

## **EVENTS LEADING TO THE AMERICAN INDIAN PROBATE REFORM ACT OF 2004(AIPRA)**

**by John C. Sledd**

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### **I. THE "FRIENDS OF INDIANS" FOUL UP – THE DAWES ACT AND THE ATOMIZATION OF INDIAN LAND OWNERSHIP.**

There is neither romance nor excitement in a discussion of the American Indian Probate Reform Act of 2004 ("AIPRA"), P.L. 108-374. The opening comments of Rep. Nick Rahall, at the House hearing on the reform bill last June are apt:

Mr. Chairman. To be frank, slogging through the bill pending before us today is a tedious chore. With terms like "pendency of probate," "after-born heirs," and "revocation of owner-managed status," this is a bill only a probate lawyer and the green-eyeshade folks can love. What is not a chore, however, is looking into the faces of Indian Country whose very family and tribal traditions depend on how we respond to the land crisis this bill seeks to address.

Rep. Rahall was right. The law is tedious. Its subject matter, however – land, ancestry, who is "Indian" – are bedrock issues of survival for Native communities.

The basic problem that the 2004 Act sought to address is well known, and has a long history. Mid-19<sup>th</sup> century white America produced an odd marriage of hunger for Indian land, and paternalistic beneficence toward its owners. To "better" Indian people, federal negotiators began to insert provisions into treaties allowing Indian lands to be parceled out to individual tribal members. The process, known as allotment, was intended to

encourage individual initiative and agrarian industry. Some of the earliest widespread allotting occurred here in Wisconsin. Under many of the treaties in the mid-1800's, the land was merely "assigned" for individual use, with title remaining in the Tribe. Provisions like this appear in all the treaties negotiated in my home of Washington State. E.g., *Treaty of Point Elliott*, Art. 7, 12 Stat. 927 (1855). Later, treaties and laws uniformly authorized Indian individuals to take title to the land.

In 1887 Congress passed the Dawes or General Allotment Act, 24 Stat. 388, which authorized the President to allot every Indian reservation, generally into 80 or 160 acre parcels. 25 U.S.C. § 331. After every Indian household had an allotment, remaining land could be settled by non-Indians, whose close example was expected to edify Native people. 25 U.S.C. § 348. Indians living off-reservation could receive allotments on other federal land. 25 U.S.C. §§ 334, 336, 337. Dawes Act allotments were to be held "in trust" by the United States and would be inalienable and exempt from state taxation and jurisdiction. 25 U.S.C. §§ 348, 349, 354. State law would determine heirship, however. 25 U.S.C. § 348. A later enactment provided that, so long as the land was in trust, the United States would determine heirs and distribute the property in accordance with state law of descent and distribution. 25 U.S.C. § 372. A 1910 amendment allowed allottees to devise trust property by will, with federal approval, and have it probated in a federal administrative forum. 25 U.S.C. § 373.<sup>i</sup> The Dawes Act anticipated that, after twenty-five years of federal trusteeship, Indian owners would be assimilated enough to manage land on their own. The United States could then patent (deed) the land to them in fee, or it could extend the trust period. 25 U.S.C. §§348, 391.<sup>ii</sup>

An amendment to the Dawes Act in 1906 allowed the fee patenting process to be accelerated if individual owners were "competent" to manage their own affairs. 25 U.S.C. §349. Soon, "competency commissions" roved Indian Country making wholesale certifications of competence. Fee patents issued willy-nilly. Real estate speculators and state property tax assessors made quick work of allottees who spoke little English, read none, and had no cash to pay taxes. Within a generation, 90,000,000 acres – two-thirds of all Indian land – had left Indian hands. Cohen, *Handbook of Federal Indian Law*, p. 138 (1982 ed.).

Even when the land was retained, allotment had devastating consequences. For a variety of reasons, many Indian allottees never prepared wills. Their heirs took the land as tenants in common, holding undivided shares, which got smaller with each intestate generation. One allottee had five children; five children had twenty-five grandchildren; twenty-five grandchildren had one hundred twenty five great grandchildren. So it has gone for 120 years. By now, single allotments may have tens or hundreds of owners, and many of the owners are so distantly related that they do not know each other, live in distant states, and are members of different tribes. No owner can make exclusive use of any part of the land without consent of the others, nor, generally, can it be leased, logged, grazed, or mined without federal approval and consent of at least a majority of ownership.<sup>iii</sup> The heirship pattern makes consent almost impossible to obtain. Moreover, because the United States has historically held land in trust only for Indians, interests

passing to non-Indian spouses and heirs have come out of trust and become subject to state taxation and other state law. *Bailess v. Paukune*, 334 U.S. 171 (1952); 25 CFR § 152.6.<sup>iv</sup>

Congress halted the carnage of allotment in 1934. The Indian Reorganization Act (“IRA”), 25 U.S.C. § 461, *et seq.*, banned further allotment as of that year, extended the trust period for remaining allotments indefinitely, and authorized acquisition of new land in trust for tribes and individuals.<sup>v</sup> The IRA also gave tribes the right to adopt federally approved constitutions through which they might exercise their sovereignty. A great many, perhaps most tribes in the lower 48, operate under IRA constitutions. The IRA also prohibited the devise or descent of trust allotments of IRA tribes except to the tribe, an Indian person, or an heir or lineal descendant. 25 U.S.C. § 464.

The IRA slowed the loss of trust land, but did not halt it. Inheritance by non-Indians continued, as did voluntary trust to fee conversions by owners. For example, in the Portland Area (now Northwest Region) of the BIA, 165,639 acres of trust land were disposed of in 1997, while only 37,637 were acquired, a net loss of more than 125,000 acres in one year. DOI, BIA Branch of Real Property Management, *Annual Report of Caseloads, etc.*, <http://www.doi.gov/bia/realty/Port97.html> (last accessed 8/29/01).

