

WILL DRAFTING FOR INDIAN TRUST PROPERTY

John C. Sledd
Northwest Justice Project
Native American Unit
401 Second Avenue South, Suite 407
Seattle, Washington 98104
(206) 464-1519
johns@nwjustice.org

August, 2005

TABLE OF CONTENTS

I.	INTRODUCTION TO INDIAN LAW AND THE HISTORY OF FEDERAL INDIAN POLICY	1
A.	Tribal Sovereignty, Federal Supremacy, And The Federal-Indian Trust Relationship.....	1
B.	The Allotment Of Tribal Land To Individuals	2
C.	Allotments, Jurisdiction And P.L. 280: Choice Of Law And Forum In Indian Country	4
D.	The Federal Indian Bureaucracy.....	5
E.	The Self-Determination Era: Tribal Operation Of Federal Programs And Land Consolidation.....	6
II.	FOUR QUESTIONS THAT DETERMINE WHAT LAW APPLIED TO INDIAN ESTATES	7
A.	Does The Estate Include Trust Property?	7
B.	Was The Decedent Legally Indian?.....	8
C.	Was The Decedent Domiciled In Indian County?	9
D.	If In Indian Country, Was The Decedent Domiciled On Fee Or Trust Land?	10
III.	THE BASIC PROCEDURES FOR PROBATE OF TRUST PROPERTY	10
A.	Probate Of Trust Property Is Governed Exclusively By Federal Law.....	10
B.	The Role Of BIA In Indian Probate.....	11
C.	The Role Of The Interior Office Of Hearings And Appeals	11
D.	The Role Of Tribal Justice Systems In Indian Probate.....	13

IV.	SUBSTANTIVE RULES APPLICABLE TO BOTH TESTATE AND INTESTATE INDIAN TRUST ESTATES	13
A.	Delayed Effective Date of Parts of AIPRA	13
B.	Adoptees	14
C.	Customary Spouses.....	14
D.	Missing and Afterborn Heirs	14
E.	Non-Indians – Law Other Than ILCA.....	15
F.	Non-Indians Under Special Statutes – Yakama and Other Tribes.....	15
G.	Indian Land Consolidation Act (ILCA) Restrictions On Who May Inherit Trust Property.....	15
	1. Generally.....	16
	2. AIPRA and the Concept of “Eligible Heirs”	16
	3. Special Rules for Some Off-Reservation Allotments	16
H.	Voluntary and Involuntary Sale of Land at Probate	17
V.	INTESTATE SUCCESSION RULES	17
A.	Surviving Spouse’s Life Estate.....	17
B.	Inheritance Absent Surviving Spouse and of Remainder After Spousal Life Estate	18
C.	“Single Heir Rule” for Interests Less Than 5%	19
D.	Intestate Advancements	19
VI.	WILLS AND TESTATE SUCCESSION.....	20
A.	Will Formalities And Similar Topics.....	20
B.	Who May Take Trust Property	21
	1. Devises of Land in Federal Trust Status	21
	2. Devises of Land in Fee Status.....	21
	3. Effect of Devise to Impermissible Beneficiary.....	22
	4. Devise of Life Estate.....	22
	5. Devise of Trust Personal Property	22

C.	Lapse And Anti-Lapse Rules	23
D.	Rules for Construction of Wills	23
E.	Protection of Spouses and Children.....	23
VII.	PROBATE PROVISIONS IN ILCA	24
A.	Heirship By Killing.....	24
B.	Renunciation and Consolidation Agreements of Heirs.....	24
VIII.	DRAFTING THE WILL FOR TRUST PROPERTY.....	25
A.	Avoiding Fractionalization	25
1.	Life Estates And Future Interests.....	25
2.	Devises Of All Interests In An Allotment To One Person.....	25
3.	Devises of Part of Allotment Held in Single Ownership.....	26
4.	Joint Tenancies With Right of Survivorship.....	26
5.	<i>Inter Vivos</i> Transfers.....	26
6.	Partitions	28
B.	Other Drafting And Dispositional Issues.....	29
1.	Conditional Estates	29
2.	Private Testamentary or Intervivos Trusts.....	29
3.	Identifying Allotted Land	30
4.	Houses And Other Buildings On Fractionated Allotments....	30
5.	Assignments Of Tribal Land.....	31
C.	The Non-Existent Role of Executors In Trust Estates	31
1.	Generally.....	31
IX.	PREPARATION AND FOLLOW-UP TO DRAFATING A WILL FOR A TRUST ESTATE.....	32
A.	Obtaining Family Information	32
B.	Inventorying Trust Property	32
C.	Discontinuance of Interior Solicitor Review and Will Storage ...	33

X. PRACTICE TIPS FOR NON-TRUST INDIAN PROPERTY33

 A. Generally33

 B. Traditional Cultural Property34

XI. Conclusion.....34

I. INTRODUCTION TO INDIAN LAW AND THE HISTORY OF FEDERAL INDIAN POLICY.

A. Tribal Sovereignty, Federal Supremacy, And The Federal-Indian Trust Relationship.

Death and inheritance are significant in every culture and it is no different for Native American people. Few lawyers realize that the law treats these matters very differently for Indian people than for others. For Indians, these are often matters of federal or tribal law, decided in federal or tribal fora. The familiar state probate process may not apply. As in other areas of Indian law, this situation cannot be understood without knowing some history, and understanding the concepts of tribal sovereignty and federal preemption of the field of Indian affairs.¹

European colonial governments presupposed their right to take the New World from its original inhabitants. They found justification in Christian evangelism, the Roman law of conquest, and the international law of the day. As elaborated by Spanish Church scholars, these precedents established that Native American tribes were sovereign nations, but subservient to the Christian states which "discovered" them. The discoverer gained the exclusive right to strip Indian nations of their land and sovereignty, whether by war or by treaty. Until the discoverer exercised its rights, indigenous nations retained both their territory and sovereignty. The rights of the discoverer rested in the crown. Local colonists had no right to acquire Indian territory without approval from the central governments. Those governments often had to restrain their colonists in order to avoid bloody and expensive Indian wars. The national governments were thus cast in the ironic role of protectors of Native rights.

These colonial notions entered American law at the outset. The U.S. Constitution gave to Congress the power to "regulate commerce with the Indian tribes." U.S. Const. Art. I, § 8. The first Congresses passed Trade and Intercourse Acts which put Indian affairs under exclusive federal control, prohibited all but federal agents from negotiating for cessions of Indian land, and defined areas of "Indian Country" into which non-Indian access was restricted. *E.g.*, 1 Stat. 137. Similar provisions remain on the books. *E.g.*, 25 U.S.C. §§ 174, 177, 180, 202, 261-264.² The U.S. Supreme Court, in a series of opinions by Chief Justice John Marshall, explicitly adopted the doctrines of discovery, inherent tribal sovereignty, and the status of tribes as nations "dependent" upon the United States for protection and subservient to federal law. *Johnson v. McIntosh*, 21 U.S. (8 Wheat)

¹ An excellent history of federal Indian law and policy is found in the leading treatise in the field, (*Felix Cohens, Handbook of Federal Indian Laws, Chap. 2 (Michie, 1982 ed.)*). A new edition of the Handbook will be published during 2005.

