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## **The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act**

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Douglas R. Nash<sup>1</sup> and Cecelia E. Burke<sup>2</sup>

Probate law typically is not a social justice issue. State probate laws are designed to effectuate the last wishes of people who have died without the benefit of a last will and testament. The policy behind state probate laws is to distribute property in a manner the majority of people would find acceptable, taking care to protect the needs and rights of the immediate family. The American Indian Probate Reform Act (AIPRA) of 2004<sup>3</sup> is a federal probate code that became effective June 20, 2006, and governs the descent and distribution of Indian lands. The policy behind the federal probate code is to repair the results of historic federal laws, reduce costs in government administration, and effectuate land consolidation. At odds with this federal objective are the personal property rights of those dying and protection for those left behind—a tension between administrative efficiencies and social justice.

The history of Indian people in the United States is a story about land—specifically, the loss of land. From the time when Indian tribes owned all of what is now the United States to the present, when those Indian tribes fortunate enough to still retain some lands own minute fractions of their original holdings, the loss of land has been the story. Federal Indian policies frequently targeted Indian land. Reducing a tribe's land base reduced that tribe's power, damaged or destroyed its traditional economy, and rendered it more readily controllable by federal authority. The allotment policy parceled out already diminished tribal lands to individual tribal members as a means of further reducing tribal land ownership. The

traditional pursuits, which formed the basis for tribal cultures, economies, and religions, were to be abandoned in favor of a Christian work ethic applied to agriculture. That expectation was not met. In fact, the policy was crippled at birth. Individual Indians were locked into a system of individual land ownership—a concept that was totally foreign to them. The system was further confounding because legal title to individual allotments remained with the United States as trustee, while individual Indians received the right to live on and use the land but otherwise had little control. Federal law required that ownership pass to successive generations in accordance with state laws of intestate succession, resulting in ownership being increasingly fractionated with the passing of each generation.

One result of the allotment policy and laws is that today, many of the original allotments are owned by hundreds, and even thousands, of individuals. The United States, eager to reap the perceived benefits of the allotment policy, has been willing to let the evolving fractionation of allotment ownership fester for 130 years, despite the fact that the result was foreseeable from the outset and has been identified as a significant issue in a multitude of studies conducted over the years. Typically, remedial action was never taken because of the estimated cost to the federal government.

The remedy has now, presumably, been delivered in the form of the American Indian Probate Reform Act. Indian tribes and people are justifiably suspicious. The purpose of AIPRA is to reduce the fractionation of land interests resulting from years of federal law and policy, or in some instances non-policy, and to promote the consolidation of fractionated ownership interests. In many respects, AIPRA represents a positive step toward achieving these goals. It introduces new tools, such as land consolidation agreements by heirs at probate and authorization for tribal probate codes, that can govern the intestate descent of interests in trust land. Some provisions are antithetical to AIPRA's stated purpose, such as intestate fractionation of larger land interests. AIPRA encourages Indian people to create wills, if for no other reason than to avoid its punitive

effects, such as forced sales at probate and primogenitor rules for smaller land interests.

AIRPA is artfully crafted in a manner that, for the most part, avoids the most fundamental federal fear—expenditure of federal monies to fix the federally created problem. It is long, over forty pages, and complex. It can be of use to Indian tribes and individuals, but only if its provisions are understood, and a clear understanding is difficult to achieve by reading it from beginning to end. The purpose of this article is to provide an understanding of AIPRA. First, the history of events leading up to AIPRA—essential information to understand the issues it purports to address—will be discussed. Second, provisions of AIPRA are discussed by key topics including the following: application to intestate and testate estates; rules of interpretation; application of AIPRA to trust personalty; mechanisms provided to reduce fractionation and consolidate ownership interests; tribal probate codes; and general rules governing the probate of Indian trust estates.

AIPRA has potential for eventually resolving the issues of fractionated ownership of Indian trust lands. It also has the potential for being used by the United States as a means of reducing obligations and services to Indian people, avoiding issues of liability for breach of trust responsibilities and reducing its costs and administrative time. With AIPRA taking effect June 20, 2006, the results of its implementation remain to be seen. The theory of the federal–Indian trust relationship, as well as long-established fundamentals of Indian law, dictate that the provisions of AIPRA be interpreted and applied for the benefit of Indian tribes and people, not to reduce the financial and administrative burden of the trustee.

I. HISTORY OF EVENTS AND LAWS LEADING TO THE  
AMERICAN INDIAN PROBATE REFORM ACT<sup>4</sup>

The history of events begins from the time Indian tribes owned what is now the United States in its entirety. From the time the United States was

established until the late 1800s, federal policy focused on the acquisition of tribal lands, which were traditionally communally owned.<sup>5</sup> “The overriding goal of the United States during treaty making was to obtain Indian lands.”<sup>6</sup> The allotment policy signaled the first time individual Indian people would own land. “Although the roots of allotment extend back to the Colonial period, the Dawes Allotment Act of 1887 was the first comprehensive proposal to replace tribal consciousness with an understanding of the value of private property.”<sup>7</sup>

#### A. *The General Allotment Act*<sup>8</sup>

The General Allotment Act,<sup>9</sup> also known as the Dawes Act, was passed by Congress in 1887. The Act had two primary goals: to eliminate tribal culture by assimilation of Indians into the expanding European-American culture and to open reservation lands to non-Indian ownership.<sup>10</sup> Only the latter goal was achieved. From the passage of the General Allotment Act until the allotment policy was repudiated by the passage of the Indian Reorganization Act in 1934, tribes lost approximately two-thirds of their reserved lands, some ninety million acres.<sup>11</sup>

Between 1770 and 1890, treaties between Indian tribes and the United States were a key tool in securing vast territories of land from tribes—lands to be settled by non-Indians.<sup>12</sup> Through treaties, tribes typically ceded significant portions of their lands, and the federal government agreed that the retained lands would serve as a reservation and homeland for the tribes forever. For example, a treaty with the Cherokee stated:

[the purpose of the treaty is to secure the Cherokee] a permanent home . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State.<sup>13</sup>

These reserved lands (reservations), like aboriginal lands, were held by Indian title, meaning Indians had the right to use and occupy the lands subject to the sovereign's plenary power to extinguish Indian title at will.<sup>14</sup> By the time of the General Allotment Act, reservation lands comprised only remnants of the original tribal land bases.

The Allotment Act authorized the president to arbitrarily select those reservations to be allotted.<sup>15</sup> Once a reservation was selected, a census was taken of its tribal inhabitants; the land was surveyed and partitioned into "allotments"—parcels of land between eighty and one hundred sixty acres.<sup>16</sup> Beneficial title to these allotments were then assigned to individual Indians, with legal title held in trust by the United States for a period of twenty-five years.<sup>17</sup> After that time, it was expected that the Indian owner would be "civilized" and "competent enough" to manage his own affairs and the government would issue a fee patent<sup>18</sup> for his allotment.<sup>19</sup> Upon receipt of the fee patent, the allottee would become subject to the laws of the state where his property was situated.<sup>20</sup>

The allotment process also allowed the government to identify a portion of the reserved lands for tribal and government use. The remaining lands were then declared "surplus" by the government, who initiated negotiations with the affected tribe for further cession of lands to the United States.<sup>21</sup> The Act did not require consent of the tribes affected by the decision to allot their land.<sup>22</sup> With no consent requirement, and despite often vigorous protests by tribes, the government garnered "agreements" for the cession of these "surplus lands."<sup>23</sup>

It is important to note that not all reservations were allotted, and often those selected for allotment contained natural resources desired by the government or westward settlers.<sup>24</sup> One clear example involved the Nez Perce tribe and federal government negotiations over territory with fertile farmlands, water, and gold. Before 1855, the Nez Perce tribe had traditionally lived on territory (in present-day Idaho, Washington, and Oregon) now estimated to be in excess of ten million acres. After the

Treaty of 1855, the size of that territory was reduced to about seven million acres.<sup>25</sup> When the Treaty of 1863 was negotiated because gold was discovered on Nez Perce land, the Nez Perce retained 785,000 acres—losing over six million acres. Allotment further reduced tribal lands by another 575,000 acres and the Nez Perce ended the allotment process owning less than 200,000 acres. The second treaty was virtually negotiated at gun point, and the allotment process was protested by the tribe to no avail. Once an agreement was secured, the surplus lands were opened to sale and settlement by non-Indians.

While the Allotment Act marked the destruction of a tribe's land base, the Burke Act of 1906 triggered the rapid loss of lands from individual Indian ownership. The Burke Act amended the Allotment Act by authorizing the secretary to issue a patent in fee on allotments before the expiration of the twenty-five-year trust period.<sup>26</sup> This led to what became known as the “forced fee patent process,” which fueled the loss of allotted lands to state tax foreclosures and real estate speculators.

The fee patent process was started upon recommendation of the local Indian Superintendent requesting that the secretary issue certificates of competency<sup>27</sup> to allottees, often without their knowledge or consent.<sup>28</sup> Once an individual was certified competent, the Burke Act authorized the issuance of a fee patent to the allottee, immediately subjecting their lands to state property taxes.<sup>29</sup> For those unaware of their declaration of competency and the subsequent fee transfer, the state taxes went unpaid. Ultimately, many Indian land owners lost their lands.<sup>30</sup>

By 1917, as a result of the government's success in obtaining land by way of the Burke Act, federal policy makers accelerated the issuance of patents in fee. Patents in fee were issued to Indians without their consent or application.<sup>31</sup> Under this policy, 17,176 fee patents were issued in the three years from 1917 to 1920, nearly twice the number issued in the preceding ten years.<sup>32</sup> The Commissioner of Indian Affairs at the time envisioned this as “the beginning of the end of the Indian problem.”<sup>33</sup> Approximately one

hundred thousand allotments were sold after fee patents were received.<sup>34</sup> In addition, non-Indian settlers flocked onto reservations where ceded lands were opened to settlement.<sup>35</sup> The result is a checkerboard pattern of land ownership on allotted reservations—a pattern which renders management and regulation of those lands and the peoples on them cumbersome at best.

For those individual Indians retaining ownership, the General Allotment Act failed them in two ways. First, the Act failed to recognize the cultural resistance to individual land ownership. The concept of individual ownership of land was foreign to many Indian people, making the allotment process meaningless, and the legislators viewed tribal communal living as needy since the indigenous ideas of wealth contrasted and disagreed with Western ideas of wealth.<sup>36</sup> Furthermore, farming was considered “women’s work” among many tribes.<sup>37</sup> Most were not inclined to abandon established tribal values and structures in favor of new and foreign concepts of individual ownership.<sup>38</sup>

Second, the Act ultimately contained a device that would render Indian allotments fractionated beyond any practical use or economic value. Section five of the General Allotment Act provides that the law of descent and partition in force in the state or territory where such lands are situated shall apply thereto after patents have been executed and delivered. This means that state laws of intestate succession would apply to the allotments held in trust, regardless of testacy—Indian people could not pass title to their trust allotments by a will.<sup>39</sup> The typical result of applying state laws of intestate succession to an ownership interest in an allotment is that the decedent’s heirs inherit undivided interests in the original allotment. When they die, their heirs inherit the interests and the process continues over generations until the original allotment has many, sometimes hundreds and even thousands, of owners of undivided interests.<sup>40</sup>

The result is what has been come to be described as the “fractionation of Indian lands,” and examples of it abound. By 1985, one 160-acre allotment made in 1887 had 312 heirs each holding a fractional interest.<sup>41</sup> The largest



interest held was 2.5 percent and the smallest interest was 0.00005625 percent, producing a yearly income of less than a penny.<sup>42</sup> Another allotment was valued at \$22,000 in 2003 but only produced \$2,000 in annual income.<sup>43</sup> Although it had 505 co-owners of undivided interests, the common denominator required to calculate fractional interests had grown to 220,670,049,600,000. If the tract could have been sold for its estimated value, the smallest interest would have been entitled to \$0.00001824.<sup>44</sup> One owner in this fractionated tract would earn \$1.00—every 32,880 years. The Bureau of Indian Affairs estimated the administrative cost to manage this tract to be \$42,800.<sup>45</sup>

In response to the negative effects of the General Allotment and Burke Acts, John Collier, then Commissioner of Indian Affairs, developed a proposal that would change United States Indian policy and declare the Dawes Act a catastrophe. Instead of granting Indians the “dignity of private property,” Collier reported that allotment “has cut down Indian land holdings from 138,000,000 [the acres Indians owned when the Dawes Act was passed in 1887] to 47,000,000 [the acres they had left in 1934].” Two-thirds of the tribal reservation land base had been lost. Furthermore, allotment had “rendered whole tribes landless. It ha[d] thrown more than a hundred thousand Indians virtually into the breadline . . . [and] put the Indian allotted lands into a hopelessly checkerboarded condition.”<sup>46</sup>

With that, Commissioner Collier presented the Indian Reorganization Act, which was designed to promote tribal self-government and economic self-sufficiency.<sup>47</sup> The Indian Reorganization Act, as passed by Congress, repudiated the allotment policy and effectively ended the practice. However, Congress did not repeal the provisions of the General Allotment Act, which remain in effect today.<sup>48</sup>

*B. Fractionation and Attempted Remedies—The Indian Land Consolidation Act(s)*

It should be no surprise that fractionated ownership of Indian allotments would inevitably pose problems of momentous proportions. A cursory examination of the inheritance provisions of the General Allotment Act leads to the obvious conclusion that, absent remedial action, ownership interests in trust and restricted allotments would increase in pyramidal fashion as generations passed.