## **II. FRACTIONATION TODAY: A STATISTICAL REVIEW.**

Allotted land owners understand too well the problem of owning a figurative shovelful of dirt, and being unable to legally turn the spade without consent of a roomful of co-owners and bureaucrats. Statistics may bring the problem home to others. There are roughly 10 million acres of individual trust lands, held in 4 million undivided interests. Testimony of Ross O. Swimmer, Special Trustee for American Indians, House Resources Comm. Hrg. on S. 1721 (AIPRA) (June 23, 2004). Income from these lands was about \$195 million in 2003, routed through 230,000 Individual Indian Money (“IIM”) accounts. *Id.* There are 1.4 million shares smaller than 2%, affecting 58,000 trust parcels. Shoemaker, *Like Snow in Springtime: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wisc. L.Rev. 729 (2003). Some shares are as small as one nine-millionth of the parcel. Swimmer Testimony, *supra*. If the smallest shares could be physically partitioned, they would be smaller than the page you are reading. The average trust allotment has 17.4 owners. Shoemaker, *supra*. Owners pass away faster than their estates are probated, causing delays that may last for years and make it hard to tell who owns what at any given time. *See*, Statement of Rep. Jackson-Lee, H. Rep. debate on S. 1721, *Cong. Rec.* H8375 (October 6, 2004) (25,000 pending Indian probate cases; 5,000 new cases each year).

The rate of fractionation is astonishing. The Supreme Court described the fractionation affecting a real allotment in *Hodel v. Irving*, 481 U.S. 704, 713 (1987). In 2002, DOI re-examined that allotment and found that the smallest share had shrunk fifty-fold in only twenty years. Swimmer Testimony, *supra*. In some areas, the number of interests under 2% is doubling every seven years. *See*, *Indian Programs, Profile of Land Ownership at*

*12 Reservations*, GAO, February 1992 (GAO/RCED-92-96BR). DOI has estimated that the number of fractional shares could increase from 1.5 million in 1994 to 11 million by 2030. Swimmer Testimony, *supra*; see, Shoemaker, *supra*.

The administrative costs created by fractionation are also high. The average probate costs over \$3,000. Swimmer Testimony, *supra*. Twenty years ago, it cost \$50.00 annually to maintain realty records for each share. GAO, *supra*. The cost to maintain each IIM account is about \$150.00 annually. Testimony of Wayne Nordwall, BIA, Sen. Comm. on Indian Affairs Hearing on S. 550 (AIPRA) (October 15, 2003). In 1999, the Bureau estimated that 50% to 75% of its realty budget was spent on management of highly fractionated interests. Sen. Rept. No. 106-361, p. 32 (Interior Dept. views on S. 1586, ILCA amendments of 2000).

The cost to put an end fractionation, by consolidating all land in tribal hands, would not be astronomical by federal budget standards, but would be far from insignificant. *E.g.*, “Fractionation a Growing Problem,” Indianz.com, May 6, 2003 (\$1.25 billion estimate by Indian Land Tenure Foundation); Statement of Rep. Jackson-Lee, House debate on S. 1721, Cong. Rec. H 8376 (Oct. 6, 2004) (\$250 million annually needed to keep number of fractional interests from increasing).

### **III. THE INDIAN LAND CONSOLIDATION ACT AND THE UNCONSTITUTIONAL TAKING OF INDIVIDUAL INDIAN LAND**

The problem of fractionated allotment ownership has not crept upon us unnoticed. The statute authorizing Indian wills was, in part, a response to fractionation that was already appearing in 1910. In 1928 the Brookings Institution issued the document we now know as the Meriam report. L. Meriam, Institute for Government research, *The Problem of Indian Administration* (Baltimore, Johns Hopkins Press). Among the many, many difficulties facing Indian Country at that time, according to the report, was the excessive fractionation of ownership of individual Indian land. *Id.* at 40-41.

The New Deal Congress attempted to address the problem. Congressman Howard, a sponsor of the IRA, referred to fractionated ownership as “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.” Rep. Howard, 78 Cong. Rec. 11728 (1934), *quoted in Hodel v. Irving*, 481 U.S. at 708. The Bill that became the Indian Reorganization Act originally had two titles – one dealt with land consolidation. Testimony of Nordwall, *supra*. The prospect of the government taking land from Indian individuals, however, was too much for most of Indian Country, coming so soon on the heels of allotment, sale of surplus lands, and forced fee patents. Budget concerns played their role, as well. The Title was dropped from the Act as passed. In August 1938, the Interior Department convened a meeting in Glacier National Park to identify solutions to fractionation. Testimony of Nordwall, *supra*. The group at Glacier identified three goals: decrease administrative cost, increase the productive use of Indian land, and stop the loss of trust land to fee status. *Id.* The first two goals, in the same

order, would probably be fair summaries of DOI's current goals. I am not convinced that keeping land in trust remains an objective of equal importance for some top Interior officials. The Glacier Park meeting identified three necessary actions: address probate procedures to stop further fractionation, develop consolidation tools, and provide funds to purchase interests from the many landowners expected to sell voluntarily. *Id.* Regrettably, the lingering Great Depression, and the beginnings of World War II, sapped funds that might have flowed to these efforts.

In 1960, Congress studied fractionation issue again. *Indian Heirship Land Survey*, 98<sup>th</sup> Cong., 2d Sess. (Comm. Print, Dec. 1, 1960), *cited in* Sen. Rept. No. 108-264 on S. 1721 (AIPRA), pp. 3 n. 7, 5 n. 19 (May 13, 2004). At that time, only one quarter of the parcels had more than six owners. *Id.*, at 5. How much easier it would have been to address the problem then!

More Congressional hearings were held in 1966. Hearings on H.R. 11113, House Comm. On Interior and Ins. Affairs, Subcomm. on Indian Affairs, 98<sup>th</sup> Cong., 2d Sess., *cited in* Sen. Rept. 108-264 at 19. In 1977 the American Indian Policy Review Commission described the problem again, and suggested responses along the lines of those laid down by other studies over the past half-century. Testimony of Nordwall, *supra*, *see*, Sen. Rept. No. 108-264, S. 1721 (AIPRA), pp. 3-5, 19 (May 13, 2004). Every solution identified in these studies would cost the federal government; every solution would upset tribal or landowner expectations. It is not surprising that Congress waited decades before taking action.