² The current definition of Indian Country, 18 U.S.C. §1151, includes all land within any Indian reservation, regardless of ownership, and parcels called "allotments" which are held for Indian individuals subject to federal control. This is a criminal jurisdictional statute but also applies in the civil context. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The special jurisdictional rules of federal Indian law generally operate only within Indian Country.

543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Over time, the protective federal role was recognized as a "trust relationship," with duties defined by federal statute and regulation, but interpreted in light of the common-law duties of a trustee. *E.g.*, *United States v. Mitchell*, 463 U.S. 206 (1983).

B. The Allotment Of Tribal Land To Individuals.

The mid-19th century produced an odd marriage of American land hunger and paternalistic beneficence toward Indians. To "better" Indian people, federal negotiators inserted into treaties provisions allowing Indian lands to be parceled out or "allotted" to individual tribal members. This was intended to discourage tribalism and to encourage individual initiative and agrarian industry. In 1887 Congress passed the Dawes or General Allotment Act, 24 Stat. 388, which provided for the allotment of land to tribal members on every Indian reservation. These allotments were generally 80 to 160 acres in size. *Id.* After every Indian household had an allotment, any remaining land could be opened to settlement by non-Indians, whose close example was expected to further 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 for twenty-five years, during which time they would be inalienable, free from state taxation and from execution or levy, and generally free from state jurisdiction. 25 U.S.C. §§ 348, 349, 354. State law would determine heirship to the allotments. 24 Stat. 388, § 5, *codified as amended at* 25 U.S.C. § 348. The Burke Act of 1906 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. 34 Stat. 182, *codified as amended at* 25 U.S.C. § 372. Allottees could also devise trust property by will, with federal approval, and have it probated in a federal administrative forum. 25 U.S.C. § 373.³ After twenty-five years the Indian owners were expected to be assimilated enough to manage the land on their own. The United States could then patent (deed) the land to them in fee, or it could extend the trust period administratively. 25 U.S.C. §§348, 391. The Burke Act allowed the fee patent process to be accelerated if individual owners were competent to manage their own affairs. 25 U.S.C. §349. Soon thereafter, "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. Today, about ten million acres of trust and restricted allotment land remain.

Even when the land stayed in Indian ownership, allotment had devastating consequences. 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. 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

³ Trust allotments in Oklahoma may be probated in state court. 25 U.S.C. §§ 373, 375.

states, and are members of different tribes. No one owner can make exclusive use of the land without consent of the others, nor, generally, can it be leased, logged, grazed, or mined without federal approval and consent of the owners of at least a majority of the undivided interests.⁴ 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 possibly other state law. *Bailess v. Paukune*, 334 U.S. 171 (1952); *see*, 25 CFR § 152.6.⁵

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 existing allotments indefinitely, and authorized acquisition of new land in trust for tribes and individuals.⁶ Where the IRA applies, allotments generally can leave trust only with the consent of their Indian owners. 25 U.S.C. 483; 25 CFR 152.4 - 152.8.⁷ The IRA authorized tribal governments to adopt written, federally-approved Constitutions through which they might exercise their sovereignty. Most, although not all, of the thirty federally-recognized Washington tribes now operate under IRA constitutions.⁸

⁴ The owner consent requirements vary depending on the type of use proposed and often depending on the number of owners. There are special statutes for some reservations. Generally, the Indian Land Consolidation Act (“ILCA”) authorizes non-agricultural uses, including rights-of-way, residential, and mineral leases (except for coal or uranium), with the consent of the owners of a majority of the undivided interests, if there are twenty owners or more. Greater percentages of ownership consent are required for parcels with fewer owners. 25 U.S.C. § 2218, *as amended*. The American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3701, *et seq.*, authorizes agricultural uses with consent of the owners of a majority of undivided interests. Both ILCA and the Agricultural Act, as well as older statutes and BIA regulations, authorize the BIA or the Tribe to consent on behalf of minors, heirs pending probate, missing owners and others in certain circumstances. Co-owner consent is not required for non-exclusive uses such as hunting and gathering.

The American Indian Probate Reform Act of 2004 (“AIPRA”), P.L. 108-374, 118 Stat. 1804, authorizes owners to unanimously request that an allotment be placed in “owner-managed status,” after which short-term agricultural leases could be entered without federal approval. 25 U.S.C. § 2220. These provisions become effective only one year after notice of AIPRA is given to landowners by Interior. 25 U.S.C. 2220(d)(1). That notice was completed in April, 2005. *See* Part IV, A. pp. _____, *infra*.

⁵ Under AIPRA, it will soon become possible for non-Indians to own Indian trust interests in some circumstances. *See* discussion at pp. 33, 37-38, *infra*.

⁶ In November, 2000, Congress fully repealed the Dawes Act provisions authorizing allotment. Indian Land Consolidation Act Amendments of 2000, P.L. 106-462, 144 Stat. at 2007 (repealing former 25 U.S.C. §§ 331-332).

⁷ Under ILCA, as amended by AIPRA, several kinds of involuntary sales of trust interests are possible. *See* discussion at pp. 35, 56-57, *infra*. Allotments are also subject to condemnation under federal and sometimes state law. 25 U.S.C. § 357.

⁸ The IRA applied only if tribes approved its application by popular vote. 25 U.S.C. § 478. It was rejected by the Chehalis, Colville, Lummi, Shoalwater Bay, Spokane, and Yakama tribes in Washington.

C. Allotments and Jurisdiction In Indian Country.

Allotment and the subsequent sale of surplus and fee patented land resulted in a checkerboard of land ownership. Most Washington reservations now include individual and tribal trust land, and land held in fee by tribes, tribal members, and non-Indians.⁹ Allotment also resulted in significant non-Indian populations on many reservations. Both these developments have had jurisdictional consequences. Today, the allocation of jurisdiction in Indian Country between tribes, states, and the federal government is highly dependent on whether events occurred on fee or trust land, and whether the parties are Indian or not. This is so, notwithstanding early case law and federal statutes establishing that tribes and the United States had exclusive jurisdiction over all land and people within the exterior boundaries of an Indian reservation. *See, e.g., Worcester v. Georgia, supra; Buster v. Wright*, 135 Fed. 947 (8th Cir., 1905); 28 U.S.C. § 1351 (definition of "Indian Country"). Recent Supreme Court decisions have eroded tribal jurisdiction over non-Indians and non-Indian land. *E.g., Nevada v. Hicks*, 533 U.S. 353 (2001) (tribes presumed to lack jurisdiction over non-Indians; exceptions where non-Indian enters consensual relationship with Indians or engages in conduct threatening tribal self-governance).

Congress also complicated things by passing Public Law 83-280 in 1953 ("P.L. 280"), 67 Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360. That statute authorized states to assume civil and criminal adjudicatory, but not tax or regulatory jurisdiction over Indian Country. *E.g., California v. Cabezon Band of Mission Indians*, 480 U.S. 202 (1987). The jurisdiction of the state under P.L. 280 is concurrent with that of tribes and their courts. *E.g., Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 562 (9th Cir., 1991).