Throughout the twentieth century, lawmakers recognized the trouble with fractionation, yet failed to implement any viable solutions to the problem.<sup>49</sup> A statute first authorizing Indian wills as a potential solution was, in part, a response to fractionation that was appearing in 1910.<sup>50</sup> It had virtually no impact, as many of the original allottees had deceased and those remaining had little knowledge of wills or will drafting services. In 1928, the Meriam Report,<sup>51</sup> a comprehensive study of the administration of Indian affairs by the United States, identified excessive fractionation of ownership of individual Indian land as one of the many problems facing Indian Country.<sup>52</sup> In August of 1938, the Interior Department convened a meeting in Glacier National Park to identify solutions to fractionation.<sup>53</sup> The group identified laudable goals and necessary actions, but they never implemented the solutions.<sup>54</sup> The fractionation issue was studied by Congress again in 1960,<sup>55</sup> and was the subject of hearings in 1966,<sup>56</sup> but neither resulted in any corrective action. In 1977, the American Indian Policy Review Commission examined the issue yet again and suggested remedies similar to those recommended by earlier studies.<sup>57</sup> Once more, none were ever implemented. In every instance, the primary reason action was never taken to stem the fractionation issue was the cost that would have been incurred.<sup>58</sup>

The first substantive step to address fractionation occurred in 1983 when Congress passed the Indian Land Consolidation Act.<sup>59</sup> The Act authorized Indian tribes to adopt land consolidation plans, subject to secretarial approval, under which they could consolidate land holdings by purchase,

sale, or exchange.<sup>60</sup> It also authorized tribes to adopt probate codes, again subject to secretarial approval, which would be applied by the Office of Hearings and Appeals in the probate of interests in trust lands.<sup>61</sup> The most radical provision called for the escheat to tribes of interests in trust allotments that represented less than 2 percent of the whole parcel, testate or intestate, which had earned less than one hundred dollars in the year prior to probate.<sup>62</sup> The federal government viewed the escheat provision as a quick, low-cost remedy to fractionation.<sup>63</sup> However, in the eyes of Indian country, it was a dangerous precedent for taking Indian lands without compensation.<sup>64</sup> Despite the opportunity it posed for adding lands to tribal ownership, it was opposed by many tribes.<sup>65</sup>

Many tribal members opposed the Act on the grounds that the escheat provision was unconstitutional.<sup>66</sup> In *Hodel v. Irving*, the Supreme Court agreed, finding the provision to be an unconstitutional taking without just compensation.<sup>67</sup> While *Hodel v. Irving* was moving through the federal court system, Congress held hearings on the issue and passed amendments to the escheat provisions of the Act, providing that 2 percent interests would not escheat if the ownership interests earned one hundred dollars in any of the five years preceding the owner's death.<sup>68</sup> The later amendments became the focus of another lawsuit and resulted in the Supreme Court finding them unconstitutional as well.<sup>69</sup>

In 1996, the filing of *Cobell v. Babbitt*<sup>70</sup> brought issues of trust responsibility and the government's management of trust assets before the public eye. Fractionation was at the heart of this litigation<sup>71</sup>—the parties alleged that the federal government mismanaged trust funds belonging to individual Indians, which were derived largely from ownership interests in individual allotments. After this case, reducing trust liability exposure became a major driver of Department of the Interior policy.<sup>72</sup>

One of the prompted actions was the convening of an Indian Probate Reinvention Lab, which issued two reports in 1999<sup>73</sup> and ultimately led to another step toward consolidation of Indian lands. Although several bills

aimed at Indian land consolidation were introduced from 1997 to 1998, Senate Bill 1586, introduced in 1999, became the Indian Land Consolidation Act Amendments of 2000.<sup>74</sup> The 2000 Act made major revisions to the Indian Land Consolidation Act, but it was so complex that the Department of the Interior ultimately conceded that the law was too complicated to administer.<sup>75</sup> Indian tribes and individuals had other issues with the 2000 Act; foremost among the concerns was determining who was Indian, and thus, could hold land in trust.<sup>76</sup> The 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 them in fee, but subject to state taxation and possibly state regulation.<sup>77</sup> As the Department of the Interior questioned the feasibility of implementing the 2000 Act's amendments pending further legislative developments, it agreed not to issue the formal certification required by the 2000 Act before the key provisions could take effect.<sup>78</sup>

Congress introduced several unsuccessful versions of Indian land consolidation bills before Senate Bill 1741, the American Indian Probate Reform Act, passed Congress on October 27, 2004.<sup>79</sup> The American Indian Probate Reform Act is a milestone. Prior to its enactment, federal Indian probate law consisted of the provision in the General Allotment Act providing that the descent and distribution of Indian trust property would be governed by the following: state laws of intestate succession;<sup>80</sup> two statutes authorizing original allottees and heirs of allottees, respectively, to pass their interests by will;<sup>81</sup> and federal regulations defining the probate process for trust assets.<sup>82</sup>

AIPRA is over forty pages long and creates a new landscape of federal Indian probate law to govern the descent and distribution of trust assets. It creates a federal probate code that can be replaced by an approved tribal probate code, which will govern the intestate succession of trust assets in federal probate. It contains new and novel provisions designed to minimize further fractionation of ownership interests and to effect consolidation of

interests through estate planning, the probate process, and outside the probate process. AIPRA is a complex statute that is not readily absorbed or understood by casual review. What follows is a breakdown of AIPRA by the subject matter essential for understanding its application and implications.

## II. THE AMERICAN INDIAN PROBATE REFORM ACT

Because AIPRA applies to those who die on or after its effective date of June 20, 2006, and because no probate proceedings have yet to take place for those affected by AIPRA as of the date of this writing, many of the implications and applications of AIPRA are yet to be known. It is important to note that exceptions to AIPRA exist. Alaska, Oklahoma, and California have specific alternative provisions governing their lands within AIPRA. Additionally, AIPRA's intestacy and testamentary rules may not amend or affect the application of special federal inheritance laws.<sup>83</sup>

The following is a general description of AIPRA and potential applications.

### *A. Definitions 25 U.S.C. § 2201*

Becoming familiar with AIPRA's definition section is crucial to understanding and applying its provisions. Because many terms are not given their usual meaning, important definitions are reviewed throughout this article in the context of the sections in which they apply. AIPRA also uses many common estate planning and probate terms and terminology, which are undefined by the Act but which hold their common meaning.

### *B. Descent and Distribution of Interests in Trust or Restricted Land*

Prior to the effective date of AIPRA, the descent and distribution of interests in trust and restricted assets were governed by the intestate succession law of the state where the property was located. AIPRA provides for the first time a federal probate code that governs the passing of

trust and restricted assets.<sup>84</sup> Some of the most significant aspects in the law are found in the provisions regarding testamentary and intestate succession.<sup>85</sup>

### **1. Intestate Succession<sup>86</sup>**

When an individual dies without benefit of a valid will, the rules of intestate succession apply to his or her estate. For Indians, at least two, and potentially three, sets of jurisdictional laws can apply: federal law for trust assets only, tribal law for all non-trust assets located within the jurisdiction of the tribe, and state law for non-trust assets located off reservation and under state jurisdiction. The following are AIPRA's intestacy rules for federal trust assets.

#### *a) Eligible Heirs*

Similar to state intestacy codes, AIPRA looks to immediate family for distribution of trust property. However, simply being in the immediate family is not enough under AIPRA, as it requires the immediate family member to also be eligible before distribution is made.<sup>87</sup> Eligible heirs<sup>88</sup> include any of a decedent's children, grandchildren, great grandchildren, full or half siblings by blood, or parents, *who are also one of the following*: an Indian;<sup>89</sup> a lineal descendent within two degrees of consanguinity of an Indian; or an owner of a trust or restricted interest in a parcel of land prior to October 27, 2004.<sup>90</sup> If a family member is not eligible, AIPRA will look to the next eligible heir in line to make distribution.

#### *b) Right of Representation*

Under AIPRA's rules of intestate succession, each child of the decedent who is eligible, living or dead, will receive one share. The share of any pre-deceased child shall be shared equally among the pre-deceased child's children.<sup>91</sup> If an individual fails to survive the decedent by at least 120 hours, as established by clear and convincing evidence, the individual will

be considered predeceased for purposes of intestate succession, and the heirs of the decedent shall be determined accordingly.<sup>92</sup> With the exception of life estates of a surviving spouse, an interest in trust or restricted land, or a trust personalty that passes in accordance with this process, shall vest in the heir in the same trust or restricted status as though such interest was held immediately prior to the decedent's death.<sup>93</sup>

c) *Two Categories of Trust Land*

To reduce the further fractionation of trust land interests, AIPRA divides land interests into two categories: those interests less than 5 percent of the total allotted parcel and those interests 5 percent or greater.<sup>94</sup> AIPRA then applies different intestacy rules to each category.<sup>95</sup>

(1) Interests Less Than 5 Percent—The Single Heir Rule

Interests less than 5 percent of a total parcel are distributed to a single heir only—the oldest surviving “eligible”<sup>96</sup> child, grandchild, or great-grandchild.<sup>97</sup> If none, then the interest goes to the tribe with jurisdiction; if no tribe, then to the other co-owners equally; and if none, then to the Secretary of the Interior (secretary)<sup>98</sup> for sale.<sup>99</sup>

A surviving spouse will receive nothing, unless the spouse is living on that small interest at the time of the decedent's death, and even then the spouse will only receive a life estate.<sup>100</sup> It makes no difference if the surviving spouse is Indian, non-Indian, or otherwise an heir eligible—a surviving spouse will never receive more than a life estate.<sup>101</sup> The life estate provided by AIPRA is without regard to waste, allowing the spouse to live on and use that interest of land for his or her lifetime, including all income and revenue generated from it.<sup>102</sup> Once the spouse dies, the interest will transfer to the single heir as designated above.<sup>103</sup>

While many trust land interests that are less than 5 percent of an original allotment are of minimal economic value, this is not always the case. Very small interests in oil, timber, mineral-rich lands, or lands in highly valued

leasing locations can be valuable. Because AIPRA distributes lands to a single heir and excludes spouses who do not live on that parcel, family members could be cut off from income they had relied upon prior to the decedent's death.

(2) Interests 5 Percent or Greater

A surviving spouse will receive a life estate without regard to waste<sup>104</sup> in all interests 5 percent or greater.<sup>105</sup> Once the surviving spouse dies, or if there was no surviving spouse, the remainder<sup>106</sup> will transfer to the decedent's eligible<sup>107</sup> children in equal shares.<sup>108</sup> If a child has died before the decedent, that child's eligible children will share that interest equally (see above, subsection b. Right of Representation).<sup>109</sup> If none, the interests will pass to the decedent's surviving eligible grandchildren or great-grandchildren in equal shares.<sup>110</sup> If none, the interests will pass to the decedent's surviving eligible parents in equal shares.<sup>111</sup> If no parents, then the interest shall pass to the decedent's surviving eligible siblings in equal shares.<sup>112</sup> If none, the interests will go to the Indian tribe with jurisdiction over the lands.<sup>113</sup> If no tribe, the interests will be shared equally among the co-owners of that interest.<sup>114</sup> If none, the interest will pass to the secretary to be sold, except that contiguous parcel owners shall be given the opportunity to purchase before the secretary sale.<sup>115</sup>

AIPRA's intestacy rules for interests greater than 5 percent more closely mirror state intestacy laws, in that AIPRA looks further out into the family tree before allowing property to escheat to a governmental agency, here the tribe or secretary. But again, unlike state intestacy laws, the family member must be an eligible heir to receive the interest,<sup>116</sup> creating the opportunity for family members to be excluded from receiving interests or income from the lands they had previously relied upon.



d) *Renunciation*

What if an heir does not want the interests they are eligible to receive? The heir of an interest who is not a minor or incompetent person may agree in writing at the probate proceeding to renounce their interest in favor of one person. The person to receive the interest must be another eligible heir or Indian related to the heir by blood, another co-owner of that parcel, or the tribe with jurisdiction.<sup>117</sup> The secretary<sup>118</sup> must give effect to the renunciation agreement in the distribution of the interest in the probate proceeding.<sup>119</sup>

## 2. Testamentary Disposition

Unlike state probate codes, AIPRA establishes testamentary rules limiting who can receive an interest and how that interest may be received.<sup>120</sup> The intended result of these testamentary rules is to further the goals of the Indian Land Consolidation Act of 2000, including the retention of trust and restricted lands in trust status to support tribal self-sufficiency and self-determination.<sup>121</sup>

a) *Devises in Trust or Restricted Status*

An owner of an interest in trust or restricted lands may devise<sup>122</sup> in trust or restricted status to one of the following eligible devisees:<sup>123</sup>

- (i) any lineal descendant of the testator (children, grandchildren, etc);
- (ii) any person who owns a preexisting undivided trust or restricted interest in the same parcel of land;
- (iii) the Indian tribe with jurisdiction over the interest in land; or
- (iv) any Indian.<sup>124</sup>

The interest will remain in trust or restricted status, even if the lineal descendants are non-Indian.<sup>125</sup>

AIPRA also states that a devise to any other person will fail, and the interest will pass in accordance with the applicable law of intestate succession,<sup>126</sup> unless the devise is of a life estate with the remainder to an

eligible devisee<sup>127</sup> or the interest is conveyed in fee.<sup>128</sup> This means the testator can leave a life estate to anyone, so long as the remainder goes to eligible devisee(s), or the testator can leave to someone not eligible above and that person will receive the interest in fee status.