In 1983, the growing mass of studies finally outweighed the political and budgetary inertia, and the Indian Land Consolidation Act ("ILCA") was born. P.L. 97-459. The Act reflected the then-new policy of tribal self-determination. Tribes were authorized, with the approval of the Secretary, to adopt plans for consolidating tribal lands through purchase, sale or exchange, ILCA § 204, 25 USC § 2203, and to adopt probate codes which, with the approval of the Secretary, would be applied in Departmental probate of trust lands. ILCA § 206, 25 USC § 2205.

Only a handful of consolidation plans and probate codes were ever approved. Attention focused instead on ILCA's most radical provisions, which called for escheat to tribes of interests less than 2% of the whole parcel, testate or intestate, which had not earned at least \$100 in the year prior to probate. ILCA § 207, 96 Stat. 2519. Escheat was seen by the United States as a quick, cheap path to consolidation. Much of Indian Country saw escheat as a dangerous precedent for the uncompensated taking of Indian land. Despite the potential transfer of land to tribal governments, many tribes opposed the escheat provisions. C. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. St. L. Jour. 889, n. 123 (nine of eleven tribal witnesses at 1984 Senate hearing opposed escheat provisions).

It was not long before allotment owners were visiting lawyers. Tribal members from South Dakota sued first. *Irving v. Watt*, No. 83-5139 (D.So. Dak.). The District Court

upheld the Act in December 1983. Congress was, perhaps, still nervous about the outcome of *Irving*, and it certainly heard the howls from Indian Country. It held hearings on a bill to amend ILCA in June 1984, and the amendments became law in October. P.L. 98-608, 98 Stat. 3172. The amended escheat provisions provided that 2% interests would not escheat if they were capable of earning \$100 of income in any of the five years succeeding the owner's death. Escheatable interests could, however, be devised to co-owners of the parcel.

Meanwhile, the Court of Appeals declared the original Act unconstitutional. *Irving v. Clark*, 758 F.2d 1260 (8<sup>th</sup> Cir., 1985). The government took the case to the U.S. Supreme Court. *Hodel v. Irving*, 481 U.S. 704 (1987). The Court declined to consider the 1984 amendments, which hadn't existed when the suit began. The Court surprised observers by holding the escheat provisions to be an unconstitutional taking of property without just compensation. Schmid, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance*, 43 U. Miami L.Rev. 739 (1989). The issue was not the heirs' rights -- Anglo courts for centuries had held that heirs had no right to inherit anything. Rather, the Court recognized the deceased owner's property right to pass his land to others at death. *Hodel, supra*, 481 U.S. at 716. The heirs were merely the available representatives to advance their late ancestors' claims. *Id.*, 481 U.S. at 711-712.

The Court did not close the door to all restriction of inheritance. The Justices voiced sympathy for the Act's objectives. *E.g., id.*, 481 U.S. at 718 (fractionation is "a serious public problem"). The opinion recounted the story of a single allotment in the Midwest that had 439 owners, with a value of \$8,000, and produced annual lease income of \$1,080. *Id.*, 481 U.S. at 713. The smallest share was valued at 4/1000 of one cent, and its owner received a penny's lease check every 177 years. *Id.* Given facts like those, the Court acknowledged that strong action was needed, and suggested some steps that might pass constitutional muster, including abolishing intestate descent of small interests or barring their further subdivision. *Id.*, 481 U.S. at 718. The Court made plain, however, that Congress could not "take the extraordinary step of abolishing both descent and devise ...." *Id.*

While all nine justices agreed in the result, they were split on the reasons, and wrote four separate opinions. As the quote above suggests, the Court's antipathy seemed to center on the escheat of testate interests, even if the will would have left the interest to an existing owner and thereby decreased fractionation. In addition, the Court was troubled by use of a single year's income to determine that an interest was "de minimis" and escheatable. *Id.* at 714 (noting valuable timber and mineral interest might not produce annual income). Three Justices relied largely on the view expressed by the Court of Appeals, that the applicable Treaty and allotment Act had protected the right of landowners to pass land to their descendants. Brennan, J., concurring, 481 U.S. at 718. It took time, but the 1984 ILCA amendments eventually had their day in court, too, and were also declared unconstitutional. *Babbitt v. Youpee*, 519 U.S. 234 (1997). The changes in the escheat provisions were too minor, the character of the Act still too

“extraordinary” to stand. *Id.*, 519 U.S. at 244. The fact that the amendments allowed devise to co-owners was no help, as that “shrinks drastically the universe of possible successors,” and the co-owner group is “unlikely to contain any lineal descendants.” *Id.*, at 244-245. Justice Stevens was the lone dissenter; he opined that, unlike the landowners in Irving, who died almost immediately after the escheat law took effect, Mr. Youpee had been given plenty of time to change his will or take other steps to avoid escheat. *Id.*, 519 U.S. at 246-247.