Washington implemented P.L. 280 in a particularly contorted fashion, taking jurisdiction over Indians only when not on their trust or allotted land, except in eight subject areas in which it assumed jurisdiction over Indians throughout Indian Country. RCW Ch. 37.12. The eight areas do not include probate and estates, whether of trust or fee property. RCW §37.12.010. The Washington statute, however, also authorized the State to assume full civil and criminal jurisdiction over all lands and all subject areas if a tribe so requested. Eleven tribes made such requests in the 1950's and 1960's. Two subsequently obtained retrocession of state civil and criminal jurisdiction on trust lands, except for the eight special subjects. Seven other tribes obtained retrocession only of state criminal jurisdiction on trust land. At present there remain nine tribes as to which state courts have concurrent civil jurisdiction over all lands, people, and subject areas,

⁹ There is also a category known as "restricted fee" lands, in which the Indian owner received a fee patent subject to a federal restriction against alienation. For most purposes, including estate law, restricted fee and trust lands are treated the same.

including probate of non-trust assets.¹⁰ These tribes are Chehalis, Colville, Muckleshoot, Nisqually, Quileute, Skokomish, Squaxin Island, Swinomish, and Tulalip.¹¹

The final key to jurisdiction and choice of law in Indian Country is the fact that each tribe is its own sovereign, which can develop its own laws. Most tribal codes are more limited in scope than are state codes, and many tribal court systems are young and lack a large body of precedent. Many tribal codes authorize consideration of the law of other jurisdictions – especially the law of other tribes -- if there is no tribal law on point. The opportunity to “make new law” in this way is one of the joys of tribal law practice. Many tribes have basic probate codes and handle probate matters in tribal court. Other tribes have not adopted probate codes, and their courts may or may not handle probate matters under a general grant of civil jurisdiction. Not every tribe has a tribal court. Some tribal courts exercise very limited jurisdiction. Most tribal courts follow the Anglo-American procedural model, but others use more traditional and sometimes unwritten procedures to resolve some or all disputes. Tribal court decisions are entitled to comity or full faith and credit. *See, e.g., In re Buehl*, 87 Wash.2d 649 (1976); Wash. Superior Court Civ. R. 82.5.

Tribal law is rarely available through traditional legal references. The monthly *Indian Law Reporter* (“ILR”) published by the American Indian Lawyer Training Program in Oakland, California and available only in hard-copy, is the single best source of tribal court opinions from around the country. Some tribal codes and court decisions are available on the Internet. For example, codes of the Tulalip, Colville, Skokomish, Nisqually, and Makah Tribes are available through the Tribal Court Clearinghouse at <http://www.tribal-institute.or/lists/codes.htm>. Versus Law, an on-line legal research firm in Redmond offers some tribal codes and court decisions. Tribal attorneys, court clerks, and Indian legal services attorneys can often help.

D. The Federal Indian Bureaucracy.

Very little can be done in Indian Country without referring to federal law and possibly involving the federal government. Much of the administrative responsibility for Indian affairs is vested in the Bureau of Indian Affairs (BIA). Originally part of the War Department, it is now within Interior. The BIA has historically had near despotic power in Indian Country. The edicts of Bureau officials were as good as law, and the Bureau ran everything from the schools to the jails. The Bureau's power is much reduced and hemmed in by recent statutes, but it remains a powerful influence, with authority or program responsibility over areas as numerous and diverse as Indian land and resources, social services, child welfare, housing, tribal courts, and law enforcement. In addition to its headquarters in the nation's capitol, the Bureau maintains regional offices, including

¹⁰ The State still lacks jurisdiction to probate trust land. RCW § 37.12.060.

¹¹ Under the 1968 Indian Civil Rights Act, assumptions of state jurisdiction after that date require the consent of the tribe. 25 U.S.C. §§ 1321, 1322. Several Washington tribes have acquired land after 1968, but never consented to state jurisdiction over these new lands. The Sauk-Suiattle, Jamestown S'Klallam, Upper Skagit and Nooksack reservations, for example, were created after 1968 and those tribes never consented to any state jurisdiction.

the Northwest Regional Office in Portland, which covers tribes in Washington, Oregon, Idaho, and western Montana. Within each region are one to several "agencies," including, nearest Seattle, the Puget Sound Agency in Everett. Each agency office is supervised by a Superintendent.

Another Interior Agency, the Office of the Special Trustee (OST), was created in the mid-1990's in an effort to improve federal management of Indian trust property. *See*, Indian Trust Management Reform Act of 1994, 25 USC 4001 *et seq.* OST has responsibility for a number of functions related to trust property, most notably management of Individual Indian Money ("IIM") accounts, into which income from trust property is deposited. The OST is also responsible for appraisals needed to lease or to transfer trust property *inter vivos*. The Special Trustee is in Washington, D.C., but many of OST's activities are based in Albuquerque, New Mexico. There is a "Trust Beneficiary Call Center" intended to respond to inquiries from trust property owners.¹² In the past several months, OST has also hired some fifty "trust officers" stationed at Indian agencies around the country. These new positions are intended, among other things, to create a single point of contact for Indians needing assistance with trust assets. Contact information for Trust Officers and regional Trust Administrators is available at the OST website.

BIA and OST get their non-litigation legal services from the Interior Solicitor's Office, which also has regional offices, including one in Portland which serves the Northwest Region.

E. The Self-Determination Era: Tribal Operation Of Federal Programs And Land Consolidation.

After the pain of allotment, the brief promise of Indian reorganization, and a dark twenty years known as the "termination era," when Congress strove assiduously to end the federal-Indian relationship, the pendulum of federal Indian policy swung again in the late 1960's. Starting with President Nixon and continuing to the present day, the Congress and Executive (but not, conspicuously, the judiciary) have followed a policy of "self-determination," encouraging tribes to take control of their own destinies, and reducing the role of federal Indian bureaucrats.

Two major statutes reflect the policy of self-determination and directly affect Indian probate. The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450 *et seq.*, and the related Tribal Self-Governance statute, 25 U.S.C. §§ 458aa, *et seq.*, authorize tribes to enter self-determination contracts or self-governance compacts under which responsibility for federal Indian activities, and the associated funding, are transferred to the tribes. The tribes can then redesign the programs to meet tribal needs. Final decision-making authority for trust property cannot be transferred to tribes, but tribes can take over supporting activities. Thus, many Washington tribes have contracted or compacted to operate BIA Realty and Probate

¹² The Call Center number, as of May, 2005, was (888) 678-6836 ext. 888.

programs, handling day to day administration of trust land and related record keeping, including records needed in drafting Indian wills. In Washington State, probate-related activities have been contracted or compacted by the Lummi, Makah, Colville, and Yakama tribes, and perhaps others.