*b) Devises in Fee Status*

Additional limitations exist for devises of trust or restricted lands in fee status, including failure of that devise if the interests are under the jurisdiction of an Indian Reorganization Act tribe.<sup>129</sup>

With legislative amendments to section four of the Indian Reorganization Act<sup>130</sup> (IRA) in 2005, as well as amendments to AIPRA in 2005 and 2006,<sup>131</sup> IRA lands are subject to additional limitations on testamentary devises. Under the earlier law, the spouse or non-Indian heirs, including children, could receive a devised interest in fee status as eligible heirs. Under the new law, a devise in fee status will be invalid<sup>132</sup> and the interest will pass according to the rules of intestate succession.<sup>133</sup>

Additionally, AIPRA provides authority for tribes to purchase any interests to be transferred in fee status at probate.<sup>134</sup> If the owner of an interest in trust or restricted land devises an interest in fee, the Indian tribe with jurisdiction over that parcel of land may acquire such interest by paying to the secretary the fair market value of such interest, as determined by the secretary on the date of the decedent's death.<sup>135</sup> The secretary must then transfer payments to any person or persons who would have received an interest in land. Exceptions that would preclude tribal purchase of fee interests include if the devisee renounces in favor of an Indian, or if the interest being transferred is part of a family farm that is devised to a member of the family of the decedent and the devisee agrees in writing that the Indian tribe with jurisdiction over the land will have the opportunity to acquire the interest for fair market value if the interest is offered for sale to a person or entity that is not a member of the family or the owner of the land.<sup>136</sup>

*C. Descent and Distribution of Off-Reservation Lands*

It is not uncommon for trust allotments to be found outside of existing reservation boundaries. These might exist where a reservation was established and then the reservation boundaries subsequently reduced. AIPRA contains special provisions that pertain to these off-reservation lands. Except in California, trust or restricted interests in off-reservation lands must descend either by testate or intestate succession in trust to an Indian,<sup>137</sup> or in fee status to any other devisees or heirs.<sup>138</sup> For purposes of this provision of AIPRA, the term “Indian Reservation” includes lands located within Oklahoma and the boundaries of an Indian tribe’s former reservation, the boundaries of any Indian tribe’s current or former reservation, or any area where the secretary is required to provide special assistance or consideration of a tribe’s acquisition of land or interests in land.<sup>139</sup>

*D. Descent and Distribution of Trust Personalty*

Trust personalty is defined as including all funds and securities of any kind that are held in trust in an individual Indian money account or otherwise supervised by the secretary.<sup>140</sup> The owner of an interest in trust personalty may devise such an interest to any person or entity that is subject to any applicable federal law or an approved tribal probate code.<sup>141</sup> When the devise of an interest in trust personalty is to a person or Indian tribe eligible to be a devisee of trust or restricted interests, the secretary shall maintain and continue to manage such interests as trust personalty.<sup>142</sup> When the devise of an interest in trust personalty is to a person or Indian tribe not eligible to be a devisee of trust or restricted interests, the secretary shall directly disburse and distribute such personalty to the devisee.<sup>143</sup> Any trust personalty that is not disposed of by a valid will shall descend in accordance with AIPRA’s rules of intestate succession.<sup>144</sup>

Absent a will, AIPRA defines how trust personalty will pass. If there is a surviving spouse and one or more surviving eligible heirs, the spouse will receive one-third of the trust personalty without restriction and the surviving eligible heirs will receive two-thirds without restriction.<sup>145</sup> If there is a surviving spouse and no children the spouse will receive 100 percent of the trust personalty.<sup>146</sup> If the spouse is Indian, the trust personalty received will be maintained in trust.<sup>147</sup> An interest in trust personalty may be renounced or disclaimed in favor of any person or entity.<sup>148</sup>

#### *E. Rules of Interpretation*

The rules of interpretation in AIPRA differ from state probate laws. The following are some highlights, and are not intended to be an exhaustive list of the rules.

AIPRA establishes explicit rules for interpretation of testamentary devises of trust and restricted land and trust personalty in the absence of a contrary intent, and except as otherwise provided under AIPRA, applicable federal law, or an approved tribal probate code.<sup>149</sup> A will shall be construed to apply to all trust and restricted land and trust personalty that the testator owned at the time of his death, including any such land or personalty acquired after the execution of his will.<sup>150</sup>

#### **1. Presumption of Devise in Trust or Restricted Status**

Any devise of a trust or restricted interest in land to an Indian or the Indian tribe with jurisdiction over the interest shall be deemed to be a devise of the interest in trust or restricted status.<sup>151</sup> Any devise to a lineal descendant, or to a person who owns a preexisting undivided interest in the same parcel of land, is presumed to be a devise in trust or restricted status unless the devisee is non-Indian and the language in the devise clearly states the intent of the testator to pass the interest as a life estate or fee interest.<sup>152</sup>

## **2. Ascertaining Classes and Devisees**

A devise using general terms such as “heirs,” “next of kin,” “relatives,” or “family” shall mean those persons, including the spouse, who would be entitled to take under the provisions of AIPRA for intestate succession.<sup>153</sup> For these, the class will be ascertained as of the date of the testator’s death.<sup>154</sup> In construing a devise to any other class, the class shall be ascertained at the time the devise is to take effect in enjoyment.<sup>155</sup> The surviving issue of any member of the class who is then dead shall take by right of representation the share which their deceased ancestor would have taken.<sup>156</sup> Subject to the general provisions regarding testamentary dispositions, where a devise has been made to someone who has predeceased the testator, the share to be received by the predeceased devisee shall be shared equally by the predeceased devisees heirs.<sup>157</sup>

In construing provisions of AIPRA relating to lapsed and void devises, and in construing a devise to a person or persons described by relationship to the testator or another, a person born out of wedlock shall be considered the child of the natural mother and also of the natural father.<sup>158</sup>

## **3. Lapsed or Void Devise**

If the disposition is not otherwise provided for by an approved tribal probate code, or if a devise other than a residuary devise of a trust or restricted interest in land or trust personalty fails for any reason, that interest shall become part of the residue and pass to the other residuary devisees, if any, in proportion to their respective shares or interests in the residue.<sup>159</sup> If a family cemetery plot owned by the testator in trust or restricted status at the time of his death is not mentioned in the decedent’s will, the ownership of the plot will descend to his heirs as if he had died intestate.<sup>160</sup>

## **4. Presumption of Joint Tenancy with Right of Survivorship**

When a testator devises trust or restricted interests in the same parcel to more than one person, the devise shall be presumed to create a joint tenancy

with the right of survivorship, absent clear and express language stating that the interest is to pass to the devisees as tenants in common.<sup>161</sup> This presumption does not apply to devises in wills executed prior to the date AIPRA took effect—June 20, 2006.<sup>162</sup> The creation of this presumption is another device to avoid the further fractionation of ownership interests in trust land. If an interest is left in equal shares to five devisees as tenants in common, the ownership of that interest is fractionated by a factor of five. However, if it is left to five devisees as joint tenants with the right of survivorship, it means that all five will receive equal shares, but when one dies, that person's interest passes to the four surviving devisees. When one of the remaining four devisees dies, that interest passes to the surviving three, and so on, until the last remaining devisee owns the entire parcel and fractionation has been avoided.

*F. The Act's Application to Real Life—Two Stories*

**1. The John J. Story**

*a) Background*

John J.,<sup>163</sup> a Northwest Indian, married his wife Laura, a non-Indian, twenty-three years ago. After receiving a masters degree, John returned to the community he grew up in and worked for various local tribal governments and agencies. John was the sole devisee to his grandmother's 50 percent undivided interest in a 160-acre parcel of forested trust lands. The other 50 percent interest is split between more than 150 co-owners as a result of intestate succession.

*b) Testamentary Devise*

John recently completed his own will, giving his wife a life estate in the home and land, with his oldest son receiving the property after her death. Under AIPRA's testamentary rules, John cannot leave his home or land to his non-Indian wife in trust or fee status.<sup>164</sup> He can only leave her a life

estate so she can live on and enjoy any income generated by the land for as long as she lives. His son, though not a full Indian or enrolled tribal member, is an “eligible heir” under AIPRA because he is a direct lineal descendant of John, who is an Indian in the first degree.<sup>165</sup>

By leaving his trust property to only one child and giving his other children personal property and nontrust assets, John has provided for all his children after his death and continued the tradition of his grandmother—to protect their lands from fractionation.

*c) John’s Home*

Indians must receive permission from the Bureau of Indian Affairs (BIA) before they are allowed to sell, lease, subdivide, encumber, or devise their interests in property.<sup>166</sup> Even with BIA approval, an Indian’s alienation options are limited as compared to other property owners. For example, an Indian may only contract or lease their property to federally approved individuals or companies, and then only for limited periods of time as determined by federal law.<sup>167</sup>

Ten years ago, John and his wife tore down his grandmother’s original allotment home and built a new house in its place. The couple scrimped and saved, taking out personal loans to pay for the construction of the new house. The couple continues to live in the home today with two of their three children. Prior to AIPRA, John’s house would have been considered his personal property, as federal laws were silent on the issue and previous BIA decisions generally held that a home built with personal funds was considered personal property (personalty) not subject to a shared interest with any other co-owner who had not contributed to its construction.<sup>168</sup>

Prior to AIPRA, John’s son would have been able to inherit a full interest in the house. Under AIPRA, all permanent fixtures are part of the land and as such, John’s son is only entitled to his father’s undivided interest in the trust property and the home, which is 50 percent. There are two possible

options for this outcome to change. First, a set of technical amendments currently pending before congress will pass redefining the land as follows:

“land”

(A) Means any real property; and

(B) for purposes of intestate succession only under section 207(a), includes with respect to any decedent who dies after July 20, 2007, the interest of the decedent in any improvements permanently affixed to a parcel of trust or restricted lands (subject to any valid mortgage or other interest in such an improvement) that was owned in whole or in part by the decedent immediately prior to the death of the decedent.

Second, before John J. dies, he can attempt to procure a private contractual release of interest or lease agreement from each of the 150 other undivided interest holders. The prospects of getting 150 people to agree on any subject seems daunting, let alone to agree en masse to relinquish their legal rights to a capital asset.

## **2. Karen and Dale G. Story**

Karen and Dale G.<sup>169</sup> are both members of the same Indian tribe and have been together thirty-eight years, but never married. They have three grown children. The couple is currently raising their two youngest grandchildren. Neither has a will, but both have trust land along with IIM accounts. Dale’s trust interests have provided the family with steady lease income over the past decade. The couple lives in a home built on trust lands and owned by Karen.

The consequences of either Karen or Dale dying without a will could be devastating since neither is considered the legal spouse or intestate heir of the other.<sup>170</sup> If Dale dies without a will, Karen will lose the lease income that has supported their family. If Karen dies, Dale will lose the right to live in their home.



Karen and Dale consider themselves married (customary spouses), but never formalized their relationship with a state marriage ceremony. Prior to AIPRA, federal laws allowed state laws to define and determine a spouse's intestacy rights. Under AIPRA, state law no longer applies, and federal law only refers to customary spouses for the purposes of legitimizing the children of the union as rightful heirs.<sup>171</sup> AIPRA is silent as to what source a probate court may use to determine Dale and Karen's inheritance rights. A probate judge could use federal law, state law, tribal law, or some combination thereof. Regardless, Dale and Karen are subject to the discretion of the probate judge unless they draft a will spelling out their wishes for each other.

### III. FRACTIONATION REDUCTION AND LAND CONSOLIDATION MECHANISMS

The title of AIPRA, the American Indian Probate Reform Act, presents the image of a probate law. However, it is much more. AIPRA contains many provisions of interest to tribal governments and officials to effectuate land consolidation and reduce fractionation of the lands over which they have jurisdiction.