In response to *Youpee*, Interior Secretary Bruce Babbitt issued an order on February 19, 1999 to return the escheated interests to their owners. *See*, P.L. 106-462, §101(11), 114 Stat. 1991 (describing Secretarial order). BIA estimated that this would require redistributions in 13,000 estates involving 178,000 interests. DOI, *High Level Implementation Plan*, (“HLIP”) p. 43 (2000). The HLIP also said that all interests would be returned (or possibly purchased) by September, 2004. *Id.* As of the end of 2004, the Bureau was still “continuing review of a draft acquisition plan” for the *Youpee* interests, *Status Report to the [Cobell] Court No. 20*, p. 56 (DOI, Feb. 1, 2005), and was begging Congress to authorize a complete buy-out. Testimony of Ross Swimmer, Special Trustee, H.R. Resources Comm. Hrg. on S. 1721, June 23, 2004. DOI’s desire to buy these interests and shave its workload apparently exceeds its desire to right the Constitutional wrong.<sup>vi</sup>

#### **IV. THE PATH FROM IRVING AND YOUPEE TO ILCA, 2000**

##### **A. How Money Made Congress Take Action on Fractionation**

In the wake of *Irving*, Congress responded to fractionation in a way the Court could not challenge – it commissioned another study. GAO, *supra*. The Bureau of Indian Affairs also initiated a “consultation” with tribes and landowners in 1994 to discuss solutions to fractionation. *See*, Sen. Rept. 106-361, p. 10, n. 35. As part of this process, the Bureau outlined a legislative proposal. *See*, Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. Rev. 231, 254-55 (1997). Many elements of this proposal resemble provisions in AIPRA. These include: a Secretarial program of acquiring fractional interests for tribes, with priority on 2% interests and income from the parcels placed in a revolving fund to buy more land; barring intestate succession by collateral heirs and spouses; and giving landowners notice of the new law’s provisions and their estate planning options, and delaying its effective date until this was done. *Id.* The response in Indian Country continued to be “confusion and mistrust.” *Id.* at 255.

No legislation resulted from the GAO study or the Bureau’s 1994 proposal, but seemingly unrelated developments in Indian trust fund management soon generated strong pressure to deal with fractionation. Complaints about management of Indian trust funds were not new. *Cobell v. Norton*, (*Cobell VI*) 240 F.3d 1081, 1089 (D.C. Cir. 2001) (summarizing federal investigations and reports beginning in 1988). Congress had tried to improve management through passage of the American Indian Trust Management

Reform Act in 1994, P.L. 103-412, *codified as amended at* 25 U.S.C. §§ 4001, *et seq.* That Act created a new Office of the Special Trustee (“OST”), charged with advising Interior on trust management. 25 USC § 4042(a). So began a decade of bureaucratic struggle between OST and the BIA, to see who would control trust management and trust reform.

In June 1996, meanwhile, a nationwide class action was filed, alleging systematic federal breaches of trust in the collection of income from individual Indian trust land and in the management of the resulting trust funds. *Cobell v. Babbitt*, U.S.D.Ct., D.C., No. 1:96CV01285. By the time Judge Lambreth, presiding over the *Cobell* case, held the Interior Secretary in contempt of court in February, 1999, the case had stirred a hornet’s nest within the Interior Department. *See*, Sen. Rept. 106-361 p. 12. The hornets are still buzzing almost a decade later.

Pressured by *Cobell*, reducing trust liability exposure became a major driver of Interior policy. The DOI “High Level Implementation Plan” in 1998 called for a variety of steps to deal with the problems of trust management, including fractionation and probate. DOI convened an “Indian Probate Reinvention Lab, which issued a report in July, 1999 and a final Phase II report in December, 1999. Among the recommendations of the Phase II report was adoption of a federal uniform intestate succession code. Phase II Rept., p. 22. Such a code is near the heart of AIRPA. 25 U.S.C. § 2206(a)(1).

Much of the Department’s trust liability exposure comes from simple failure to get trust management work done, and the quantity of that work is directly proportional to the number of owners for whom leases must be approved, trust accounts created, payments received, invested, and distributed, and estates probated. *See*, H.R. Rept. No. 108-656 on S. 1721, p. 6 (September 7, 2004) (“Fractionation is at the heart of the *Cobell v. Norton* litigation.”) Consequently, reducing the number of owners of trust land achieved a new policy priority in Washington D.C. This renewed attention to the problem of fractionation led to a series of Bills in Congress, and, after several years’ gestation, to the AIPRA of 2004.

## **B. The Rise and Fall of the 2000 ILCA Amendments**

Two bills were introduced in 1997 and 1998. *See*, Sen. Rept. 106-361, p. 34, and Testimony of Austin Nunez on S. 1340 (ILCA amendments), Sen. Comm. on Indian Affs. (May 22, 2004), for somewhat competing views of these Bills. The “Administration Bill,” H.R. 2743, was criticized by landowners and tribes for failure to give them enough of a role in addressing fractionation. An association of tribal and individual landowners called the Indian Land Working Group supported the alternative bill, H.R. 4325. The Bills contained many elements that also appeared in later proposals to amend ILCA, including S. 1586, which became the 2000 ILCA amendments, and the various bills in the 107<sup>th</sup> and 108<sup>th</sup> Congress which eventually became the AIPRA of 2004. These features included a mandate to provide estate planning, limiting inheritance by non-Indians or all but the closest family or the tribe, statutory rights for spouses and

children, and new programs to acquire fractional interests. These House Bills, however, were also different in important ways from later Senate proposals. For example, H.R. 4325, the “ILWG Bill,” would have defined all descendants of tribal members as Indians, and would have greatly increased the tribal role in land acquisition and title functions. For its part, HR 2743 would have authorized tribal courts to probate trust estates.

In December 1998, representatives from ILWG and DOI met with Congressional staff to develop a compromise bill. Whether there was much compromise by the Administration is debatable, but the discussions led to S. 1586, introduced in the Senate in 1999. It became the Indian Land Consolidation Act Amendments of 2000, P.L. 106-462.

The 2000 Act made wholesale revisions to ILCA, and contained numerous provisions to restrict the number of heirs. The legislation was also incredibly complex, as exemplified by a scheme under which a devise to a non-Indian or a distant relative would result in an implied life estate, with implied remainders going to specified close Indian relatives, more distant relatives who were co-owners, or the tribe. DOI eventually conceded that the law was simply too complicated to administer. Testimony of Ross Swimmer, *supra*.