The second major probate-related statute is the Indian Land Consolidation Act, 25 U.S.C. § 2201, *et seq.* (“ILCA”), passed in 1983 to address the problem of fractionated heirship of allotted lands. The Act authorized tribes, with federal approval, to adopt probate codes to govern trust property.¹³ To date only a handful of tribal codes have been approved. Originally, ILCA provided that very small undivided interests would not pass by intestacy and could not be devised, but would instead escheat to the tribe on whose reservation they were located. This provision was held to be an unconstitutional taking of property in *Hodel v. Irving*, 481 U.S. 704 (1987). Minor amendments to the escheat provision of the Act, made in 1984, were also struck down. *Babbitt v. Youpee*, 519 U.S. 234 (1997).

Comprehensive amendments to ILCA were adopted in 2000. P.L. 106-462, 114 Stat. 1992. The 2000 provisions were complex and controversial. Work began almost immediately on additional amendments. The American Indian Probate Reform Act of 2004 replaced many of the provisions of the 2000 Act. The 2000 and 2004 amendments expanded tribal authority over Indian probate, restricted the passage of trust property to non-Indians, and adopted an abbreviated, uniform federal probate code, discussed below.

II. FOUR QUESTIONS THAT DETERMINE WHAT LAW APPLIES TO INDIAN ESTATES.

Four questions determine whether tribal, federal, or state laws apply to Indian estates, and which jurisdiction will decide Indian probates in Washington.¹⁴ The questions are: Does the estate include Indian trust property? Was the decedent Indian? Was he or she domiciled in Indian Country? Was the domicile on fee or trust land?

A. Does The Estate Include Trust Property?

The descent and distribution of Indian trust property is controlled exclusively by federal law. The federal law at times incorporates state and tribal law. State courts and state law have no role unless Congress expressly provides otherwise. *McKay v. Kalyton*, 204 U.S. 458 (1907); *Blanset v. Cardin*, 256 U.S. 319 (1921). The substance of federal law applicable to trust estates is detailed in parts III through VI below.

¹³ Indian allotments in Alaska are not subject to these or any other provisions of ILCA. 25 U.S.C. § 2219, *as amended*.

¹⁴ In these materials, “probate” is used loosely, to mean any proceeding to determine who gets property after death. Similarly, the words “inheritance” and “heir” are used to refer to both testate and intestate succession.

B. Was The Decedent Legally Indian?

Generally, federal and tribal inheritance laws only apply if the decedent was "Indian."¹⁵ There is no single legal definition of Indian. *Handbook of Federal Indian Law supra* at 20-27. Individuals who self-identify as Indian may not legally be so. Being legally "Indian" involves the political relationships between individuals and their tribes, and between tribes and the United States. *Morton v. Mancari*, 417 U.S. 535 (1974) (preference for hiring Indians in federal employment is not equal protection violation as it reflects political, not racial classification).

For probate, the definition of Indian has historically been broad. 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). 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). Tribal membership is akin to a recognition of tribal citizenship, and is determined by each tribe under its own law. The most common evidence of membership is "enrollment" an administrative process resulting in entry of the member's name on a list or "roll." Enrollment often requires proof of a certain quantum of ancestry or "blood" from that tribe. Enrollment is not the only means to establish membership, however. *E.g., J.W. v. R.J.*, 951 P.2d 1206, 1211 (Ak. 1998) (for Indian Child Welfare Act, membership may be established by tribal council resolution); BIA, "Guidelines for State Courts; Indian Child Custody Proceedings," 44 Fed. Reg. 67584, 67586 (1979), citing, *U.S. v. Broncheau*, 597 F. 2d 1260 (9th Cir. 1979)(defendant is "Indian" within federal criminal jurisdiction statute if he had an ancestor in what is now the U.S. before 1492, and is recognized as Indian by an Indian community).

Many landowners feared that their inter-tribal or inter-racial descendants would not qualify as tribal "members" and would therefore be barred from inheriting more than a life estate under the 2000 law P.L. 106-462, §103(4), 114 Stat. 1996-1997. The 2000 ILCA amendments to §207 of ICLA generally defined "Indian" as tribal members and those eligible for membership. This engendered widespread, negative reaction to the 2000 Act. Pending further amendments, DOI agreed not to issue a formal certification required for the 2000 changes to ILCA section 207 to take effect.

In developing AIPRA, Congress sought to allow more people in Indian communities to inherit, without resorting to a purely racial definition, which could violate equal protection. The result is a multi-tiered definition of Indian, coupled with a new class of "eligible heirs" who need not within the statutory definition of Indian but are eligible to inherit land in trust. As amended by AIPRA, the Land Consolidation Act now defines "Indian" to mean:

¹⁵ In some instances under AIPRA, Indian trust land may be inherited by a non-Indian and remain in trust and subject to federal Indian probate law. See, pp. 33, 37-38, *infra*.

- (A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner, as of October 27, 2004, of a trust or restricted interest in land;
- (B) any person meeting the definition of Indian under Section 479 of this title and the regulations promulgated thereunder;¹⁶ and
- (C) with respect to the inheritance and ownership of trust or restricted land in the state of California pursuant to Section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that state.

25 U.S.C. § 2201(2), *as amended*.¹⁷

Part (A) of this definition retains the reference to membership from the 2000 Act. Until clarified through regulations or Interior probate decisions, caution should be used in treating a person who is not enrolled or eligible for enrollment as a “member” and therefore an Indian. Despite the ICWA and other precedent there is a risk that Interior will interpret “membership” narrowly to mean enrollment. If such a person is held to be non-Indian he or she may be ineligible to take property in trust or at all. A contingent devise for this eventuality may be appropriate.

C. Was The Decedent Domiciled In Indian Country?

If the decedent was an Indian domiciled in Indian Country, the tribe with jurisdiction over that area has authority to probate and determine inheritance of non-trust real or personal property. *Jones v. Meehan*, 175 U.S. 1 (1889); *see, e.g., In re Estate of Tolson* 89 Wn. App. 21, 30-31 (1997) (primary probate jurisdiction is in state of domicile).¹⁸ The Tribe should also have jurisdiction as to off-reservation personal property of a reservation decedent, just as a state may probate out-of-state personal property of its domiciliaries. *See, id.* Tribal jurisdiction over off-reservation non-trust realty probably does not exist. *See, e.g., In re Estate of Stein*, 78 Wn. App. 251, 261-262 (1995) (courts of a decedent's domicile do not have jurisdiction to control devolution

¹⁶ 25 U.S.C. §479 is part of the Indian Reorganization Act. It provides that:

‘Indian’ as used in [this Act] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

¹⁷ The definition for California reflects that state’s unique history. California had a huge and diverse Indian population, but the United States recognized few tribes there, created few reservations, and instead created thousands of off-reservation allotments. As a result, many Indian people in California own trust land but are not associated with a federally-recognized tribe.

¹⁸ Many tribes take the position that their members are always domiciled within the tribe’s reservation homeland, wherever they may “temporarily” reside.

of real property in another state); *WELSA Heirship Determinations*, 31 IBIA 201, 209 (1997) (real property descent follows law of the situs of the land).