#### A. *Land Consolidation Plans*

Notwithstanding any other provision of law, and subject to approval by the secretary, AIPRA authorizes any Indian tribe to adopt a tribal land consolidation plan.<sup>172</sup> A land consolidation plan can provide for the sale or exchange of any tribal lands or interests in lands for the purpose of eliminating fractional interests in Indian trust or restricted lands or consolidating its tribal land holdings.<sup>173</sup> Any consolidation plan must meet the following criteria to be approved:

- the sale price or exchanged value received by the tribe for land or interests in land under the plan must be no less than

within 10 percent of the fair market value as determined by the secretary;<sup>174</sup>

- if the tribal land involved in an exchange is of greater or lesser value than the land for which it is being exchanged, the tribe may accept or give cash in such an exchange in order to equalize the value of the property exchanged;<sup>175</sup>
- any proceeds from the sale of land or interests in land, or proceeds received by the tribe to equalize an exchange made, shall be used exclusively for the purchase of land or other interests in land;<sup>176</sup>
- the secretary must maintain a separate trust account for each tribe selling or exchanging land under a land consolidation plan consisting of the proceeds of the land sales and exchanges and must release those funds only for the purpose of buying lands under the plan;<sup>177</sup> and
- any tribe may retain the mineral rights to land sold or exchanged and the secretary must assist such tribe in determining the value of those mineral rights and shall take that value into consideration in determining the fair market value of such lands.<sup>178</sup>

The secretary is required to execute the instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that the sale or exchange is not in the best interest of the tribe or is not in compliance with the tribe's plan.<sup>179</sup> Cherokee Nation of Oklahoma homesites may be conveyed for less than fair market value under a special provision of AIPRA.<sup>180</sup>

*B. Purchase by Tribes of Trust or Restricted or Controlled Lands at No Less than Fair Market Value*

Indian tribes have the option of purchasing interests in trust lands from willing sellers. Under AIPRA, the tribe may now purchase all of the interests in a tract with the consent of 50 percent or more of the undivided

interest co-owners in the tract.<sup>181</sup> The interest owned by the Indian tribe in the tract can be included in the computation of the percentage for ownership for consent.<sup>182</sup>

Any Indian owning an undivided interest and in actual use and possession of such tract for at least three years preceding the tribe's attempt to purchase may purchase the tract by matching the tribal offer.<sup>183</sup> If the individual acquiring the interest under this section wishes to sell or transfer for a period of five years, the tribe will have a right to purchase for fair market value.<sup>184</sup> Secretarial approval is required for a land sale by this process; however, approval is not required when the tribe making the purchase has, in effect, a Secretarial approved tribal land consolidation plan under AIPRA.<sup>185</sup>

This provision will effectuate consolidation, but may also result in involuntary land loss for individuals who are unable to match the tribal offer.

### *C. Partition*

The partition process under AIPRA is not the traditional partition process of dividing a parcel of land into separate legal parcels for each individual owner. While traditional partitions are still available for trust or restricted interest owners, AIPRA adds a second type of partition—one that reconsolidates all interests into one owner through sale. Through a partition under AIPRA, one owner purchases all other undivided interests in the parcel, and does so not necessarily with the consent of all other co-owners. Thus, the partition process can serve as a useful tool to consolidate land ownership interests in a tract in one owner. At the same time, an owner of an interest could lose that interest to the partition process without the owner's consent.

Parcels of land that are highly fractionated are subject to partition.<sup>186</sup> “Highly fractionated” means a parcel that has fifty or more, but less than one hundred, co-owners of trust or restricted status where no one of the co-

owners holds an interest that is greater than 10 percent of the whole, or where a parcel has one hundred or more co-owners of trust or restricted interests.<sup>187</sup> The partition process begins by an application filed by any co-owner<sup>188</sup> in the subject parcel, including individuals, the tribe, and original decedents of the allottee.<sup>189</sup> Applications for partitions will begin to be accepted one year after the effective date of AIPRA, which will be June 20, 2007.<sup>190</sup> The applicant is responsible for the costs of serving and publishing notice and shall be required to pay the estimated costs<sup>191</sup> thereof to the secretary or to furnish a sufficient bond.<sup>192</sup> If the payment is not made or the bond not provided, the secretary is not required to begin the partition process and may deny the application.<sup>193</sup> However, the secretary has the discretion to waive the requirement for payment or bond upon making a determination that such a waiver will further the policies of AIPRA.<sup>194</sup>

The government will consider applications for partition only if the applicant secures written, acknowledged consent from:

- the Indian tribe with jurisdiction over the subject land if the tribe owns an undivided interest in the parcel;<sup>195</sup>
- any owner who, for the immediately preceding three years has continuously maintained a bona fide residence on the parcel or has operated a bona fide farm, ranch, or other business on the parcel; and<sup>196</sup>
- the owners (including parents of minor owners and guardians of incompetent owners) of at least 50 percent of the undivided interests in the parcel, but only when the secretary determines, based upon the appraisal, that any one Indian owner's total undivided interest (not including the interest of an Indian tribe or that of the owner requesting the partition) has a value in excess of \$1,500.<sup>197</sup>

The secretary shall approve any consent, absent reason to believe that the consent was obtained as a result of fraud or undue influence.<sup>198</sup> For purposes of a partition application, the secretary may consent on behalf of undetermined heirs<sup>199</sup> of trust or restricted interests, owners of such interests

who are minors and legal incompetents having no parents or legal guardians,<sup>200</sup> and missing owners or owners of trust or restricted interests whose whereabouts are unknown, but only after a search for such owners has been completed.<sup>201</sup> If the applicant fails to secure any required consent by the date established by the secretary prior to the proposed sale, the secretary may either extend the time period for obtaining consent or deny the request for partition.<sup>202</sup>

Upon a determination that the parcel is highly fractionated, the secretary shall appraise and make a fair market value determination of the parcel's value.<sup>203</sup> When the appraisal is completed, the secretary must give notice of the requested partition and appraisal to all owners of undivided interests in the parcel.<sup>204</sup> AIPRA specifies the content of that notice in some detail.<sup>205</sup> The secretary is required to use due diligence to provide all owners with actual notice of the partition proceedings by mail.<sup>206</sup> Notice by publication and posting is allowed if actual notice of the partition could not be accomplished by mail, and as a means of serving unknown heirs and assigns.<sup>207</sup> AIPRA assumes that owners of interest in the parcel have the right to submit comments on the appraisal, in that it requires the secretary to review and consider comments or information submitted and allows the secretary to order a new appraisal or approve the original appraisal as needed to comply with the requirements for establishing fair market value.<sup>208</sup> Notice, provided in the same manner as required for the original notice of appraisal, must be given if a new appraisal is ordered<sup>209</sup> or if the new appraisal results in a value of the land that is equal to or greater than that of the first appraisal.<sup>210</sup> Upon approval of an appraisal, the secretary is required to serve the Indian tribe with jurisdiction over the property and to all persons who submitted written comments or objections to the proposed partition or appraisal. The written notice should state, among other specified information, the results of the appraisal, the time of the sale or for submitting bids, the owner's right to pursue an administrative appeal, and the date by which the appeal must be taken.<sup>211</sup>

At the time and place specified in the notice, the secretary may sell the parcel by competitive bid, by public auction, or by sealed bids—whichever method the secretary determines to be more appropriate—for not less than the final appraised value of the parcel.<sup>212</sup> The parcel will be sold to the highest bidder from among the following eligible bidders:

- the Indian tribe, if any, with jurisdiction over the trust or restricted interests being sold;
- any person who is a member or is eligible to be a member of the tribe having jurisdiction over the parcel;
- any person who is a member, or is eligible to be a member, of another Indian tribe, but only if such person already owns an undivided interest in the parcel at the time of sale;
- any lineal descendant of the original allottee of the parcel who is a member or is eligible to be a member of an Indian tribe, or, if the parcel is in California and is not within an Indian reservation or otherwise subject to the jurisdiction of an Indian tribe, who is a member or eligible to be a member of an Indian tribe, or owns a trust or restricted interest in the parcel.<sup>213</sup>

If the highest bidder is an eligible bidder only as a member—or person eligible to be a member—of an Indian tribe other than the tribe having jurisdiction over the land, and who already owns an undivided interest in the parcel at the time of the sale, the tribe having jurisdiction over the parcel has the right to match the highest bid and acquire the parcel.<sup>214</sup> However, this can be done only if (1) at the time of the sale, the tribe has a law or resolution reserving its right to match bids of nonmember bidders in partition sales under AIPRA, (2) a copy of that law or resolution has been delivered to the secretary,<sup>215</sup> and (3) the parcel is not acquired by a person owning the largest undivided interest.<sup>216</sup> A person who owns the largest undivided interest and who is a member, or is eligible to become a member, of the tribe having jurisdiction over the parcel has the right to purchase the parcel by tendering an amount equal to the highest bid less the amount

attributable to the tendering owner's share.<sup>217</sup> This is to be only if (1) the owner submitted a sufficient bid at the sale,<sup>218</sup> (2) the owner's undivided interest in the parcel immediately prior to the sale was greater than the undivided interest held by any other owners,<sup>219</sup> and (3) the interest was equal to or greater than 20 percent of the entire undivided ownership of the parcel.<sup>220</sup>

The highest bidder must exercise the right to purchase within three days following the date of the auction or receiving sealed bids by delivery of a written notice of intent to exercise the owner's right to purchase to the secretary.<sup>221</sup> The highest bidder must tender the amount of the purchase price not more than thirty days after the date of the auction or time for receiving sealed bids.<sup>222</sup>

The purchaser may acquire title to the parcel in trust or restricted status, free of any and all claims of title or ownership of all persons or entities, except the United States, owning or claiming to own an interest in the parcel prior to the time of sale.<sup>223</sup> The proceeds from the sale will be distributed to the owners of interests in the parcel proportionate to their respective interests.<sup>224</sup> If the interest purchased was held in trust or restricted status, the proceeds shall be maintained as trust personality.<sup>225</sup> The secretary shall hold the proceeds attributable to the sale of interests of owners whose whereabouts are unknown, of undetermined heirs, or of other persons whose ownership interests have not been recorded until such time as the proceeds may be appropriately distributed.<sup>226</sup> If no bidder offers a bid that equals or exceeds the final appraised value, the secretary may either purchase the parcel for the appraised fair market value on behalf of the Indian tribe with jurisdiction over the land<sup>227</sup> or terminate the partition process.<sup>228</sup>

Once the secretary approves the partition, and an owner of an interest in the parcel refuses to surrender possession or refuses to execute any conveyance necessary to implement the partition, any affected owner or the United States may initiate a civil action in the United States district court

where the parcel is located, seeking either an order requiring anyone refusing to deliver possession to leave the property or any other appropriate remedy necessary to implement the partition.<sup>229</sup> In any such civil action brought, the United States shall receive notice of the civil action and may be a party to the civil action.<sup>230</sup>

The secretary may provide grants and low-interest loans to successful bidders at partition sales provided that the total assistance does not exceed 20 percent of the appraised value of the land sold and the funds provided shall only be applied toward the purchase price of the land.<sup>231</sup>

### **1. John J. Story—The Potential Effects of Tribal Land Purchases and Partitions**

Continuing with our story of John J., the following hypothetical discusses the potential impacts and implications of AIPRA's land consolidation provisions. What follows is a best attempt to analyze the impacts of AIPRA because no precedent exists and the provisions have not been exercised as of the date of this writing.

#### *a) Tribal Land Purchase*

John is exposed to a potential tribal purchase or sale of his land if all of the other co-owners should ever decide to seek a sale of their interests to the tribe.<sup>232</sup> The other co-owners own 50 percent, therefore meeting the minimum consent requirement. If this occurs, John will be required to either pay fair market value or match the tribe's purchase offer for the home and land that his family has lived on for generations.<sup>233</sup> While AIPRA contains a provision stating that the secretary may provide grants and low interest loans to successful bidders, the assistance is not guaranteed and even if granted the loan cannot exceed 20 percent of the appraised value of the parcel sold.<sup>234</sup> If John is unable to raise the money within thirty days, the tribe has the legal authority to compensate him and take his land and home.



If John purchases his land at a sale, he is further limited by AIPRA. If at any time within five years of this purchase John attempts to take the land out of trust status for any purpose, including mortgaging, or if John should attempt to sell the land, even to another eligible Indian, he will be enjoined and the tribe will be given 180 days for first right of purchase at fair market value.<sup>235</sup>

Essentially, AIPRA may unintentionally make capital investments by Indian co-owners, such as John, tenuous at best and possibly imprudent.