Tribes and landowners had their own issues with the 2000 Act. Prominent among them was a narrow definition of who was “Indian” and could hold land in trust. Being legally “Indian” is more than a racial concept; it involves the political relationships between individuals and their tribes, and between tribes and the United States. *Morton v. Mancari*, 417 U.S. 535 (1974) (federal Indian employment preference not an equal protection violation; it reflects political, not racial classification). Prior to the 2000 ILCA amendments, any descendant of a tribal member was allowed to take in trust. *Estate of Cladoosby*, 151 IBIA 203, 211 (1987). This practice was consistent with the definition of Indian used for federal jurisdiction over certain crimes by Indians in Indian Country. *See, U.S. v. Broncheau*, 597 F. 2d 1260 (9<sup>th</sup> Cir. 1979) (defendant is “Indian” within 18 U.S.C. §1153 if he had an ancestor in what is now the U.S. before 1492, and is recognized as Indian by an Indian community).

The 2000 Land Consolidation Act amendments generally defined “Indian” as members of tribes and those eligible to become members. P.L. 106-462, §103(1)(B), 114 Stat. 1992. Under §206 (a) and (b) of ILCA as amended in 2000, non-“Indians” could not inherit more than a life estate. P.L. 106-462, §103(4), 114 Stat. 1996-1997. Given inter-racial and inter-tribal marriages, and the prevalence of “blood quantum” requirements for formal “enrollment” in tribes, many descendants of Indian landowners are not enrolled, nor are they eligible to be. *See, e.g., Constitution of the Skokomish Tribe, Art. II, §1(c)* (persons of “one-fourth degree Skokomish blood” may be enrolled as members).<sup>vii</sup>

The 2000 definition would have forced landowners to choose between disinheriting their “non-Indian” children, and taking family land out of trust so it could be

left to the children in fee, but subject to state taxation and possibly state regulation. More owners than expected chose the latter option. In parts of the country there was a trust to fee land rush. Sen. Rept. No. 108-264, p.12. The removal of so much land from trust would have increased state tax and regulatory intrusions and seriously threatened tribal economies and sovereignty, and the threat of it caused an uproar in Indian Country. When even DOI began to question the feasibility of implementing the 2000 law, its fate was sealed, and the stage was set for Take 3 at Land Consolidation Act amendments. Pending further legislative efforts, DOI agreed not to issue a formal certification required by the 2000 Act before the new definition and other key provisions in that Act could take effect. H.R. Rept. No. 106-656 on S. 1721, p. 3 (Sept. 7, 2004).

## V. 2001 TO 2004: PASSIVE TRUSTEES AND INDIANS WHO AREN'T.

### A. S. 1340

By the spring of 2001, Senate Indian Affairs Committee staff was circulating drafts of an Indian Probate Reform Act. In August, Sen. Nighthorse-Campbell introduced S. 1340, whose key feature was a proposed uniform federal code of succession to replace the application of state law. Hearings were held in the Senate in May, 2002. Broadening the definition of Indian was a central topic of testimony, with all four tribal witnesses in favor. Such a change was unlikely without the acquiescence of DOI. Prospects for that seemed poor, as rumors flew that key DOI officials were willing to end their management headaches in any way they could, including selling allotments on the courthouse steps, giving the owners a check, and kissing individual Indian trust ownership goodbye. *See*, Testimony of Austin Nunez, ILWG, Sen. Comm. on Indian Affs. Hrg. on S. 1721 (Oct. 15, 2003); "Interior Considering a Limited Trust Fund, <http://www.indianz.com/news/show.asp?id=pol02/03152002-1> (March 15, 2002) (last accessed April 18, 2005) (quoting Special Trustee Swimmer: "there obviously is some value . . . if there were a way to having less than a full trust duty to those properties").

In August 2002 there was a two-day meeting of members from the Joint DOI/Tribal Leaders Task Force on Trust Reform, which discussed fractionation issues. A smaller workgroup had follow-up meetings in September, at which DOI staff weighed in with a package of proposed amendments to S. 1340, with the caveat that there had been no review by "policy officials." "*Bush Proposal to Take 'Unclaimed' Indian Land,*" <http://www.indianz.com/news/show.asp?id=2002/09/26/trust> (Sept. 26, 2002) (last accessed April 18, 2005); copies of DOI proposals on file with author. DOI's first proposal was an "unclaimed property" provision, which would have dealt with the many interests for which the Department has no valid owner's address. DOI would publish newspaper notices and conduct a vaguely defined search. If the owner were not located within six months, DOI would seize the land and give it to the tribe. The appraised value

would be paid into an unclaimed property account, with interest paid to Interior. If the money remained unclaimed after five years, DOI would get the principal, too. Concerns about the fairness and constitutionality of these proposals led Interior to back off, with the expectation that tribal representatives would help develop a more acceptable approach. *See*, Nat'l Congress of American Indians ("NCAI") Broadcast #02-072 (October 15, 2002), <http://130.94.214.68/data/docs/legislative/BCF02-072.pdf> (last accessed April 18, 2005).

Another DOI proposal was for expanded partition authority, to allow the physical segregation of any Indian or non-Indian interest in any trust parcel. Current law limits the availability of partition absent consent of owners, *e.g.*, *Sampson v. Andrus*, 483 U.S. 240 (D.So.Dak. 1980) (request of at least one owner required under IRA); *Davis v. Acting Aberdeen Area Director*, 27 IBIA 281 (1995) (unanimous consent required for "restricted fee" allotments not under Dawes Act). Interior's authority to partition out fee interests is also unclear. *See*, Testimony of Tex Hall, NCAI, Sen. Comm. on Indian Affs. Hrg. on S. 1340 (May 22, 2002); *U.S. v. Schurz*, 102 U.S. 378 (1880) (Interior Department jurisdiction ends upon issuance of patent); *but see*, *Davis, supra*, 27 IBIA 281 (partition case; parcel included a fee interest); Ponca Termination Act, 25 U.S.C. §974 (authorizing partition, including fee interests). The DOI staff proposal had no detail; the Secretary was to provide that by regulation.