D. If In Indian Country, Was Decedent Domiciled On Trust Land?

In Washington, on reservations subject to P.L. 280, state courts have jurisdiction concurrent with the tribe to probate non-trust property of Indian decedents domiciled on fee land. Except for the nine “full 280” reservations, *see*, page 6, *supra*, there is no state jurisdiction, at least over the reservation estate, if the domicile was on trust land under the jurisdiction of the decedent’s own tribe. RCW 37.12.010 (no assumption of state jurisdiction over Indians on their trust lands).

III. THE BASIC PROCEDURES FOR PROBATE OF TRUST PROPERTY.

A. Probate Of Trust Property Is Governed Exclusively By Federal Law.

Indian trust property is probated exclusively by the federal government under 25 U.S.C. §§ 372 and 373. This property includes trust and restricted allotments, structures affixed to allotments, 25 U.S.C. §2201(7), and IIM or other funds held by the U.S. in trust for an Indian. 25 U.S.C. §§2206(a)(1), 2206(a)(3). Again, there are exceptions in Oklahoma, where some allotments are probated in state courts.

Until passage of ILCA, intestate heirs to trust property were determined in accordance with the law of the state where the property was located. ILCA allowed federally-approved tribal intestate succession law to supplant state law. Prior to AIPRA, substantive rules for testate estates were established by Interior, mostly by regulations at 25 CFR Part 15 (BIA) and 43 CFR Part 4, Subpart D (OHA). The regulations are less comprehensive than most state probate codes, however, so many issues were resolved by the ALJ or Interior Board of Indian Appeals (“IBIA”) often by analogy to state, tribal, or common law. *See, e.g., Estate of Molina*, 27 IBIA 254, 259 (Mar. 29, 1995) (referring to state law to determine meaning of devise to “heirs of the body”). Matters not explicitly covered by the regulations included “revival, incorporation by reference, ademption, simultaneous death, pretermitted heirs and spouses, and others.” *Handbook of Federal Indian Law*, at 636 n. 34 (1982), *citing, Estate of Abbott*, 82 I.D. 169 (1975).

When AIPRA takes full effect, intestate succession will be governed by the uniform federal rules in that Act or by federally-approved probate codes of each tribe where decedent owned trust property. 25 U.S.C. § 372; 25 U.S.C. § 2206(a)(1). AIPRA also will provide many of the substantive rules for probate of testate estates which previously were established by regulation or decisional law. AIPRA is not a complete probate code, however, so gaps remain to be filled by tribal probate codes or by Interior.

Although federal law in the past incorporated state intestate succession law as the rule of decision, efforts to apply state law to other probate issues have been unsuccessful. For example, Interior has no obligation to follow a state court’s determination of who are a decedent’s heirs or surviving spouse. *Estate of Edland*, 63 I.D. 141 (1956); *Estate of*

Thompson, 60 I.D. 125 (1948). Efforts by surviving spouses to apply state or tribal community property law to trust property have uniformly failed, regardless of the use of community funds to purchase or manage trust land. *E.g.*, *Estate of McMaster*, 5 IBIA 61, 83 I.D. 145 (Apr. 6, 1976); “Application of Oklahoma Community Property Act,” Solicitor’s Opinion M-34899, 59 I.D. 474 (Apr. 2, 1947). Efforts to apply state law to protect surviving spouses and children from disinheritance have similarly failed. *E.g.*, *Blanset v. Cardin*, 256 U.S. 319 (1921) (state law regarding omitted spouse inapplicable); *Akers v. Morton*, 499 F.2d. 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975) (state law of dower inapplicable); *Estate of Pederson*, 1 IBIA 14, 77 I.D. 270 (Oct. 6, 1970) (state law regarding omitted child inapplicable); *see also*, *Estate of Simpson*, 1A-1270, 71I.D. 103 (1964) (state anti-lapse law inapplicable).

B. The Role Of BIA In Indian Probate.

The BIA is the primary administrative agency for Indian probate, under 25 CFR Part 15. These regulations were recently revised. 70 *Fed. Reg.* 11803 (March 9, 2005). These revisions, which took effect immediately, shifted many responsibilities from BIA to the Interior Office of Hearings and Appeals but made only minor substantive changes. Interior expects another set of amendments in 2005, in response to passage of AIPRA. 70 *Fed. Reg.* at 11805. Under the regulations, BIA keeps records of land ownership and leases, receives notification of deaths, inventories the trust estate, identifies probable heirs, manages trust property pending final probate decisions, receives requests to pay burial expenses from the estate, assembles information regarding other claims, and provides interested parties with notice of its proceedings.¹⁹

Historically BIA has also been the drafter of most wills for trust property. As of April 29, 2005, however, BIA ended this practice. DOI remains obligated under AIPRA to provide estate planning assistance to the extent of available appropriations, either itself or through grants to or contracts with tribes, Indian legal services programs, or others. 25 U.S.C. §2206(j). The promise of such assistance, necessary to avoid some onerous parts of AIPRA, was an important incentive for landowner support of that legislation. It is unclear at this time whether and how Interior intends to fulfill this promise.

C. The Role Of The Interior Office Of Hearings And Appeals.

The Interior Office of Hearings and Appeals (OHA) houses the probate decision makers. These include Attorney Decision Makers (“ADM’s”), Administrative Law Judges (“ALJ’s”), and Indian Probate Judges. There are currently about ten ADM’s and nine ALJ’s hearing Indian probate cases nationwide. The ALJ primarily responsible for Washington is based in Sacramento, and the ADM is in Portland. OHA’s Indian probate regulations appear at 43 CFR Part 4, subpart D.

¹⁹ Most of these functions are performed at the BIA agency office, supported by a “Title Plant” or Land Titles and Records Office in each region, which usually has the most complete and up to date records of allotment interests and ownership. Where a decedent had allotment interests on more than one reservation, the agency for the tribe in which the decedent was enrolled will usually be in charge. *See*, 25 CFR § 15.108 (probate package prepared by agency of tribe having “the strongest association with the decedent”).

Whether an ADM is used, or an ALJ, the OHA is responsible for notifying interested parties. 43 CFR §§ 4.216, 4.217. Under AIPRA, actual written notice must be attempted. 25 U.S.C. 2206(n). Minimum efforts to locate heirs for notice purposes include searching government records, inquiry with family and tribe, and, if “the property” (presumably the particular interest to be taken by the heir) is worth more than \$2,000, contracting with a search firm. *Id.*²⁰ The OHA decision maker will approve, disapprove, and interpret wills, approve claims against the estate, approve renunciation of interests by heirs or devisees, determine heirs or beneficiaries and whether they are Indian, and order distribution of the estate. 43 CFR §§ 4.202(c); 4.214 (contents of ADM decision); 4.240 (contents of ALJ decision). Under AIPRA, the OHA decision maker also has authority to approve *ad hoc* consolidation agreements among probable heirs. 25 U.S.C. §§ 2206(e), 2206(k)(9).²¹

An Attorney Decision Maker can determine heirs and “summarily process” estates consisting solely of trust funds worth less than \$5,000. 43 CFR §§ 4.211(a), 4.212. An ADM can decide all other probate cases unless a probable heir or beneficiary requests a formal hearing before an ALJ or probate judge, or one of a dozen or so criteria exist, which are linked to complexity of the probate. See, 43 CFR §4.202(b)(1) to (b)(14). If not summarily processed, the ADM will conduct an informal hearing. 43 CFR §§ 4.202; 4.213(c)(2) –(c)(3). The ADM’s decision is reviewable *de novo* by an ALJ or Indian Probate Judge. 43 CFR 4.215.