*b) Partition*

Even though John owns a 50 percent interest, AIPRA has given John's parcel the title of highly fractionated because there are more than one hundred co-owners.<sup>236</sup> As such, the tribe, or another co-owner, has the right to bring a partition application and attempt to reconsolidate the lands.<sup>237</sup> However, because John currently maintains his residence on the land and has done so for more than three years, his consent will be required before partitioning can be accomplished.<sup>238</sup>

## **2. Acquisition of Fractional Interests by Tribes**

If the owner of an interest in trust or restricted status devises the interest to a non-Indian, the tribe that exercises jurisdiction over the land may acquire the interest by paying the secretary the fair market value of that interest, as determined by the secretary on the date of the decedent's death.<sup>239</sup> The secretary is required to allow the tribe, upon its request, up to two years to either make the payment<sup>240</sup> or to recognize alternative exchanges of consideration or extended payment terms agreed upon between the tribe and the non-Indian devisee.<sup>241</sup> The secretary will transfer payments received to any person or persons who would have received an interest in the land had the tribe not purchased it.<sup>242</sup> This option is not available to tribes if, while the decedent's estate is pending, the non-Indian devisee renounces the interest in favor of an Indian person<sup>243</sup> or if the interest is part of a family farm that is devised to a member of the family<sup>244</sup>

of the decedent, and the devisee agrees, in writing, that the Indian tribe with jurisdiction over the land will have the opportunity to acquire the interest for fair market value if the interest is offered for sale to a person or entity that is not a member of the family of the owner.<sup>245</sup> The tribe with jurisdiction over the parcel may request that a restriction to that effect be recorded as part of the deed relating to the interest involved.<sup>246</sup>

A non-Indian devisee may retain a life estate in the interest involved, including a life estate to the revenue produced from the interest.<sup>247</sup> The amount of any payment required from the tribe to purchase the interest under this process shall be reduced to reflect the value of any life estate reserved by the non-Indian devisee.<sup>248</sup>

#### *D. Purchase Option at Probate*

The secretary has authority to sell the trust or restricted interests in a decedent's estate at probate, including the life estate interest that a surviving spouse would otherwise receive, but at no less than fair market value.<sup>249</sup> Under certain conditions, the sale is permitted without the consent of the heirs.<sup>250</sup> Those eligible to purchase an interest at probate are as follows:

- any other eligible heir<sup>251</sup> taking an interest in the same parcel of land by intestate succession or the decedent's other devisees of interest in the same parcel who are eligible<sup>252</sup> to receive a devise;<sup>253</sup>
- all persons who own undivided trust or restricted interests in the same parcel of land involved in the probate proceeding;<sup>254</sup> or
- the Indian tribe with jurisdiction over the interest or the Secretary on behalf of such Indian tribe.<sup>255</sup>

The process initiates when an eligible purchaser submits a written request to purchase prior to the final distribution of the interest to the heirs or devisees at probate.<sup>256</sup>

The eligible purchaser must receive consent to the sale from any devisee and from any intestate heir who is receiving an interest of 5 percent or greater.<sup>257</sup> No consent is required if the interest is passing by intestate succession, if the interest passing to the heir<sup>258</sup> is less than 5 percent of the entire undivided ownership in the parcel,<sup>259</sup> and if the heir did not reside on that parcel at the time of the decedent's death.<sup>260</sup> The proceeds from the sale will be distributed to the heirs, devisees, or spouse whose interest was sold, in accordance with their respective interests.<sup>261</sup> The proceeds distributed will be deposited and held as trust personalty if the interest sold would otherwise have passed in trust or restricted status.<sup>262</sup>

The purchase option at probate is potentially one of the most problematic provisions of AIPRA. Under currently pending code of federal regulations that would provide the administrative directions for federal probate,<sup>263</sup> the probate court will be required to look to the future vesting interests to be received by the heirs, and not to the interests held by the decedent. One result of this interpretation is, for example, that an intestate decedent with a 20 percent interest at probate and five children would have the entire 20 percent subjected to forced sale. AIPRA intestate laws fractionate the 20 percent interest by distributing to all children equally,<sup>264</sup> each receiving a 4 percent interest. The same law then views those 4 percent interests as small interests<sup>265</sup> open to forced sale without consent of the heirs.

Three things will preclude a forced sale at the probate of interests less than 5 percent: (1) the interest is passing by a valid will, thus triggering the consent requirement,<sup>266</sup> (2) the interest is passing intestate, but the heir to receive it lives on that parcel at the time of the decedent's death,<sup>267</sup> or (3) the heirs voluntarily agree to enter into a consolidation agreement at probate.<sup>268</sup>

### **1. Consolidation Agreements**

Officials authorized to adjudicate the probate of trust or restricted lands have the authority to approve agreements to consolidate interests in trust or

restricted land between a decedent's heirs and devisees.<sup>269</sup> Such agreements may include trust or restricted lands that are not part of the decedent's estate being probated.<sup>270</sup> The secretary is authorized under AIPRA to promulgate regulations regarding consolidation agreements.<sup>271</sup>

## **2. Purchase of Intestate Interests**

If there are no eligible heirs to receive an interest in trust or restricted land passing according to the intestate succession provisions,<sup>272</sup> an Indian co-owner, including the Indian tribe with jurisdiction over the parcel, may acquire an interest that would otherwise pass by those provisions by paying the fair market value of the interest in the land into the estate of the decedent before the close of probate.<sup>273</sup> If more than one Indian co-owner offers to purchase the interest, it will be sold to the highest bidder.<sup>274</sup>

If there is no Indian tribe with jurisdiction over the trust or restricted interests, and there is no offer by a co-owner to purchase, the interests will be divided equally among the co-owners of the trust or restricted interests in the parcel.<sup>275</sup> If there are no co-owners, the interest will pass to the United States to be sold.<sup>276</sup>

However, if the interest passing to the United States is contiguous to another parcel of trust or restricted land, the secretary shall give the owner or owners of trust or restricted interests in the contiguous parcel the first opportunity to purchase the interest at not less than fair market value.<sup>277</sup> If one or more owners in the contiguous parcel seek to purchase the interest, the secretary shall sell the interest by public auction or sealed bids at not less than fair market value to whichever owner of a trust or restricted interest in the contiguous parcel who submits the highest bid.<sup>278</sup>

## **3. Renunciation of Interest**

Any person who is eighteen years of age or older may renounce or disclaim an inheritance of a trust, restricted interest in land, or a trust personally through intestate succession or devise. The renunciation or

disclaimer may be done either in full or, where the interest is in land, by the heir filing a signed and acknowledged declaration with the probate decision maker prior to the entry of a final probate order.<sup>279</sup> An interest that is renounced or disclaimed will not be considered as having vested in the renouncing or disclaiming heir or devisee, and shall not be considered to be a transfer or gift of the renounced or disclaimed interest.<sup>280</sup> An interest in trust or restricted land may be renounced or disclaimed only in favor of:

- an eligible heir,<sup>281</sup>
- any person who would have been eligible to be a devisee of the interest in question pursuant to §2206(b)(1)(A), but only in cases where the renouncing person is a devisee of the interest under a valid will,<sup>282</sup> or
- the Indian tribe with jurisdiction over the interest.<sup>283</sup>

The interest so renounced will pass to its recipient in trust or restricted status.<sup>284</sup> Unless the interest is renounced or disclaimed in favor of a person or tribe eligible to receive the interest, the renounced or disclaimed interest will pass as if the renunciation or disclaimer had not been made.<sup>285</sup> The renunciation or disclaimer will be considered accepted when it is implemented in a final order by a probate decision maker, and it will thereafter be irrevocable.<sup>286</sup> No renunciation or disclaimer shall be included in a final order unless the recipient of the interest has been given notice of the renunciation and has not refused to accept the interest.<sup>287</sup> All disclaimers and renunciations filed and implemented in probate orders made effective prior to the date of enactment of AIPRA are ratified by it.<sup>288</sup> The provisions allowing renunciations and disclaimers are not to be construed to allow the renunciation or disclaimer of a trust or restricted interest amounting to less than 5 percent of the total parcel in favor of more than one person.<sup>289</sup> This limitation is useful because renunciation of a small interest to more than one person would have the effect of further fractionating the ownership interest.

In instances where the interest passing by intestate succession is less than 5 percent, an heir who is not a minor or incompetent may agree, in writing entered into the record of the decedent's probate proceeding, to renounce their interest in trust or restricted land<sup>290</sup> in favor of:

- any other eligible heir or Indian person related to the heir by blood, but, in any case, never in favor of more than one such heir or person,<sup>291</sup>
- not more than one co-owner of another trust or restricted interest in such parcel of land,<sup>292</sup> or
- the Indian tribe with jurisdiction over the interest, if any.<sup>293</sup>

Finally, an interest in trust personalty<sup>294</sup> may be renounced or disclaimed in favor of any person.<sup>295</sup>

#### IV. TRIBAL PROBATE CODES

Indian tribes have always had the inherent power to regulate the passing of a deceased member's property.<sup>296</sup> However, federal law has always denied application of tribal law to trust personalty and real property. AIPRA authorizes tribes to adopt tribal probate codes that will govern the descent and distribution of trust or restricted lands located within that tribe's reservation, or which are otherwise subject to that tribe's jurisdiction, notwithstanding any other provision of law.<sup>297</sup> Tribal probate codes may include rules of intestate succession,<sup>298</sup> as well as any other provisions that are consistent with federal law and that promote the policies set forth in section 102 of the Indian Land Consolidation Act (ILCA) Amendments of 2000.<sup>299</sup> The policies stated in section 102 of ILCA 2000 are the following:

- prevent further fractionation of trust allotments;
- consolidate fractional interests and ownership of those interests into useable parcels;
- consolidate fractional interests in a manner that enhances tribal sovereignty;

- promote tribal self-sufficiency and self-determination; and
- reverse the effects of the allotment policy on Indian tribes.<sup>300</sup>

Thus, there are many provisions that may be included within a tribal code that further these objectives but can have a profound impact upon the probate of tribal member estates. These include, for example, providing a definition of a spouse, which AIPRA does not do. A definition of a spouse could recognize marriages, by custom or tradition, that are common to a tribe. The inheritance rights of adopted-out children might also be provided for. Additionally, special provisions might be made to protect family heirlooms and artifacts. Careful consideration should be given to a tribe's customs, interests, and desires, and steps should be taken to insure that those are addressed to the fullest extent possible in its probate code.

A tribal probate code may not prohibit the testamentary devise of an interest in trust or restricted land to a lineal descendent of the original allottee<sup>301</sup> or to an Indian who is not a member of the Indian tribe with jurisdiction over such interest<sup>302</sup> unless the code allows eligible devisees to renounce their interests,<sup>303</sup> provides for the opportunity for a devisee who is the spouse or lineal descendent of a testator to reserve a life estate without regard to waste,<sup>304</sup> and requires payment of fair market value to the devisee.<sup>305</sup>

AIPRA establishes, for the first time, federal rules of intestate succession that will apply to the descent and distribution of trust property.<sup>306</sup> A tribe may adopt rules of intestate succession that differ from the federal rules and which will govern the descent and distribution of trust land subject to its jurisdiction.<sup>307</sup> Rules of intestate succession contained in a tribal code will be applied in the federal probate process.<sup>308</sup> For small, fractionated interests, the tribal code will be applied, but only if all of the following conditions apply:

- a copy of the tribal rule is delivered to the official designated by the secretary to receive copies of tribal rules;

- the tribal rule provides for the intestate inheritance of such interest by no more than one heir, so that the interest does not further fractionate;
- the tribal rule does not apply to any interest disposed of by a valid will;
- the decedent died on or after June 20, 2006, or on or after the date on which a copy of the tribal rule was delivered to the secretary, whichever is later; and
- the secretary does not make a determination within ninety days after a copy of the tribal rule is delivered that the rule would be unreasonably difficult to administer or does not conform with the second or third requirements above.<sup>309</sup>

Tribal probate codes that are intended to govern the descent and distribution of trust or restricted land must be approved by the secretary before they become effective.<sup>310</sup> The development and promulgation of an approved tribal probate code provides tribes with an opportunity to pass ownership interests consistent with tribal practices, customs, and interests that may be different than the federal inheritance code provisions.

The approval process is specified in AIPRA and states that the secretary has 180 days after the code is submitted to either approve or disapprove it.<sup>311</sup> If the secretary fails to approve or disapprove a code within that time, the code will be deemed to have been approved by the secretary, but only to the extent that it is consistent with federal law and promotes the policies set forth in section 102 of the Indian Land Consolidation Act amendments of 2000.<sup>312</sup> The secretary is expressly prohibited from approving a tribal probate code or an amendment to a tribal probate code unless the secretary determines that the code promotes those policies.<sup>313</sup> If a tribal probate code or an amendment to an approved code is disapproved, the secretary must include in the notice of disapproval to the tribe a written explanation of the reason for the disapproval.<sup>314</sup>

Once a tribal probate code has been approved, any amendment to that code must also be submitted for approval by the secretary.<sup>315</sup> The secretary



has sixty days to approve or disapprove the amendment after receiving it.<sup>316</sup> If the secretary fails to approve or disapprove an amendment within that time, it shall be deemed to have been approved, but only to the extent it is consistent with federal law and promotes the policies set forth in section 102 of the Indian Land Consolidation Act amendments of 2000.<sup>317</sup>

A tribal probate code that has been approved becomes effective on the later of two dates—June 20, 2006, or 180 days after the date of approval.<sup>318</sup> Approved tribal probate codes apply only to estates of decedents who die on or after the effective date of the probate code.<sup>319</sup> Likewise, an amendment to a tribal probate code shall apply only to the estates of decedents who die on or after the effective date of the amendment.<sup>320</sup> The repeal of a tribal probate code will not be effective earlier than 180 days after the secretary receives notice of the repeal and will apply only to the estates of decedents who die on or after the effective date of the repeal.<sup>321</sup>

The secretary is obliged to give full faith and credit to approved tribal probate codes, applicable to estates of decedents whose deaths occur on or after the effective date of the approved tribal ordinance, in regulating the descent and distribution of trust lands.<sup>322</sup>

