially those interests that would have escheated to a tribe but for the Supreme Court's decision in Babbitt v. Youpee, (117 S Ct. 727 (1997));

"(3) to the extent practicable—

"(A) shall consult with the reservation's recognized tribal government in determining which tracts to acquire on a reservation;

"(B) shall coordinate the acquisition activities with the reservation's recognized tribal government's acquisition program, including a tribal land consolidation plan approved pursuant to section 204; and

"(C) may enter into agreements (such agreements will not be subject to the provisions of the Indian Self-Determination and Education Assistance Act of 1974) with the reservation's recognized tribal government or a subordinate entity of the tribal government to carry out some or all of the Secretary's land acquisition program; and

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

"(c) SALE OF INTEREST TO INDIAN LANDOWNERS.—

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

"(2) LIMITATIONS.—

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

"(B) LIMITATION.—With respect to a conveyance under this subsection, the Secretary shall not approve an application to terminate the trust status or remove the restrictions of such an interest."

25 U.S.C. 2213

"§ 2213. Administration of Acquired Fractional Interests, Disposition of Proceeds

"(a) IN GENERAL.—Subject to the conditions described in subsection (b)(1), an Indian tribe receiving a fractional interest under section 213 may, as a tenant in common with the other owners of the trust or restricted lands, lease the interest, sell the resources, consent to the granting of rights-of-way, or engage in any other transaction affecting the trust or restricted land authorized by law.

"(b) CONDITIONS.—

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

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

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

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

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

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

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

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

"(A) the Secretary makes a finding that—

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

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

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

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

"(c) EFFECT ON INDIAN TRIBE.—

"(1) IN GENERAL.—Paragraph (2) shall apply with respect to any undivided interest in allotted land held by the Secretary in trust for a tribe if a lease or agreement under subsection (a) is otherwise applicable to such undivided interest by reason of this

section even though the Indian tribe did not consent to the lease or agreement.

"(2) APPLICATION OF LEASE.—The lease or agreement described in paragraph (1) shall apply to the portion of the undivided interest in allotted land described in such paragraph (including entitlement of the Indian tribe to payment under the lease or agreement), and the Indian tribe shall not be treated as being a party to the lease or agreement. Nothing in this section (or in the lease or agreement) shall be construed to affect the sovereignty of the Indian tribe."

25 U.S.C. 2214

"§ 2214. Establishing Fair Market Value

"(a) IN GENERAL.—For purposes of this Act, the Secretary may develop a system for establishing the fair market value of various types of lands and improvements. Such a system may include determinations of fair market value based on appropriate geographic units as determined by the Secretary. Such system may govern the amounts offered for the purchase of interests in trust or restricted lands under section 213.

"(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to prevent the owner of an interest in trust or restricted lands from appealing a determination of fair market value made in accordance with this section."

25 U.S.C. 2215

"§ 2215. Acquisition Fund

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

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

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

"(b) DEPOSITS; USE.—

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

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

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

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

25 U.S.C. 2216

"§ 2216. Trust and Restricted Land Transactions

"(a) POLICY.—It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions involving individual Indians and between Indians and a reservation's recognized tribal government in a manner consistent with the

policy of maintaining the trust status of allotted lands. Nothing in this section shall be construed to apply to or to authorize the sale of trust or restricted lands to a person who is not an Indian.

"(b) SALES AND EXCHANGES BETWEEN INDIANS AND BETWEEN INDIANS AND INDIAN TRIBES.—

"(1) IN GENERAL.—

"(A) ESTIMATE OF VALUE.—Notwithstanding any other provision of law and only after the Indian selling or exchanging an interest in land has been provided with an estimate of the value of the interest of the Indian pursuant to this section—

"(i) the sale or exchange of an interest in trust or restricted land may be made for an amount that is less than the fair market value of that interest; and

"(ii) the approval of a transaction that is in compliance with this section shall not constitute a breach of trust by the Secretary.

"(B) WAIVER OF REQUIREMENT.—The requirement for an estimate of value under subparagraph (A) may be waived in writing by an Indian selling or exchanging an interest in land with an Indian person who is the owner's spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir.

"(2) LIMITATION.—For a period of 5 years after the Secretary approves a conveyance pursuant to this subsection, the Secretary shall not approve an application to terminate the trust status or remove the restrictions of such an interest.

"(c) ACQUISITION OF INTEREST BY SECRETARY.—An Indian, or the recognized tribal government of a reservation, in possession of an interest in trust or restricted lands, at least a portion of which is in trust or restricted status on the date of enactment of the Indian Land Consolidation Act Amendments of 2000 and located within a reservation, may request that the interest be taken into trust by the Secretary. Upon such a request, the Secretary shall forthwith take such interest into trust.