An ALJ or Indian Probate Judge can hear any probate proceeding. The regulations identify some issues that can only be decided by an ALJ or Indian probate judge, such as whether to presume the death of a missing heir. 43 CFR § 2.204; see also, 43 CFR §§ 4.203 (nonexistent persons), 4.205 (escheat for lack of heirs); 4.207 (approval of settlement agreements between interested parties). Some discovery is allowed in proceedings before an ALJ or Indian Probate Judge. 43 CFR §§ 4.220 through 4.224. The ALJ can subpoena witnesses to the hearing. 43 CFR § 4.230 (a)(2). The hearing need not follow the formal rules of evidence. 43 CFR § 4.232. The ALJ often calls and actively question witnesses to insure development of an adequate record, especially where parties lack counsel. See, 43 CFR § 4.234(b).

Proposed ALJ decisions are issued and become final after 60 days, 43 CFR § 4.240(c), unless rehearing is sought under 43 CFR § 4.241. Decisions can be reopened within three years after they become final if an affected party had no notice and was not in the area when notice was posted at the agency. 43 CFR § 4.242(a). Reopening is possible after three years to prevent manifest injustice. 43 CFR § 4.242(i). Decisions can

²⁰ To help Interior improve its notoriously inaccurate and incomplete address records, the Department is now required to send a change of address form to every owner at least annually. 25 U.S.C. §2221.

²¹ These two provisions of ILCA regarding consolidation agreements are almost identical. For some reason (or perhaps for no good reason), § 2206(e) took effect immediately upon passage of AIPRA, but § 2206(k)(9) does not take effect until one year after Interior gives notice of AIPRA’s enactment to landowners. P.L. 108-374, §8(b); 118 Stat. 1809.

be modified on motion or *sua sponte* by the ALJ if property was inadvertently omitted from or included in the estate. 43 CFR §§ 4.271, 4.272. ALJ decisions are not published.

Decisions of the ALJ may be appealed within sixty days after they become final, to the Interior Board of Indian Appeals in Arlington, Virginia. 43 CFR § 4.320(b). Rules for IBIA probate appeals are at 43 CFR § 4.310, *et seq.* The IBIA makes decisions on the record. *See*, 43 CFR §4.321. The decisions are published by Interior in the IBIA Reporter, and selected decisions are published in Interior Decisions (“I.D”). Interior Decisions are available at the King County Law Library. Interior Decisions and IBIA decisions are available through commercial on-line legal research services. IBIA decisions are available free and in searchable form at a private website, <http://www.ibiadections.com>. IBIA probate decisions may be reviewed in federal district court under the Administrative Procedure Act. 25 U.S.C. §§ 372, 373.

D. The Role Of Tribal Justice Systems In Indian Trust Probate.

Federally-approved tribal codes can provide rules of decision in federal Indian probates, 25 U.S.C. § 2205(a)(1); 25 U.S.C. § 2207 (full faith and credit for tribal probate codes), but the existence of tribal court jurisdiction over trust estates has been “uncertain” at best. *Handbook of Federal Indian Law* at 634, n. 22 and accompanying text (1982 ed.). As a practical matter, OHA has frequently relied on and followed tribal court determinations regarding family relationships, births, deaths, and the like.

Under the 2000 amendments to the Land Consolidation Act, Interior can promulgate regulations authorizing the justice systems of tribes with approved probate codes to make proposed findings of fact and conclusions of law which Interior will use in probate decisions. 25 U.S.C. 2205(d). This provision was unaffected by AIPRA. It is not clear whether this provision of ILCA merely condones existing practices, such as the utilization of tribal court factual findings regarding familial status, or whether Secretarial regulations could authorize use of tribal courts as the initial decision-making body in federal Indian probate, with proposed decisions reviewed or accepted by OHA. Under the latter view, tribal courts could perform a role similar to a federal magistrate who makes a “report and recommendation” to a federal judge under 28 U.S.C. § 636(b)(1)(B). Until regulations are adopted, it will be impossible to say how this provision will play out.

IV. SUBSTANTIVE RULES APPLICABLE TO BOTH TESTATE AND INTESTATE SUCCESSION.

A. Delayed Effective Date of Parts of AIPRA.

As noted above, AIPRA added a uniform federal probate code to §207 of ILCA, 25 U.S.C. §2206. With two minor exceptions, AIPRA’s amendments to section 207 do not take effect immediately. Interior must first give notice of the amendments to all tribes and Indian trust landowners, and must certify in the *Federal Register* that notice was given. AIPRA, P.L. 108-374, §8. The amendments to section 207 apply only to

estates of persons who die one year or more after the *Federal Register* certification appears. *Id.*, §8(b). The *Federal Register* certification was published on June 28, 2005. 70 *Fed. Reg.* 37107. Amended §207 will therefore be in effect for all estates of persons who die after June 28, 2006. Until the one year period has passed and AIPRA's changes are in effect, both AIPRA and pre-AIPRA law should be considered. Caution is needed because the pre-AIPRA law that will apply is the 1999 version of section 207, not the 2000 version. The 2000 amendments to section 207 had their own notice and certification requirements, which were never completed, so the amendments never became effective.

B. Adoptees.

Federal law recognizes the right of adopted children to inherit Indian trust property from adoptive parents if the adoption was by decree of a state or tribal court. 25 U.S.C. 372a. Adopted children will also benefit from the pretermitted heir protections of AIPRA. 25 U.S.C. § 2206(k)(2)(B)(ii). Adoptions under tribal custom or tradition, which are fairly common among older Indians, are not enforceable in trust probate unless they occurred and were "recognized" by Interior prior to 1940, or the tribe has established an adoption procedure "recognized" by Interior, and the adoption is recorded in the records of the BIA agency superintendent. *Id.*; *Estate of Kipp*, 8 IBIA 67 (1980).

Under AIPRA, adopted children will not inherit from their biological parents. 25 U.S.C. §2206(k)(2)(B)(iii)(I). They may, however, inherit from other blood kin who have maintained familial relationships with the adoptee. *Id.* Tribal law – any tribal law, not just an approved probate code – may provide different rules for inheritance by adopted children from their biological kin. 25 U.S.C. §2206(k)(2)(B)(iii)(II).

C. Customary Spouses.

The children of tribal custom marriages can inherit trust property from both parents. 25 U.S.C. § 371. This is true regardless of whether state law recognizes such marriages. The law of many tribes, however, has supplanted custom marriage with requirements for marriage licenses and formalization analogous to state law. Absent a valid marriage under custom or law, the applicable law of intestacy determines whether a surviving partner or child can inherit from a deceased parent or child. *See, Estate of Track*, 1 IBIA 216, 79 I.D. 83 (1972). Customary divorce procedures have also been held sufficient to terminate both a customary and a statutory marriage for purposes of trust probate. *Estate of Shockto*, 2 IBIA 224, 81 I.D. 177 (1974).