## V. GENERAL RULES GOVERNING PROBATE AND MISCELLANEOUS PROVISIONS OF AIPRA

In addition to the specific rules discussed above, AIPRA provides general rules that will govern the probate of estates containing trust or restricted interests in land or trust personalty, except as might be provided under applicable federal law or approved tribal probate code.<sup>323</sup>

### *A. Pretermitted Spouses and Children*

#### **1. Spouses**

If the surviving spouse of a testator married the testator after the testator executed his or her will, the surviving spouse will receive the intestate share of the decedent's trust or restricted land and trust personalty that the spouse

would have received had the testator died intestate.<sup>324</sup> That rule does not apply to a trust or restricted interest in land when:

- the will of the testator is executed before June 20, 2006;<sup>325</sup>
- the spouse of a testator is a non-Indian<sup>326</sup> and the testator devised his or her interests in trust or restricted land to one or more Indians;<sup>327</sup>
- it appears that the will was made in contemplation of the marriage of the testator to the surviving spouse;<sup>328</sup>
- the will expresses the intention that the will is to be effective notwithstanding any subsequent marriage;<sup>329</sup> or
- the testator provided for the spouse by a transfer of funds or property outside the will,<sup>330</sup> and an intent that the transfer be in lieu of a testamentary provision is demonstrated by statements of the testator or through a reasonable inference based on the amount of the transfer or other evidence.<sup>331</sup>

## **2. Spouses Married at the Time of the Will**

If the surviving spouse of the testator is omitted from the will of the testator, the surviving spouse will inherit interests in trust or restricted lands in accordance with the provisions of AIPRA that define the intestate succession of such interests to a surviving spouse,<sup>332</sup> but only if one of the following conditions apply:

- the testator and spouse were continuously married without legal separation for the five-year period preceding the decedent's death;<sup>333</sup>
- the testator and surviving spouse have a surviving child who is the child of the testator;<sup>334</sup>
- the surviving spouse has made substantial payments toward the purchase of, or improvements to, the trust or restricted land in such estate;<sup>335</sup> or

- the surviving spouse is under a binding obligation to continue making loan payments for the trust or restricted land for a substantial period of time.<sup>336</sup>

However, these provisions will not apply if there is evidence that the testator adequately provided for the surviving spouse and any minor children by a transfer of funds or property outside of the will.<sup>337</sup>

### **3. Children**

If the testator executed his or her will before the birth or adoption of one or more children of the testator, and the omission of the children from the will is a product of inadvertence rather than an intentional omission, then the children will share in the trust or restricted interests in land and trust personalty as if the decedent had died intestate.<sup>338</sup>

Any child recognized as an heir by virtue of adoption under the Act of July 8, 1940, will be treated as a child of the decedent.<sup>339</sup> For purposes of determining pretermitted heirs, an adopted person shall not be considered the child or issue of his natural parents except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person.<sup>340</sup> If a natural parent has married the adoptive parent, the adopted person shall also be considered the issue of the natural parent.<sup>341</sup> The foregoing is subject to other federal laws and the laws of Indian tribes with jurisdiction over trust or restricted land, which may otherwise define the inheritance rights of adopted-out children.<sup>342</sup>

### **4. Divorce**

An individual who is divorced from a decedent or whose marriage to the decedent has been annulled shall not be considered to be a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of the decedent's death.<sup>343</sup> A decree of separation that does not dissolve the marriage and terminate the status of husband and wife shall not be considered a divorce for purposes of determining pretermitted

heirs.<sup>344</sup> These provisions shall not prevent the secretary from giving effect to a property right settlement relating to trust, restricted land, or an interest in trust personalty, if one of the parties to the settlement dies before the issuance of a final decree dissolving the marriage of the parties to the property settlement.<sup>345</sup> If a testator's marriage ends by divorce or annulment after the testator has executed a will, as of the effective date of the divorce or annulment, any disposition of trust or restricted interests in land or trust personalty made by the will to the former spouse of the testator shall be considered revoked unless the will expressly provides otherwise.<sup>346</sup> Property that is prevented from passing to the former spouse in that situation shall pass as if the former spouse failed to survive the decedent.<sup>347</sup> Any provision of a will that is revoked solely by reason of divorce or annulment under these provisions shall be revived by the remarriage of the testator to the former spouse of the testator.<sup>348</sup>

*B. After-Born Heirs*

A child in gestation at the time of decedent's death will be treated as having survived the decedent if the child lives at least 120 hours after its birth.<sup>349</sup>

**1. Advancements of Trust Personalty During Lifetime**

The trust personalty of a decedent who dies intestate, as to all or a portion of his or her estate given during the decedent's lifetime to a person eligible to be an heir of the decedent, shall be treated as an advancement against the heir's inheritance.<sup>350</sup> However, this only applies if the decedent declared it in a contemporaneous writing, or the heir acknowledged in writing that the gift is an advancement or is to be taken into account in computing the division and distribution of the decedent's intestate estate.<sup>351</sup> In those situations, trust personalty advanced during the decedent's lifetime is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever occurs first.<sup>352</sup>

If the recipient of the trust personalty predeceases the decedent, the property shall not be treated as an advancement or taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.<sup>353</sup>

*C. Heirs Related Through Two Lines*

A person related to the decedent through two lines of relationship is entitled only to a single share of the trust or restricted land or trust personalty in the decedent's estate based upon the relationship that would entitle them to the larger share.<sup>354</sup>

*D. Heirship by Killing*

As used in AIPRA, "heir by killing" means any person who knowingly participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of the decedent.<sup>355</sup> Subject to any applicable federal law relating to the devise or descent of trust or restricted land, no heir by killing shall, in any way, acquire any trust or restricted interests in land or interests in trust personalty as the result of the death of the decedent.<sup>356</sup>

**1. Descent, Distribution, and Right of Survivorship**

The heir by killing shall be deemed to have predeceased the decedent as to the decedent's trust or restricted interests in land or trust personalty, which would have passed from the decedent or his estate to such heir under intestate succession either under this section, under a tribal probate code (unless otherwise provided for as the surviving spouse), by devise, as a reversion or a vested remainder, as a survivorship interest, or as a contingent remainder or executory or other future interest.<sup>357</sup>

## **2. Joint Tenants, Joint Owners, and Joint Obligees**

Any trust or restricted land or trust personalty held by only the heir by killing and the decedent, as joint tenants, joint owners, or joint obligees, shall pass upon the death of the decedent to his or her estate as if the heir by killing had predeceased the decedent.<sup>358</sup>

As to trust and restricted land or trust personalty held jointly by three or more persons, including both the heir by killing and the decedent, any income which would have accrued to the heir by killing as a result of the death of the decedent shall pass to the estate of the decedent as if the heir by killing had predeceased the decedent and any surviving joint tenants.<sup>359</sup> Notwithstanding the foregoing, the decedent's trust or restricted interest in land or trust personalty that is held in a joint tenancy with the right of survivorship shall be severed from the joint tenancy as though the property held in the joint tenancy were to be severed and distributed equally among the joint tenants, and the decedent's interest shall pass to his estate; the remainder of the interests shall remain in joint tenancy with right of survivorship among the surviving joint tenants.<sup>360</sup>

## **3. Life Estate for the Life of Another**

If the estate is held by a third person whose possession expires upon the death of the decedent, it shall remain in such person's hands for the period of time following the decedent's death, equal to the life expectancy of the decedent but for the killing.<sup>361</sup>

## **4. Preadjudication Rule**

If a person has been charged, whether by indictment, information, or otherwise by the United States, a tribe, or any state, with voluntary manslaughter or homicide in connection with a decedent's death, then any and all trust or restricted land or trust personalty that would otherwise pass to that person from the decedent's estate shall not pass or be distributed by the secretary until the charges have been resolved.<sup>362</sup> Upon dismissal or

withdrawal of the charge, or upon a verdict of not guilty, such land and personalty shall pass as if no charge had been made or filed.<sup>363</sup> Upon conviction of such person and the exhaustion of all appeals, if any, the trust and restricted land and trust personalty in the estate shall pass in accordance with the provisions applicable to an heir by killing.<sup>364</sup>

### **5. Broad Construction Policy**

The provisions relating to heir by killing are not to be considered penal in nature, but shall be construed broadly in order to effect the policy that no person shall be allowed to profit by his own wrong, wherever committed.<sup>365</sup>

#### *a) Trusteeship Title of United States for any Indian or Indian Tribe*

Title to any land acquired under AIPRA by any Indian or Indian tribe will be taken in trust by the United States for that Indian or Indian tribe.<sup>366</sup>

#### *b) Tax Exemption*

All lands or interests in land acquired by the United States for an Indian or Indian tribe under the authority of the Act will be exempt from Federal, State, and local taxation.<sup>367</sup>

#### *c) Tribal Justice Systems*

The term “tribal justice system” is defined by 25 U.S.C. §2205(d), which provides that it:

means the entire judicial branch, and employees thereof, of an Indian tribe, including (but not limited to) traditional methods and forums for dispute resolution, lower courts, appellate courts (including intertribal appellate courts), alternative dispute resolution systems, and circuit rider systems, established by inherent tribal authority whether or not they constitute a court of record.<sup>368</sup>

AIPRA authorizes the secretary, by regulation, to provide for the use of findings of fact and conclusions of law rendered by a tribal justice system in the adjudication of federal probate proceedings.<sup>369</sup>

## VI. CONCLUSION

AIPRA represents a major change in the law applicable to Indian lands, wills, and the probate of those wills. Although currently in effect, AIPRA does not represent the final iteration in the law that Indian people and attorneys will have to learn. Congress has already passed two bills containing technical amendments.<sup>370</sup> A third technical amendment bill is currently being developed. This amendment process underscores the complexity of AIPRA and is necessary because of the many impacts and implications that were unforeseen or unintended when the initial version was passed.

In addition, the federal regulations<sup>371</sup> that will implement AIPRA are not yet finalized. After having undergone a preliminary review and consultation with Indian tribes, individuals, and organizations, the proposed regulations were published on August 8, 2006.<sup>372</sup> Public comments on these draft regulations were due by October 10, 2006, but were extended another sixty days. The Department of the Interior will consider comments received and then formulate a final version of the regulations which will then govern Indian wills and probate. This process is of major concern because, while Congress passed the law, it is the current administration that will develop the regulations that implement it. The current administration has consistently sought to reduce services to Indian people, limit its trust responsibilities to Indian tribes and people, and to utilize opportunities like this to reduce its workload and costs.

The evolution of AIPRA will continue. There may well be a need for further amendments to AIPRA, both technical and substantive. Likewise, there may be a need for amendments to the regulations after they become final. The need for changes will be identified as part of the learning process



as AIPRA and other regulations are used and applied and, potentially, from litigation that challenges the validity of provisions of AIPRA, the implementing regulations, or their interpretation.

For the present, the message is clear. Indian tribes need to consider, and act on, the options that are made available under AIPRA for the development of tribal probate codes and the acquisition of fractionated ownership interests. And, more importantly, individual owners of undivided interests in trust and restricted lands need to make informed decisions about how they want to pass those interests to future generations.

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<sup>3</sup> American Indian Probate Reform Act, 25 U.S.C. §§ 2201-2221 (2004).

<sup>4</sup> The authors wish to gratefully acknowledge the work of John Sledd, of counsel, Kanji & Katzen, PLLC, Seattle, WA, who has written extensively on this subject and gave permission for the inclusion of excerpts from his materials in this article.

<sup>5</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 66 (Nell Jessup Newton et al. eds., 2005).

<sup>6</sup> FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 66 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

<sup>7</sup> JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934, at 1 (1991).

<sup>8</sup> For a comprehensive history, review, and analysis of the General Allotment Act, see *id.*

<sup>9</sup> General Allotment (Dawes) Act, ch. 119, 24 Stat. 388, 390 (1887) (current version 25 U.S.C. § 331 (2000)).

<sup>10</sup> MCDONNELL, *supra* note 7, at 1-3.