"(d) STATUS OF LANDS.—The sale or exchange of an interest in trust or restricted land under this section shall not affect the status of that land as trust or restricted land.

"(e) GIFT DEEDS.—

"(1) IN GENERAL.—An individual owner of an interest in trust or restricted land may convey that interest by gift deed to—

"(A) an individual Indian; or

"(B) the Indian tribe that exercises jurisdiction over that land.

"(2) SPECIAL RULE.—With respect to any gift deed conveyed under this section, the Secretary shall not require an appraisal and the transaction shall be consistent with this Act and any other provision of Federal law.

"(f) NO TERMINATION.—During the 7-year period beginning on the date on which the Secretary approves a conveyance of an interest in trust or restricted land under subsection (e), the Secretary shall not approve an application to terminate the trust status of, or remove the restrictions on, such an interest.

"(g) LAND OWNERSHIP INFORMATION.—Notwithstanding any other provision of law, the names and mailing addresses of the Indian

owners of trust or restricted lands, and information on the location of the parcel and the percentage of undivided interest owned by each individual, or of any interest in trust or restricted lands, shall, upon written request, be made available to—

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

"(2) the tribe that exercises jurisdiction over the reservation where the parcel is located or any person who is eligible for membership in that tribe; and

"(3) prospective applicants for the leasing, use, or consolidation of such trust or restricted land or the interest in trust or restricted lands."

25 U.S.C. 2217

"§ 2217. Reports to Congress

"(a) IN GENERAL.—Prior to expiration of the authority provided for in section 213(a)(2)(A), the Secretary, after consultation with Indian tribes and other interested parties, shall submit to the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate and the Committee on Resources of the House of Representatives a report that indicates, for the period covered by the report—

"(1) the number of fractional interests in trust or restricted lands acquired; and

"(2) the impact of the resulting reduction in the number of such fractional interests on the financial and realty record-keeping systems of the Bureau of Indian Affairs.

"(b) REPORT.—The reports described in subsection (a) and section 213(a) shall contain findings as to whether the program under this Act to acquire fractional interests in trust or restricted lands should be extended and whether such program should be altered to make resources available to Indian tribes and individual Indian landowners."

25 U.S.C. 2218

"§ 2218. Approval of Leases, Rights-of-Way, and Sales of Natural Resources

"(a) APPROVAL BY THE SECRETARY.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may approve any lease or agreement that affects individually owned allotted land, if—

"(A) the owners of not less than the applicable percentage (determined under subsection (b)) of the undivided interest in the allotted land that is covered by the lease or agreement consent in writing to the lease or agreement; and

"(B) the Secretary determines that approving the lease or agreement is in the best interest of the owners of the undivided interest in the allotted land.

"(2) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to apply to leases involving coal or uranium.

"(b) APPLICABLE PERCENTAGE.—

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

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

"(B) If there are more than 5 such owners, but fewer than 11 such owners, the applicable percentage shall be 80 percent.

"(C) If there are more than 10 such owners, but fewer than 20 such owners, the applicable percentage shall be 60 percent.

"(D) If there are 20 or more such owners, the applicable percentage shall be a majority of the interests in the allotted land.

"(2) DETERMINATION OF OWNERS.—

"(A) IN GENERAL.—For purposes of this subsection, in determining the number of owners of, and their interests in, the undivided interest in the allotted land with respect to a lease or agreement, the Secretary shall make such determination based on the records of the Department of the Interior that identify the owners of such lands and their interests and the number of owners of such land on the date on which the lease or agreement involved is submitted to the Secretary under this section.

"(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed to authorize the Secretary to treat an Indian tribe as the owner of an interest in allotted land that did not escheat to the tribe pursuant to section 207 as a result of the Supreme Court's decision in Babbitt v. Youpee, (117 S Ct. 727 (1997)).

"(c) AUTHORITY OF SECRETARY TO SIGN LEASE OR AGREEMENT ON BEHALF OF CERTAIN OWNERS.—The Secretary may give written consent to a lease or agreement under subsection (a)—

"(1) on behalf of the individual Indian owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined; or

"(2) on behalf of any heir or devisee referred to in paragraph (1) if the heir or devisee has been determined but cannot be located

"(d) EFFECT OF APPROVAL.—

"(1) APPLICATION TO ALL PARTIES.—

"(A) IN GENERAL.—Subject to paragraph (2), a lease or agreement approved by the Secretary under subsection (a) shall be binding on the parties described in subparagraph (B), to the same extent as if all of the owners of the undivided interest in allotted land covered under the lease or agreement consented to the lease or agreement.