D. Missing and Afterborn Heirs.

Under AIPRA, an heir will be presumed missing if he or she remains "whereabouts unknown" sixty days after completion of notification efforts by OHA under 25 U.S.C. §2206(n), and the heir has had no contact with other heirs for six years, and no contact with Interior concerning trust assets in that same time. 25 U.S.C. §2206(o)(1). OHA may extend the search period. 25 U.S.C. §2206(o)(2). A missing heir

will be treated as predeceased. 25 U.S.C. §2206(o)(4). Pre-AIPRA OHA regulations authorize probate judges to presume that a missing individual is dead. 43 CFR §4.204.

Under AIPRA, children in gestation who survive decedent by at least 120 hours will be treated as surviving children, testate or intestate. 25 U.S.C. §2206(k)(4).

E. Non-Indians -- Law Other Than ILCA.

The federal-Indian trust relationship by definition arises only in regards to Indian people. Historically, then, whenever a non-Indian inherited an interest in a piece of trust land, that interest would leave trust status. *Bailless v. Paukune*, 334 U.S. 171 (1952).²² Only the non-Indian's interest would leave trust, not those of Indian co-owners. If a non-Indian takes a life estate, a remainder held by an Indian will remain in trust and Interior will consider the full title to be in trust. *Estate of Williams*, 13 IBIA 35 (1984).

The IRA provides that trust property on the reservations of IRA tribes can only descend or be devised to the tribe, an heir at law, a lineal descendant of the testator, or another Indian. 25 U.S.C. § 464. Non-Indians and collateral relatives who would not be intestate heirs cannot inherit or receive devises of land on these reservations. Because AIPRA will substantially narrow the class of people who will be “heirs at law” it will also substantially narrow the class eligible to take devises under this provision of the IRA. For land that is subject to the jurisdiction of an IRA tribe, AIPRA will also bar devise of that land in fee to anyone. 25 U.S.C. § 2206(b)(2)(B). Other than these changes, AIPRA preserves the right to devise as specified by the IRA. *Id.*

F. Non Indians Under Special Statutes – Yakama and Other Tribes.

Special statutes govern the devise or descent of allotments under the jurisdiction of the Nez Perce (Idaho), Warm Springs (Oregon), and Yakama (Washington) tribes. 25 U.S.C. §§ 607 (Yakama); 86 Stat. 744 (Nez Perce); 86 Stat. 530 (Warm Springs). Under these laws, if allotments within those tribes’ reservations or the areas they ceded by treaty are devised to or would be inherited by anyone other than an enrolled member of the tribes, having one-quarter degree or more of blood of the tribe, then the tribe may purchase the interest. Surviving spouses may reserve a life estate in half the interest purchased by the tribe. Implementing regulations are at 43 CFR § 4.300 – 4.308. There are also inheritance statutes specific to the Lake Traverse and Standing Rock Sioux Reservations in North and South Dakota. P.L. 96-274, 94 Stat. 537 (Standing Rock); P.L. 98-513, 98 Stat. 2411 (Lake Traverse). A federal district court has held that the escheat provisions of the Lake Traverse law work an unconstitutional taking of property. *Dumarce v. Norton*, 277 F. Supp. 2d 1046 (D.So. Dak 2003).

G. ILCA Restrictions On Who May Inherit Trust Property.

²² As noted below, AIPRA will change this result for some close kin who are “eligible heirs” but do not meet ILCA’s definition of “Indian.”

1. Generally.

AIPRA contains extensive provisions restricting devise and descent of land to non-Indians and distant relatives. The general scheme is to limit intestate succession to a very few people, in order to control fractionation and keep land in trust, while allowing disposition by will to a wider group. This scheme is responsive to the *Hodel v. Irving* and *Babbitt v. Youpee* decisions, which suggested greater constitutional power to restrict intestate inheritance. See pages 14-15, *supra*. Even testate dispositions, however, are substantially limited by AIPRA. These limitations vary depending on whether the land is on an IRA reservation or not, whether the devisee is to take in trust or in fee, and the relationship of the devisee to the testator.

2. AIPRA and the Concept of “Eligible Heirs.”

For intestate succession, property must pass to an “eligible heir” or it will escheat to the tribe. The statute defines “eligible heir” as:

any of a decedent’s children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are –

(A) Indian; or

(B) lineal descendants within two degrees of consanguinity of an Indian [*i.e.*, children and grandchildren of an Indian]; or

(C) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement under section 2206 of this title, another trust or restricted interest in such parcel from the decedent.

25 U.S.C. §2201(9). The definition eliminates intestate inheritance by in-laws and collateral heirs such as aunts, uncles, and cousins. By allowing non-Indians who are children or grandchildren of Indians to take land in trust, the statute responds to criticism of the 2000 Act. This provision also buys two generations of time in which tribes can consider whether in order to insure continued inheritance in trust status, their membership standards should be changed to include descendants with less blood quantum from that tribe. This definition of “eligible heirs” together with the definition of “Indian,” reflects the central compromise behind AIPRA.²³

3. Special Rules For Some Off-Reservation Allotments.

AIPRA has special rules for off-reservation allotments, 25 U.S.C. §2206(d). Such allotments are common in Washington, particularly where Indian communities refused to leave their ancestral areas to relocate to reservations and instead received allotments from public domain land within their traditional areas. For some Washington tribes, such as the

²³ Until very late in the legislative process, the people now classified as “eligible heirs” were within the Bill’s definition of “Indian.” Interior officials insisted on the current formulation as the price of their support for the Bill.

Nooksack and Sauk-Suiattle, the bulk of the community's land base is in public domain allotments, rather than reservation land. Under AIPRA, interests in these allotments, if not subject to tribal jurisdiction may only be devised to or inherited in trust by Indians, or in fee by any other person. 25 U.S.C. §2206(d)(1). Thus, the owner of such off-reservation land has fewer options to pass his property in trust than does the owner of reservation land, but has a greater chance to pass it in fee. Presumably, the rationale for these distinctions is that the parcels are difficult for the United States to manage and confer little overall tribal benefit. This rationale does not necessarily reflect the facts.

The statute does not define what constitutes tribal jurisdiction over the land. State and local governments have often resisted tribal assertions of authority over public domain allotments, and the BIA has not been a consistent defender of tribal authority. Depending on how Interior interprets this provision of AIPRA, many off-reservation allotments may be determined to be outside tribal jurisdiction. Their owners may see their ancestral land taken from trust, and their tribes may lose an important part of the Indian land base.²⁴

H. Voluntary and Involuntary Sales at Probate.

AIPRA will allow the sale of any interest, at the time of probate, to the tribe with jurisdiction, to Interior, to a co-owner of a trust or restricted interest in the parcel, to any "eligible heir" taking an interest in the parcel by intestate succession, or to anyone eligible to be a devisee of a trust interest in the parcel. 25 U.S.C. §2206(p)(1) and (p)(2). The property will only be offered for sale if an eligible purchaser makes a written request during probate 25 U.S.C. §2206(p)(3)(A). The consent of heirs is not required if the estate is intestate, the interest that the heir would take is less than 5% of the parcel, and the heir is not living on the parcel. 25 U.S.C. §2206(p)(5). Otherwise, sale requires the consent of all the heirs or devisees of the interest. 25 U.S.C. §2206(p)(3)(B). Sale will be at market value, or to the high bidder if more than one eligible buyer requests the sale. Proceeds of sale go to the heir or devisee who would otherwise have inherited.