- <sup>11</sup> COHEN, *supra* note 6, at 138 (citing D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 17 (Francis Paul Prucha ed., 1973)).
- <sup>12</sup> INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904), available at <http://digital.library.okstate.edu/kappler/index.htm>.
- <sup>13</sup> Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311.
- <sup>14</sup> Indian title describes the right of a tribe to occupy its aboriginal lands subject to the exclusive power and authority of the United States to extinguish that title. *Johnson v. McIntosh*, 21 U.S. 543, 584-85 (1823).
- <sup>15</sup> COHEN, *supra* note 6, at 130-31.
- <sup>16</sup> General Allotment (Dawes) Act, ch. 119, 24 Stat. 388, 390 (1887) (current version 25 U.S.C. § 331 (2000)).
- <sup>17</sup> *Id.*
- <sup>18</sup> A fee patent (patent-in-fee): The word “patent” means the title deed by which the federal government conveys or transfers land to people. “In fee” refers to the fee simple ownership in land. The term “patent-in-fee” describes the title document issued by the U.S. federal government to terminate the trust created by the trust patent issued to the allottee. The patent-in-fee operates to vest fee simple ownership in an allottee or their heirs.
- <sup>19</sup> General Allotment Act § 5.
- <sup>20</sup> General Allotment Act § 6.
- <sup>21</sup> General Allotment Act § 5.
- <sup>22</sup> General Allotment Act § 1.
- <sup>23</sup> *See, e.g.*, *United States v. Webb*, 219 F.3d 1127, 1130 (9th Cir. 2000); MCDONNELL, *supra* note 7, at 8 (stating that “tribes sold or ceded 28,500,000 acres of surplus reservation land after allotment”).
- <sup>24</sup> *See, e.g.*, *Nez Perce Cession Act*, 29 Stat. 873, 873-74 (1895).
- <sup>25</sup> *See, e.g.*, *Nez Perce Tribe of Indians v. United States*, 95 Ct. Cl. 1, 3 (1941); Photo exhibit: WITH THE NEZ PERCE DURING ALLOTMENT: E. JANE GAY, HER MAJESTY’S COOK AND PHOTOGRAPHER (Louise D. Barber curator, University of Idaho).
- <sup>26</sup> *Burke Act*, ch. 2348, 34 Stat. 182, 183 (1906) (current version at 25 U.S.C. § 349 (2006)).
- <sup>27</sup> *Id.* (stating that the secretary could issue a patent-in-fee before the trust period expired “whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs”).
- <sup>28</sup> COHEN, *supra* note 6, at 136.
- <sup>29</sup> *Id.*
- <sup>30</sup> COHEN, *supra* note 6, at 138.
- <sup>31</sup> MCDONNELL, *supra* note 7, at 1049.
- <sup>32</sup> COHEN, *supra* note 6, at 137 (citing 2 DEP’T INT. ANN. REP. 3-4 (1917)).
- <sup>33</sup> *Id.*
- <sup>34</sup> MCDONNELL, *supra* note 7, at 121.
- <sup>35</sup> *Id.* at 10.
- <sup>36</sup> Rose Stremlau, “*To Domesticate and Civilize Wild Indians*”: *Allotment and the Campaign to Reform Indian Families, 1875–1887*, 30 J. FAM. HIST. 265, 277-78 (2005).
- <sup>37</sup> MCDONNELL, *supra* note 7, at 124.

<sup>38</sup> *Id.*

<sup>39</sup> Only when the Act of June 25, 1910, ch. 431, 36 Stat. 855, was passed were original allottees authorized to execute wills passing title to their trust allotments; the Act of February 14, 1913, ch. 55, 37 Stat. 678, 678, extended that authority to heirs of original allottees.

<sup>40</sup> An “undivided interest” is a share of the ownership interest in a parcel of trust land. The number of interests grows with the division among heirs of these interests, according to state or tribal probate laws. The income derived from the parcel is divided according to the percentage of the total interest held by an individual.

<sup>41</sup> MCDONNELL, *supra* note 7, at 121.

<sup>42</sup> *Id.*

<sup>43</sup> E-mail from Peter R. Jones, Attorney for Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, to Douglas R. Nash, Director, Inst. for Indian Est. Planning & Probate (Apr. 18, 2006)(on file with author).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> NATIVE AMERICAN TESTIMONY (Peter Nabokov ed., Penguin Books 1991) (1978).

<sup>47</sup> COHEN, *supra* note 6, at 147.

<sup>48</sup> General Allotment Act, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. § 331 (2000)).

<sup>49</sup> John C. Sledd, Events Leading to the American Indian Probate Reform Act of 2004 (AIRPA) (May. 18, 2005) (unpublished article, on file with IndianWills.org).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> Lewis Meriam et al., *The Problem of Indian Administration: Report of a Survey Made at the Request of Hon. Hubert Work, Sec. of the Int.* (Feb. 21, 1928) (John Hopkins Press, 1928) available at [http://www.alaskool.org/native\\_ed/research\\_reports/IndianAdmin/Indian\\_Admin\\_Problms.html](http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Indian_Admin_Problms.html).

<sup>52</sup> Generally, “Indian Country” is any land granted by treaty or allotment to Native American nations, tribes, reservations, communities, colonies, or individuals and recognized by the federal government. For the statutory definition, see 18 U.S.C. § 1151.

<sup>53</sup> Sledd, *supra* note 49, at 6.

<sup>54</sup> *Id.*

<sup>55</sup> HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., INDIAN HEIRSHIP LAND SURVEY (Comm. Print 1961); SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONGR., INDIAN HEIRSHIP LAND SURVEY (Comm. Print 1960-61).

<sup>56</sup> *Hearings on H.R., 11113, Before the Subcomm. On Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 98th Cong., 2d Sess. (1966).

<sup>57</sup> Am. Indian Pol’y Rev. Comm. Final report submitted to Congress May 17, 1977.

<sup>58</sup> Sledd, *supra* note 49, at 5.

<sup>59</sup> Indian Land Consolidation Act (ILCA), Pub. L. No. 97-459, § 101, 96 Stat. 2515, 1-6 (1983).

<sup>60</sup> 25 U.S.C. § 2203 (2006).

<sup>61</sup> 25 U.S.C. § 2205 (2006).

<sup>62</sup> ILCA § 207, 96 Stat. 2519.

<sup>63</sup> Sledd, *supra* note 49, at 7.

<sup>64</sup> *Id.*

<sup>65</sup> Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003).

<sup>66</sup> Sledd, *supra* note 49, at 4.

<sup>67</sup> *Hodel v. Irving*, 481 U.S. 704, 710 (1987); *see also*, Suzanne S. Schmid, comment, *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).

<sup>68</sup> Schmid, *supra* note 67, at 744.

<sup>69</sup> *Babbitt v. Youpee*, 519 U.S. 234 (1997).

<sup>70</sup> *Cobell v. Babbitt*, 91 F.Supp. 2d 1(D.C. 1999).

<sup>71</sup> *Id.*

<sup>72</sup> Sledd, *supra* note 49, at 9.

<sup>73</sup> *Id.*

<sup>74</sup> INDIAN LAND CONSOLIDATION ACT AMENDMENTS OF 2000, Pub. L. No. 106-462, 114 Stat. 1991 (2000).

<sup>75</sup> *Indian Land Consolidation Act: Capitol Hill Hearing Testimony on S. 1721 Before the House Resources Comm.*, 108th Cong. (2004) (statement of Ross Swimmer, Special Trustee for Am. Indians, U.S. Dep't of the Interior).

<sup>76</sup> Sledd, *supra* note 49, at 10.

<sup>77</sup> INDIAN LAND CONSOLIDATION ACT AMENDMENTS OF 2000, Pub. L. No 106-462, § 103(1)(B), 114 Stat. 1991 (2000).

<sup>78</sup> Sledd, *supra* note 49, at 10. Thus, although the amendments were passed by Congress, they never became effective because they lacked the required certification.

<sup>79</sup> *See, e.g.*, Indian Probate Reform Act of 2001, S. 1340, 107th Cong. (2001).

<sup>80</sup> General Allotment Act, ch. 119, 24 Stat. 388, 389 (1887) (current version at 25 U.S.C. § 331 (2000)).

<sup>81</sup> *Id.*

<sup>82</sup> 25 C.F.R. 15 (2005); 43 C.F.R. §§ 4, 30 (2006).

<sup>83</sup> 25 U.S.C. § 2206(G) (2006). Examples of inheritance laws include Yakama P.L. 91-627 (1970); 25 U.S.C. 607 (1976) amending 60 Stat. 968 (1946); Warm Springs P.L. 92-377, 86 Stat. 530 (1972); Nez Perce P.L. 92-443, 86 Stat. 744 (1972); Devils Lake Sioux P.L. 97-459, 96 Stat. 2515 (1983); Standing Rock Sioux P.L. 96-274, § 4(b), 94 Stat. 537 (1980); Lake Traverse Reservation Sisseton-Wahpeton Sioux P.L. 98-513, 98 Stat 2411 (1984).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Laws of intestate succession apply when a person dies intestate, that is, without having a will.

<sup>87</sup> 25 U.S.C. § 2206(A) (2006).

<sup>88</sup> 25 U.S.C. § 2201(9) (2006).

<sup>89</sup> “Indian” differs from the definition found in other federal laws. Under 25 U.S.C. §2201(2), an Indian is defined as:

(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 the date of enactment of the

American Indian Probate Reform Act of 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. §479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206, 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.

<sup>90</sup> 25 U.S.C. §2201(2).

<sup>91</sup> 25 U.S.C. § 2201(9).

<sup>92</sup> 25 U.S.C. § 2206(a)(3).

<sup>93</sup> 25 U.S.C. § 2206(a)(4).

<sup>94</sup> 25 U.S.C. § 2206(a)(5).

<sup>95</sup> 25 U.S.C. § 2206(a).

<sup>96</sup> *Id.*

<sup>97</sup> 25 U.S.C. § 2201(9).

<sup>98</sup> 25 U.S.C. § 2206(a)(2)(D)(iii).

<sup>99</sup> “Secretary” is defined in AIPRA as the Secretary of the Interior. 25 U.S.C. § 2201(3).

<sup>100</sup> 25 U.S.C. § 2201(3).

<sup>101</sup> 25 U.S.C. § 2206(a)(2)(D)(ii).

<sup>102</sup> 25 U.S.C. § 2206(a)(2)(A); 25 U.S.C. § 2206(a)(2)(D).

<sup>103</sup> 25 U.S.C. § 2201(10).

<sup>104</sup> 25 U.S.C. § 2206(a)(2)(D)(ii).

<sup>105</sup> “Without regard to waste,” as defined in AIPRA, means “. . . with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remainderman.” 25 U.S.C. § 2201(10). Whether it includes or excludes traditional definitions of the concept of “without regard to waste” remains to be seen.

<sup>106</sup> 25 U.S.C. § 2206(a)(2)(A)(i).

<sup>107</sup> “Remainder” is any and all property interests remaining after the life estate holder dies.

<sup>108</sup> 25 U.S.C. § 2201(9).

<sup>109</sup> 25 U.S.C. § 2206(a)(2)(B)(i).

<sup>110</sup> *Id.*

<sup>111</sup> 25 U.S.C. § 2206(a)(2)(B)(ii).

<sup>112</sup> 25 U.S.C. § 2206(a)(2)(B)(iii).

<sup>113</sup> 25 U.S.C. § 2206(a)(2)(B)(iv).

<sup>114</sup> 25 U.S.C. § 2206(a)(2)(B)(v).

<sup>115</sup> 25 U.S.C. § 2206(a)(2)(C)(i).

<sup>116</sup> 25 U.S.C. § 2206(a)(2)(C)(i)-(ii).

<sup>117</sup> 25 U.S.C. § 2206(a)(2)(B).

<sup>118</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(I)(bb).

<sup>119</sup> “Secretary” is defined in AIPRA as the Secretary of the Interior. 25 U.S.C. § 2201(3).

- <sup>119</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(I)(bb).  
<sup>120</sup> 25 U.S.C. § 2206(b).  
<sup>121</sup> Act of Nov. 7, 2000, Pub. L. No. 106-462, § 102, 114 Stat. 1992 (2000).  
<sup>122</sup> “Devise” is to give property by last will and testament; bequeath.  
<sup>123</sup> “Devisee” is a person who receives property by last will and testament.  
<sup>124</sup> 25 U.S.C. § 2206(b)(1)(A).  
<sup>125</sup> 25 U.S.C. § 2206(b)(2)(A)(i).  
<sup>126</sup> 25 U.S.C. § 2206(b)(4)(A).  
<sup>127</sup> 25 U.S.C. § 2206(b)(2)(A)(i).  
<sup>128</sup> 25 U.S.C. § 2206(b)(2)(A)(ii).  
<sup>129</sup> 25 U.S.C. § 2206(b)(2)(B).  
<sup>130</sup> 25 U.S.C. § 464.  
<sup>131</sup> 25 U.S.C. § 2206(b)(2)(B).  
<sup>132</sup> 25 U.S.C. § 464; 25 U.S.C. § 2206(b)(2)(B).  
<sup>133</sup> 25 U.S.C. § 2206(b)(4)(A).  
<sup>134</sup> 25 U.S.C. § 2205(c).  
<sup>135</sup> 25 U.S.C. § 2205(c)(1)(A).  
<sup>136</sup> 25 U.S.C. § 2205(c)(1)(B)-(2)(a)(i)(I)(bb).  
<sup>137</sup> Under § 2201(2), “Indian” means (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 of a trust or restricted interest in land as if the date of enactment of AIPRA; (B) any person meeting the definition of Indian under the Indian Reorganization Act, 25 U.S.C. § 479 and the regulations promulgated thereunder; and, in addition in California, any person who owns a trust or restricted interest in a parcel of such land in that state.  
<sup>138</sup> 25 U.S.C. § 2206(d)(2).  
<sup>139</sup> 25 U.S.C. § 2206(d)(1).  
<sup>140</sup> 25 U.S.C. § 2206(b)(3)(A).  
<sup>141</sup> 25 U.S.C. § 2206(b)(3)(B).  
<sup>142</sup> 25 U.S.C. § 2206(b)(3)(C).  
<sup>143</sup> 25 U.S.C. § 2206(b)(3)(D).  
<sup>144</sup> 25 U.S.C. § 2206(b)(4)(B).  
<sup>145</sup> 25 U.S.C. § 2206(a)(2)(A).  
<sup>146</sup> *Id.*  
<sup>147</sup> *Id.*  
<sup>148</sup> 25 U.S.C. § 2206 (j)(8)(B)(ii).  
<sup>149</sup> 25 U.S.C. § 2206 (h).  
<sup>150</sup> *Id.*  
<sup>151</sup> 25 U.S.C. § 2206 (b)(1)(B).  
<sup>152</sup> 25 U.S.C. § 2206 (h).  
<sup>153</sup> 25 U.S.C. § 2206 (h)(2)(B).  
<sup>154</sup> *Id.*  
<sup>155</sup> 25 U.S.C. § 2206 (h)(2)(C).  
<sup>156</sup> *Id.*  
<sup>157</sup> 25 U.S.C. § 2206 (h)(5).  
<sup>158</sup> 25 U.S.C. § 2206 (h)(4).