The third informal proposal from DOI was a new "passive trust" status, into which a trust interest would be placed at its owner's request. The interest would remain tax-exempt and inalienable, but no Interior approval or oversight would be required to use the land. The passive trust proposal, too, was bare bones, coupled with authority for implanting regulations. The idea, which NCAI supported, was to limit Interior's workload (and the number of potential breach of trust plaintiffs) while maintaining the Indian tax and jurisdictional status of the land. "Take a Pass on Passive Trust," <http://www.indianz.com/news/show.asp?id=2002/10/18/trust> (October 18, 2002) (last accessed April 18, 2005).

By October 2002, discussions of S. 1340 had congealed in a draft substitute Bill, quite different from S.1340 as introduced. Among the new ideas was to apply different intestate succession rules to lands, depending on whether they were inherited or acquired by the decedent in his or her lifetime. Inherited interests would generally stay with blood descendants and not go to a surviving spouse. These provisions replaced ones that would have split all trust land equally between the surviving spouse and children.

The October draft also proposed to change the land acquisition pilot project in the 2000 Act, so that income from acquired interests was not tied solely to that interest and automatically released when that interest was paid for. Rather, the revenue went into a fund tied to further acquisitions on that reservation, and the Secretary could periodically lift his lien on income from the acquired interests, whether paid for or not.

The three biggest changes in the early October draft substitute S. 1340, compared to the Bill as introduced, dealt with passive trust, the definition of “Indian,” and partition. The draft included a fully formed version of “passive trust.” Passive trust interests could be created *inter vivo*, or by devise. Non-Indian devisees (as narrowly defined) could only take in passive trust or in fee. The new “partition” procedure actually authorized sale of allotments and partition of the cash. Only the tribe could instigate partition and buy at the sale. This was, in effect, authority to condemn individual interests for tribal use. The scheme would rely on merely published notice to landowners, and would “deem” the owners to have consented if they did not affirmatively object. The new definition of Indian made any federal law definition of “Indian” applicable unless the Secretary said otherwise in regulations. A special definition for “Indians of California,” based on a 1928 statute, would apply until Congress said otherwise.

The new provisions were very controversial, but time was running out on the 107<sup>th</sup> Congress. There was strong pressure to get something passed before Interior “certified” the effectiveness of the 2000 law. As a result, no new hearings were held on the October, 2002 substitute S.1340. When it became apparent that the Bill could not pass as separate legislation, NCAI and others pushed to include it in an omnibus Indian Bill, S. 2711, which had formerly included only a handful of minor technical amendments to the 2000 Act. Sen. McCain and some landowner groups and Indian media opposed what was seen as back-door legislation, without an open and public legislative drafting process. “Passive Trust Faces New Test in Congress,” <http://www.indianz.com/News/printme.asp?ID=2002/11/25/trust> (November 25, 2002) (last accessed April 18, 2005). Proponents of the Omnibus approach feared that more public attention would risk DOI opposition or even a veto, because of the expanded definition of “Indian” in the Bill. These proponents were satisfied with a “stealth approach” in which only a couple of Senators and their staff might ever read the final language.

The proponents of stealth prevailed, and the Senate included ILCA amendments as subtitle B of S. 2711, which passed the Senate on November 20, 2002. The legislation, however, failed to pass the House before Congress adjourned.

## **B. S. 550**

On March 6, 2003, Senator Campbell again introduced the American Indian Probate Reform Act, now S. 550. To build consensus between DOI, landowners, and tribes, an informal S. 550 Task Force was organized, facilitated by California Indian Legal Services, which represents both tribes and landowners. Testimony of Lisa Oshiro, California Indian Legal Services, submitted for record of Sen. Indian Affs. Comm. Hrg. on S. 1721, October 15, 2003. Attention continued to focus on partition, the definition of Indian, and passive trust, as well as highly technical efforts to perfect the uniform federal probate code. Successive drafts added protections for landowners, while still trying to encourage consolidation and reduce DOI’s workload and liability exposure.

Hearings on S. 550 were held before the Senate Indian Affairs Committee in May, 2003. The BIA witness opposed the Bill, which he said was too complicated and did too little to tackle fractionation. Testimony of Wayne Nordwall. Landowners opposed the passive trust provisions, as well as the emphasis on consolidation only in tribal hands, rather than individual. Testimony of Austin Nunez, ILWG, Sen. Comm. on Indian Affs. Hrg. on S. 1721 (October 15, 2003). The partition process also drew criticism, with fears that “partitions by sale” would lead to large losses of individually-owned land, as they had under state partition by sale laws, applicable to certain Oklahoma allotments under 25 U.S.C. 355. *Id.*

### C. S. 1721

Discussions within the Task Force continued. With regard to the succession code, succeeding drafts moved steadily toward relatively liberal provisions for testate succession and increasingly restrictive provisions to apply when no will was prepared. Another substitute bill, S. 1721, was introduced by Senator Campbell in October, 2003. The Bill closely resembled the final legislation. Under S. 1721, landowners could devise in trust status to any lineal descendant. S. 1721 as introduced would have defined “Indian” to include tribal members, persons eligible for membership, any current owner of a trust interest, any person defined as Indian under the IRA, any lineal descendant within three degrees of kinship of any of the former, any owner of a trust interest who stood to inherit an interest in the same parcel, and “Indians of California.” As introduced, S. 1721 allowed devise, in trust, not only to Indians or the tribe with jurisdiction, but to any owner of an existing trust interest and to any lineal descendant of the testator.

Interior could partition by selling the land, but landowners would also be able to initiate partition by sale. There would be no new partition in kind process, as had been discussed in the Task Force. The new partition process would be available only where the land met a new definition of “highly fractionated.” Passive trusts were gone, in name if not in practice, replaced by “owner managed” status. That status, however, could only be created *inter vivos*, and only if every interest holder in a parcel agreed. At that point, owners could enter 25-year agricultural leases and collect the rent on their own, but otherwise the Secretary’s approval role would be unchanged. A new “purchase option at probate” provided for auction of interests at the request of the putative heir, or, if the parcel was “highly fractionated,” an involuntary sale upon request of a tribe or Indian wanting to buy the interest.