The involuntary sale authorized by this provision resembles a condemnation, but the sale can be triggered by an individual to obtain the land for himself. The constitutionality of this procedure is debatable, and landowner testimony at committee hearings on AIPRA suggested a challenge is likely.

V. INTESTATE SUCCESSION.

A. Surviving Spouse.

Under AIPRA, the surviving spouse of an intestate decedent will inherit a life estate, without regard to waste, in all the decedent's interests in trust lands which

²⁴ The off-reservation allotment rules do not apply to California, 25 U.S.C. §2206(d)(2), again because of its history and large numbers of public domain allotments. The rules also do not apply to allotments within former reservations, such as the former Moses Columbia Reservation around Lake Chelan. 25 U.S.C. §§2206(d)(1)(A) and (d)(1)(B).

comprise more than 5% of the parcel. 25 U.S.C. §§ 2206(a)(2)(A)(i) and (A)(ii). There is a special “single heir rule” for interests smaller than 5%, 25 U.S.C. §§2206(a)(2)(D), which is discussed below. AIPRA prohibits the spouse from taking more than a life estate in order to reduce inheritance by in-laws, which is a major cause of fractionation and complicates land management because in-laws often have little tie to the land or to co-owners. In addition, in many tribes rights to use land have traditionally been passed through the bloodline.

The spouse will take all of the decedent’s trust personal property if there are no “eligible heirs.” 25 U.S.C. §2206(a)(2)(A)(ii). If there are one or more eligible heirs, the spouse takes one-third of the trust personalty. 25 U.S.C. §2206(a)(2)(A)(i). The funds remain in trust only if the spouse is Indian. 25 U.S.C. §2206(a)(2)(A)(iv).

B. No Surviving Spouse and Remainder After Spousal Life Estate

The remainder following an intestate spousal life estate, and all intestate trust realty if there is no surviving spouse, pass as follows:

- ◆ First, to children who are eligible heirs, and to any of the deceased child’s surviving children who are eligible heirs, by right of representation, 25 U.S.C. §2206(a)(2)(B)(i);²⁵
- ◆ If the property does not pass to children and grandchildren, it will go to the decedent’s surviving great-grandchildren who are eligible heirs, 25 U.S.C. §2206(a)(2)(B)(ii);
- ◆ That failing, the property will go next to surviving parents who are eligible heirs, 25 U.S.C. §2206(a)(2)(B)(iii);
- ◆ Next, if need be, property will go to surviving siblings who are eligible heirs, 25 U.S.C. §2206(a)(2)(B)(iv);
- ◆ If the property has still not passed it will escheat to the tribe with jurisdiction, 25 U.S.C. §2206(a)(2)(B)(v), subject to the right of Indian or tribal co-owners to purchase at probate by payment of fair market value, or high bid should more than one co-owner seek to buy, 25 U.S.C. §2206(a)(2)(B);
- ◆ If there is no tribe with jurisdiction over the land, the interest will be divided equally among co-owners of trust or restricted interests, 25 U.S.C. §2206(a)(2)(C)(i);
- ◆ If there are no co-owners, the land will escheat to the United States to be sold for the benefit of the land acquisition fund established under §2215 of ILCA, subject to the right of the owners of trust interests in contiguous parcels to purchase for fair market value or high bid. 25 U.S.C. §§2206(a)(2)(C)(ii) and (C)(ii).²⁶

²⁵ “Right of representation” is defined at 25 U.S.C. §2206(a)(3).

²⁶ Federal law has long provided that, where an Indian allotment owner dies intestate with no heirs, the property shall escheat to the tribe having jurisdiction or, for public domain allotments, to the United States. 25 U.S.C. §§ 373a, 373b.

C. “Single Heir Rule” for Interests Less Than 5%.

In the development of AIPRA there was significant tension between the federal desire to limit fractionation and associated administrative costs, and the desire of Indian owners to pass land to their descendants. The Administration insisted that it would not seek additional appropriations for purchase of interests from voluntary sellers unless the potential for fractionation was dramatically reduced. Otherwise, acquisition efforts might be “chasing their tail,” with new interests created as fast as prior ones were bought.²⁷

The one provision in the Bill which did the most to cap fractionation and secure administration support is one which returns to the ancient law of primogeniture. This “single heir rule” provides that any intestate interest less than 5% of a parcel shall descend in trust or restricted status as follows:

- As a life estate without regard to waste, to a spouse living on the land, with remainder as set forth below, 25 U.S.C. §2206(a)(2)(D)(ii);
- To the oldest surviving child who is an eligible heir, 25 U.S.C. §2206(a)(2)(D)(iii)(I);
- If not to a child, then to the oldest surviving grandchild who is an eligible heir, 25 U.S.C. §2206(a)(2)(D)(iii)(II);
- If none, then to the oldest surviving great-grandchild who is an eligible heir, 25 U.S.C. §2206(a)(2)(D)(iii)(III);
- If not to child, grandchild, or great-grandchild, then to the tribe with jurisdiction, 25 U.S.C. §2206(a)(2)(D)(iii)(IV);
- If no tribe has jurisdiction, then equally to co-owners of trust or restricted interests in the parcel or, if none, to the United States to be sold for the benefit of the land acquisition fund, with a preference right of purchase by owners of contiguous trust parcels. 25 U.S.C. §2206(a)(2)(D)(iii)(V).

The designated single heir may renounce his interest at probate, in favor of any Indian or eligible heir related to the single heir by blood, any co-owner of a trust interest, or the tribe with jurisdiction. 25 U.S.C. §2206(a)(2)(D)(iv)(I).²⁸ The tribe with jurisdiction may adopt its own version of the single heir rule. 25 U.S.C. §2206(a)(2)(D)(iv)(II). The tribal rule need not be in a federally-approved probate code, but the tribe must provide a copy of the rule to Interior. 25 U.S.C. §2206(a)(2)(D)(iv)(II)(aa).

D. Intestate Advancements of Trust Funds.

If any part of the estate passes intestate, and the decedent, while living, transferred trust funds to an intestate heir, those funds may be treated as an advancement against inheritance of either trust funds or trust lands. 25 U.S.C. §2206(k)(5)(A). This will occur only if the heir would be eligible to be a devisee of IRA land under 25 U.S.C.

²⁷ This was exactly the result of an acquisition pilot project operated from 2000-2003.

²⁸ A pending Senate Bill would amend this section to clarify that no more than a single co-owner may take through such a renunciation. S. 536, 109th Cong., 1st Sess.