"(B) DESCRIPTION OF PARTIES.—The parties referred to in subparagraph (A) are—

"(i) the owners of the undivided interest in the allotted land covered under the lease or agreement referred to in such subparagraph; and

"(ii) all other parties to the lease or agreement.

"(2) EFFECT ON INDIAN TRIBE.—

"(A) IN GENERAL.—Subparagraph (B) shall apply with respect to any undivided interest in allotted land held by the Secretary in trust for a tribe if a lease or agreement

under subsection (a) is otherwise applicable to such undivided interest by reason of this section even though the Indian tribe did not consent to the lease or agreement.

"(B) APPLICATION OF LEASE.—The lease or agreement described in subparagraph (A) shall apply to the portion of the undivided interest in allotted land described in such paragraph (including entitlement of the Indian tribe to payment under the lease or agreement), and the Indian tribe shall not be treated as being a party to the lease or agreement. Nothing in this section (or in the lease or agreement) shall be construed to affect the sovereignty of the Indian tribe.

"(e) DISTRIBUTION OF PROCEEDS.—

"(1) IN GENERAL.—The proceeds derived from a lease or agreement that is approved by the Secretary under subsection (a) shall be distributed to all owners of undivided interest in the allotted land covered under the lease or agreement.

"(2) DETERMINATION OF AMOUNTS DISTRIBUTED.—The amount of the proceeds under paragraph (1) that are distributed to each owner under that paragraph shall be determined in accordance with the portion of the undivided interest in the allotted land covered under the lease or agreement that is owned by that owner.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to amend or modify the provisions of Public Law 105–188 (25 U.S.C. 396 note), the American Indian Agricultural Resources Management Act (25 U.S.C. 3701 et seq.) or any other Act that provides specific standards for the percentage of ownership interest that must approve a lease or agreement on a specified reservation."

25 U.S.C. 2219

"§ 2219. Application to Alaska

"(a) FINDINGS.—Congress find that—

"(1) numerous academic and governmental organizations have studied the nature and extent of fractionated ownership of Indian land outside of Alaska and have proposed solutions to this problem; and

"(2) despite these studies, there has not been a comparable effort to analyze the problem, if any, of fractionated ownership in Alaska.

"(b) APPLICATION OF ACT TO ALASKA.—Except as provided in this section, this Act shall not apply to land located within Alaska.

"(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to constitute a ratification of any determination by any agency, instrumentality, or court of the United States that may support the assertion of tribal jurisdiction over allotment lands or interests in such land in Alaska.".

SEC. 5. JUDICIAL REVIEW.

Notwithstanding section 207(f)(5) of the Indian Land Consolidation Act (25 U.S.C. 2206(f)(5)), after the Secretary of Interior provides the certification required under section 207(f)(4) of such Act, the owner of an interest in trust or restricted land may bring an administrative action to challenge the application of such section 207 to their interest in trust or restricted lands, and may seek judicial

review of the final decision of the Secretary of Interior with respect to such challenge.

SEC. 6. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated not to exceed $8,000,000 for fiscal year 2001 and each subsequent fiscal year to carry out the provisions of this Act (and the amendments made by this Act) that are not otherwise funded under the authority provided for in any other provision of Federal law.

25 U.S.C. 331

[§25 U.S.C. 331. Allotments on reservations; irrigable and nonirrigable lands

[In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.]

25 U.S.C. 332

[§25 U.S.C. 332. Selection of allotments

[All allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, un-

less they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.**]**

25 U.S.C. 333

[§ 25 U.S.C. 333. Making of allotments by agents

[The allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the Bureau of Land Management.**]**

25 U.S.C. 348

§ 25 U.S.C. 348. Patents to be held in trust; descent and partition

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

provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

§ 25 U.S.C. 372. Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, [under] *under the Indian Land Consolidation Act or a tribal probate code approved under such Act and pursuant to* such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decisions shall be subject to judicial review to the same extent as determinations rendered under section 373 of this title. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold:

Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid on such deferred payments, all payments made, together with all interest paid on such deferred installments, shall be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the allottee or his heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: Provided, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear: Provided further, That the Secretary of the Interior is authorized, in his discretion, to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: Provided further, That any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: Provided, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safe-

guard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior.

25 U.S.C. 373

§ 25 U.S.C. 373. Disposal by will of allotments held under trust

Any persons of the age of eighteen years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance [with regulations] *with the Indian Land Consolidation Act or a tribal probate code approved under such Act and regulations* to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians.

25 U.S.C. 464

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

Except as provided in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal

laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold in [trust:] *trust, except as provided by the Indian Land Consolidation Act:* Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

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