The Interior Department got an “unclaimed property” provision in S. 1721, but with somewhat more procedural protections for landowners, in terms of notice and a real DOI effort to locate missing owners before selling their land. Landowners seeking some flexibility got authorization for a pilot project to test placement of trust land into private trusts or corporations, so that one artificial legal entity could replace the need for consents from and reporting to every owner directly.

Senate hearings on S. 1721 were held the day after its introduction. Sen. Hrg. No. 108-379 (October 15, 2003). DOI's reaction continued to be lukewarm. Its witness described the Bill as a "marginal" effort to deal with fractionation, unlike the "bold" provisions in the original Land Consolidation Act. Testimony of Wayne Nordwall. In DOI's view, Congress's tendency to compromise threatened what might be the last opportunity to deal with fractionation before the problem became utterly insoluble. *Id.*

The witness for the Indian Land Working Group suggested that, before taking bold action, the Senate should get some facts concerning land tenure on different reservations and how the Bill would affect it. Testimony of Austin Nunez. It was a sensible recommendation, which could not prevail against the combined urgency of landowners who feared the 2000 Act, and DOI, which feared it would lose the chance for a major strike against fractionation and fiduciary liability exposure. Drafting continued with participants relying on anecdote and their own experience in lieu of data.<sup>viii</sup>

After the October, 2003 hearing, additional efforts were made to secure DOI support. Proving there is nothing new under the sun, these efforts yielded a limited return to the ancient concept of primogeniture. Under this "single heir rule" small interests would pass to only one person. At first, the suggestion was that only the youngest inherit, in order to postpone the costs of probate, but the traditional eldest heir was soon substituted. Despite the many accommodations to its desires, DOI wanted more. After Senate staff told the Task Force that no more changes could be made if the Bill was to be enacted in the 108<sup>th</sup> Congress, DOI demanded major changes in the definition of "Indian," a definition it had known of for months and not objected to. Testimony of Marcella Giles for ILWG, House Resources Comm. Hrg., June 23, 2004. The fragile consensus behind S. 1721 very nearly came unglued. Once again, though, the pressures of the legislative calendar, and the threats of a veto or of certification of the 2000 amendments, forced submission to the Department's agenda. The end result is AIPRA's narrow definition of "Indian," emphasizing tribal membership, 25 U.S.C. § 2201(2), combined with the novel creation of a class of potentially non-Indian "eligible heirs," 25 U.S.C. §2201(9), who can still hold land in trust. 25 U.S.C. §§ 2206(a)(2)(B)(v), (a)(2)(D)(iii)(IV).

With this change, S. 1721 was reported out of the Senate Indian Affairs Committee, and passed the Senate on June 2, 2004. The House Resources Committee held a hearing, but the House made no changes in the Bill. It passed the House on October 7, and was signed into law on October 27, 2004.

## **VI. WHAT IS TO BE DONE?**

Zoologists say that a long gestation produces a more complex adult. A similar principle seems evident in AIPRA, the product of nearly 100 years of tinkering with allotment policy. Given the enormous complexity of the statute, the lack of hard data available to

its drafters, and the conflicting interests the Act seeks to accommodate, the risk of unexpected statutory consequences seems large. There is much work to do if such consequences are to be kept to a minimum.

Some work may be needed in Congress, as the flaws in the 2004 Act become more apparent. Indeed, a package of amendments, ostensibly “technical” but having substantive effects, passed out of the Senate Indian Affairs Committee on March 9 of this year. S. 536, “Native American Omnibus Act of 2005,” Title II, Subtitle C, §221. Another broad scale bill, however, is unlikely.

There may be work in the courts, as well. The consensus seems to be that the restrictions on intestate succession in the 2004 Act, although severe, will survive constitutional scrutiny because the Act preserves most options for testate disposition. Of course, the consensus on ILCA’s constitutionality has been wrong twice before. The predicted landowner challenge to forced sale at probate may have more merit.

The most important work will, as ever, be in tribal communities. There is a tremendous need to expand the availability of trust property estate planning for Native people. DOI and tribal realty and probate offices, tribal and private non-profit legal services programs, law school clinical programs, and the private estate planning bar must all become more informed and active in this area.

Tribal communities must also struggle with the issue most responsible for AIPRA – defining who is Indian. The political and economic stakes in such discussions are obvious – who gets a share of tribal economic development and governmental services, who is subject to tribal jurisdiction and beyond state authority, who takes land in trust. The existential and cultural stakes are less readily described, but far more important. Finally, there are legal stakes. When Indians are lucky enough to have received favorable treatment from the federal government, that exercise of federal power has been saved from equal protection attacks by emphasizing the political relationship of tribes with the United States. That argument won *Morton v. Mancari*, but in the arena of tribal jurisdiction, the emphasis on membership as the basis of government authority has led courts to treat non-member Indians the same as non-Indians, despite the very different status the two may have in an Indian community. See, *Washington v. Colville Confederated Tribes*, 447 U.S. 134, 160-161 (1980) (state may tax tribal sales to non-member Indians on reservation); *Duro v. Reina*, 495 U.S. 676 (1990) (tribes lack criminal jurisdiction over non-member Indians). In the arena of federal jurisdiction, the emphasis on membership contributes to Congressional reticence to extend federal protections to all who are culturally Indian, as AIPRA’s definition of “Indian” makes clear.<sup>ix</sup>

As intertribal parentage and the mobility of Native people grow, the jurisdictional hole involving non-member Indians will also grow. Congress may sew it shut on occasion, as in the “*Duro* fix.” P.L. 101-511, Title VIII, §8077(b) and (c) (amending the Indian Civil Rights Act to recognize inherent tribal criminal jurisdiction over non-member Indians). The Court may sometimes let such Congressional needlework be, as in *Lara v. United*

*States*, 541 U.S. 193 (2004) (recognizing inherent tribal criminal jurisdiction under the “Duro fix”). This jurisdictional darning and mending could be avoided if creative lawyers would weave the history and theory of federal Indian law, constitutional law, and international law into a new and constitutionally sound justification for tribal authority and federal trust responsibility over all the people whom Indian communities know, in a common sense and humanistic way, are their members. Cf., G. Valencia-Weber, *Racial Equality: Old And New Strains And American Indians*, Notre Dame L. Rev. 333 (2004) (arguing that constitutional scholars have not dealt adequately with the incongruity of Indian status).

Lastly, there is a need for a deep-seated review of the policy underpinnings of ILCA. For many years, some federal and tribal officials have looked to tribal land ownership to solve fractionation. This emphasis on tribal ownership may have unfortunate political, economic, and cultural consequences. Indian landowners are politically powerful on many reservations; they may block a solution that relies only on tribal ownership, leaving the fractionation problem to fester. Conversely, where 100% tribal land ownership occurs, it will increase the concentration of reservation economic and political power in the hands of tribal government. Where power is concentrated, the consequences of its mistaken exercise are magnified, and abuse is more likely. The push for tribal ownership may also rest on the unstated notion that tribal land ownership is the cultural norm for Indian communities. This is simply false. Traditions of tribes varied widely; many recognized forms of private land use rights. E.g., Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559 (2001). In any case, cultural norms change. Since 1887, family land ownership has become deeply imbedded in the cultures of many tribes. Should federal policy dictate that those cultures must change again?

If we really respect self-determination, then the goal in Indian land reform should not be to force tribes to substitute tribal for individual ownership. Nor should we encourage legislation like the partition and probate sale provisions of AIPRA, which threaten to create a tribal gentry defined by their financial ability to pry interests from lower-income owners. Rather, just as tribal justice systems are being transformed from blind mimics of state and federal courts to embodiments of community values and traditional dispute resolution, so the single, deviant land ownership system created by the Dawes Act should be transformed by Indian people themselves into a range of systems that conform to their property and community norms, and which promote familial security and individual initiative while furthering the collective tribal good.

That is not a modest challenge. It will require a combination of creative tribal legislation, acceptance by landowners, understanding by Interior officials who must approve tribal codes, and adequate funding for implementation. The combination is improbable. Fortunately, Indian communities have become adept at defying probability in pursuit of survival. May they do so again in the arena of allotted land tenure.

<sup>i</sup> Allotments made to members of the “Five Civilized Tribes” and the Osage Tribe in Oklahoma are probated in state courts. 25 U.S.C. §§ 373, 375.

<sup>ii</sup> This general probate scheme is still in place. The Bureau of Indian Affairs (“BIA”) acts like the executor, managing the property and gathering information. BIA probate regulations are at 25 CFR Part 15. The Interior Office of Hearings and Appeals (“OHA”) houses the probate decisionmakers, whose regulations are at 43 CFR Part 4. An OHA judge may be appealed to the Interior Board of Indian Appeals (“IBIA”) under rules at 43 CFR § 4.310, *et seq.* IBIA decisions may be reviewed in federal district court. 25 U.S.C. §§ 372, 373. The BIA and OHA probate regulations were recently revised. 70 *Fed. Reg.* 11803 (March 9, 2005). The revisions shifted responsibilities from BIA to OHA but made few substantive changes. Interior expects more rule changes in 2005, in response to passage of AIPRA. 70 *Fed. Reg.* 11805.

<sup>iii</sup> The consent requirements vary depending on the proposed use and the reservation. Generally, non-agricultural uses require consent of the owners of a majority of the undivided interests, if there are twenty owners or more. Greater percentages, up to a maximum of 90%, are required for parcels with fewer owners. 25 U.S.C. § 2218, *as amended by AIPRA*. The American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. §3711(c)(2)(A) requires only majority consent for agricultural uses.

<sup>iv</sup> Under AIPRA, it will be possible for some non-Indians to own Indian trust interests. See discussion of “eligible heirs,” *infra*.

<sup>v</sup> Congress repealed the Dawes Act provisions authorizing allotment in 2000. P.L. 106-462, 144 Stat. 2007.

<sup>vi</sup> This criticism of DOI, like others in this article, is directed at the Department as a political institution. Many individual DOI employees work with integrity and intelligence to uphold the law, protect Indian property, and promote tribal welfare.

<sup>vii</sup> Tribal membership need not be established by completing a tribe’s formal enrollment process, although the two are often equated in casual discussion. *E.g.*, *J.W. v. R.J.*, 951 P.2d 1206, 1211 (Ak. 1998) (membership established by tribal council resolution, for purposes of Indian Child Welfare Act or ICWA, 25 U.S.C. § 1901 *et seq.*); BIA, “Guidelines for State Courts; Indian Child Custody Proceedings,” 44 *Fed. Reg.* 67584, 67586 (1979). ILCA’s reference to tribal members and those eligible for membership was modeled on the ICWA. *See*, Sen. Rept. No. 106-361, 106<sup>th</sup> Cong., 2d Sess., p. 14.

<sup>viii</sup> Senator Campbell asked DOI for such facts as the typical number and range of owners per parcel, and the typical and range of share sizes in different areas. DOI attempted a response, but felt so insecure about the quality of its data that the information was never released to the Task Force. The poor data is, in part, the result of poor data management systems. As recently as a few years ago, Interior used 67 different systems for trust title records, and nearly one-third of BIA offices still relied on three by five inch Allotment and Estate cards. Testimony of John Berrey, Quapaw Tribal Business Committee, Sen. Comm. on Indian Affairs, May 7, 2003.

<sup>ix</sup> This reticence is understandable, but perhaps overstated in view of the distinction the Court has made between the membership-based nature of tribal jurisdiction, and the

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legislative power of Congress. In *Moe v. Confederated Salish and Kootenai Tribes*, the Court noted that Congressional actions regarding Indians “were neither ‘invidious’ nor ‘racial’ in character,” and should stand “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians’.” 425 U.S. 463, 480 (1976) (quoting, *Morton v. Mancari*). The distinction was re-emphasized in *Duro v. Reina*, *supra*, 495 U.S. at 689-690.