<sup>159</sup> 25 U.S.C. § 2206 (h)(6).

<sup>160</sup> 25 U.S.C. § 2206 (h)(7).

<sup>161</sup> 25 U.S.C. § 2206(c)(1); “Tenants in common” is a type of joint tenancy of property without a right of survivorship—each tenant’s interest will pass into their estate.

<sup>162</sup> 25 U.S.C. § 2206(c)(2). Currently, pending technical amendments to AIPRA would change this date to July 27, 2007.

<sup>163</sup> Pseudonyms were used and facts were altered to protect the individuals’ privacy and rights to confidentiality.

<sup>164</sup> 25 U.S.C. § 2206(a)(2)(A)(i).

<sup>165</sup> 25 U.S.C. § 464 (2004).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Rhead v. Acting Portland Area Director*, B.I.A., 18 I.B.I.A. 257 (1990).

<sup>169</sup> The names were changed to pseudonyms, but the situations are based upon actual individuals.

<sup>170</sup> 25 U.S.C. § 2206(a).

<sup>171</sup> 25 U.S.C. § 371.

<sup>172</sup> 25 U.S.C. § 2203(a).

<sup>173</sup> *Id.*

<sup>174</sup> 25 U.S.C. § 2203(a)(1).

<sup>175</sup> 25 U.S.C. § 2203(a)(2).

<sup>176</sup> 25 U.S.C. § 2203(a)(3).

<sup>177</sup> 25 U.S.C. § 2203(a)(4).

<sup>178</sup> 25 U.S.C. § 2203(a)(5).

<sup>179</sup> 25 U.S.C. § 2203(b).

<sup>180</sup> 25 U.S.C. § 2203(c).

<sup>181</sup> 25 U.S.C. § 2204(a)(1)(B).

<sup>182</sup> 25 U.S.C. § 2204(a)(2)(B).

<sup>183</sup> 25 U.S.C. § 2204(b)(1).

<sup>184</sup> 25 U.S.C. § 2204(b)(2).

<sup>185</sup> 25 U.S.C. § 2204(b)(3).

<sup>186</sup> 25 U.S.C. § 2204(d).

<sup>187</sup> 25 U.S.C. § 2201(6).

<sup>188</sup> 25 U.S.C. § 2204(c)(2)(A). “Co-owner” includes the Indian tribe with jurisdiction over the subject land that owns an undivided interest in the parcel; or any person who is a member or eligible to become a member of that tribe; or any person who is a member of another tribe or eligible to become a member of another tribe but only if such person already owns an undivided interest in the parcel at the time of sale; or any lineal descendent of the original allottee of the parcel who is a member or is eligible to be a member of an Indian tribe; or, if the land is in California and not within a tribe’s reservation or otherwise subject to the jurisdiction of a tribe, who is a member, or eligible to be a member, of an Indian tribe or owns a trust or restricted interest in the parcel.

<sup>189</sup> 25 U.S.C. § 2204(c)(2)(A); *see also* 25 U.S.C. § 2204(c)(2).

<sup>190</sup> 25 U.S.C. § 2204(c)(2)(A).

- <sup>191</sup> Because AIPRA partitions have not begun as of the date of this writing, estimated costs and outcomes are unknown.
- <sup>192</sup> 25 U.S.C. § 2204(c)(2)(B).
- <sup>193</sup> *Id.*
- <sup>194</sup> *Id.*
- <sup>195</sup> 25 U.S.C. § 2204(c)(2)(D)(i)(I).
- <sup>196</sup> 25 U.S.C. § 2204(c)(2)(D)(i)(II).
- <sup>197</sup> 25 U.S.C. § 2204(c)(2)(D)(i)(III).
- <sup>198</sup> 25 U.S.C. § 2204(c)(2)(D)(i).
- <sup>199</sup> “Undetermined heirs” exist while a probate is pending and heirs have not yet been identified.
- <sup>200</sup> 25 U.S.C. § 2204(c)(2)(D)(ii)(I).
- <sup>201</sup> 25 U.S.C. § 2204(c)(2)(D)(ii)(II).
- <sup>202</sup> 25 U.S.C. § 2204(c)(2)(K)(ii).
- <sup>203</sup> 25 U.S.C. § 2204(c)(2)(E).
- <sup>204</sup> 25 U.S.C. § 2204(c)(2)(F).
- <sup>205</sup> 25 U.S.C. § 2204(c)(2)(F)(i)(I)-(XI).
- <sup>206</sup> 25 U.S.C. § 2204(c)(2)(F)(ii)(I).
- <sup>207</sup> 25 U.S.C. § 2204(c)(2)(F)(ii)(II).
- <sup>208</sup> 25 U.S.C. § 2204(c)(2)(G)(i).
- <sup>209</sup> *Id.*
- <sup>210</sup> 25 U.S.C. § 2204(c)(2)(G)(ii).
- <sup>211</sup> 25 U.S.C. § 2204(c)(2)(H)(i)-(viii).
- <sup>212</sup> 25 U.S.C. § 2204(c)(2)(I)(i).
- <sup>213</sup> 25 U.S.C. § 2204(c)(2)(I)(i)(I)-(IV).
- <sup>214</sup> 25 U.S.C. § 2204(c)(2)(I)(ii).
- <sup>215</sup> 25 U.S.C. § 2204(c)(2)(I)(ii)(I).
- <sup>216</sup> 25 U.S.C. § 2204(c)(2)(I)(ii)(II).
- <sup>217</sup> 25 U.S.C. § 2204(c)(2)(I)(iii).
- <sup>218</sup> 25 U.S.C. § 2204(c)(2)(I)(iii)(I).
- <sup>219</sup> 25 U.S.C. § 2204(c)(2)(I)(iii)(II)(aa). Where there are two or more co-owners whose interests are of equal size but larger than all other interests, the owners of the largest interests may agree in writing that one of them may exercise this right to purchase.
- <sup>220</sup> 25 U.S.C. § 2204(c)(2)(I)(iii)(II)(bb).
- <sup>221</sup> 25 U.S.C. § 2204(c)(2)(I)(iii)(III).
- <sup>222</sup> 25 U.S.C. § 2204(c)(2)(I)(iii)(IV).
- <sup>223</sup> 25 U.S.C. § 2204(c)(2)(I)(iv).
- <sup>224</sup> 25 U.S.C. § 2204(c)(2)(J)(i).
- <sup>225</sup> 25 U.S.C. § 2204(c)(2)(J)(ii).
- <sup>226</sup> 25 U.S.C. § 2204(c)(2)(J)(iii).
- <sup>227</sup> 25 U.S.C. § 2204(c)(2)(K)(i)(I).
- <sup>228</sup> 25 U.S.C. § 2204(c)(2)(K)(i)(II).
- <sup>229</sup> 25 U.S.C. § 2204(c)(3)(A).
- <sup>230</sup> 25 U.S.C. § 2204(c)(3)(B)(i).
- <sup>231</sup> 25 U.S.C. § 2204(c)(4).



<sup>232</sup> 25 U.S.C. § 2204(a).

<sup>233</sup> 25 U.S.C. § 2204(b)(1).

<sup>234</sup> 25 U.S.C. § 2204(b)(4)(a).

<sup>235</sup> 25 U.S.C. § 2204(b)(2).

<sup>236</sup> 25 U.S.C. § 2201(6).

<sup>237</sup> 25 U.S.C. § 2204(c)(2)(D)(i).

<sup>238</sup> 25 U.S.C. § 2204(c)(2)(D)(i)(II)(aa).

<sup>239</sup> 25 U.S.C. § 2205(c)(1)(A).

<sup>240</sup> 25 U.S.C. § 2205(c)(3)(A).

<sup>241</sup> 25 U.S.C. § 2205(c)(3)(B).

<sup>242</sup> 25 U.S.C. § 2205(c)(1)(B).

<sup>243</sup> 25 U.S.C. § 2205(c)(2)(A)(i)(I).

<sup>244</sup> For purposes of this process, “member of the family” means a lineal descendant of the testator; a lineal descendant of the grandparent of a decedent or landowner; the spouse of a descendant or landowner who is a lineal descendant of a decedent or landowner; and the spouse of a decedent or landowner. 25 U.S.C. § 2205(c)(2)(A)(iv).

<sup>245</sup> 25 U.S.C. § 2205(c)(2)(A)(i)(II). This does not limit the ability of the landowner to mortgage the land or the right of the entity holding the mortgage to foreclose or otherwise enforce the mortgage in accordance with applicable law. 25 U.S.C. § 2205(c)(2)(A)(iii).

<sup>246</sup> 25 U.S.C. § 2205(c)(2)(A)(ii).

<sup>247</sup> 25 U.S.C. § 2205(c)(3)(B).

<sup>248</sup> *Id.*

<sup>249</sup> 25 U.S.C. § 2206(o)(2).

<sup>250</sup> 25 U.S.C. § 2206(o)(3)(B).

<sup>251</sup> 25 U.S.C. § 2201(9).

<sup>252</sup> 25 U.S.C. § 2206(a)(2)(A) or (D).

<sup>253</sup> 25 U.S.C. § 2206(o)(2)(A).

<sup>254</sup> 25 U.S.C. § 2206(o)(2)(B).

<sup>255</sup> 25 U.S.C. § 2206(o)(2)(C).

<sup>256</sup> 25 U.S.C. § 2206(o)(2)(A).

<sup>257</sup> A life estate as provided in 25 U.S.C. § 2206(a)(2)(A) and (D).

<sup>258</sup> 25 U.S.C. § 2206(a)(2)(A)(ii).

<sup>259</sup> 25 U.S.C. § 2206(o)(5)(A).

<sup>260</sup> 25 U.S.C. § 2206(o)(5)(B).

<sup>261</sup> 25 U.S.C. § 2206(o)(6)(A).

<sup>262</sup> 25 U.S.C. § 2206(o)(6)(B).

<sup>263</sup> 43 C.F.R. § 30.163 (2005).

<sup>264</sup> 25 U.S.C. § 2206(a)(2)(B)(i).

<sup>265</sup> 25 U.S.C. § 2206(o)(5).

<sup>266</sup> 25 U.S.C. § 2206(o)(5)(A)(i).

<sup>267</sup> 25 U.S.C. § 2206(o)(5)(B)(i).

<sup>268</sup> 25 U.S.C. § 2206(e).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

- <sup>272</sup> 25 U.S.C. § 2206(a)(1)-(2).  
<sup>273</sup> 25 U.S.C. § 2206(a)(2)(B)(v).  
<sup>274</sup> *Id.*  
<sup>275</sup> 25 U.S.C. § 2206(a)(2)(C)(i).  
<sup>276</sup> *Id.*  
<sup>277</sup> 25 U.S.C. § 2206(a)(2)(C)(ii).  
<sup>278</sup> *Id.*  
<sup>279</sup> 25 U.S.C. § 2206(j)(8)(A).  
<sup>280</sup> *Id.*  
<sup>281</sup> 25 U.S.C. § 2206(j)(8)(B)(i)(I). “Eligible heirs” are defined at 25 U.S.C. § 2201(9).  
<sup>282</sup> 25 U.S.C. § 2206(j)(8)(B)(i)(II).  
<sup>283</sup> 25 U.S.C. § 2206(j)(8)(B)(i)(III).  
<sup>284</sup> 25 U.S.C. § 2206(j)(8)(B)(i).  
<sup>285</sup> 25 U.S.C. § 2206(j)(8)(B)(i)(III).  
<sup>286</sup> 25 U.S.C. § 2206(j)(8)(C).  
<sup>287</sup> *Id.*  
<sup>288</sup> *Id.*  
<sup>289</sup> 25 U.S.C. § 2206(j)(8)(D).  
<sup>290</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(1)(aa).  
<sup>291</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(1)(aa)(AA).  
<sup>292</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(1)(aa)(BB).  
<sup>293</sup> 25 U.S.C. § 2206(a)(2)(D)(iv)(1)(aa)(CC).  
<sup>294</sup> Trust personalty is defined to include all funds and securities of any kind which are held in trust in an individual Indian money account or otherwise supervised by the secretary. 25 U.S.C. § 2206(b)(3)(A).  
<sup>295</sup> 25 U.S.C. § 2206(j)(8)(B)(ii); *see* 25 U.S.C. § 2206(b)(3)(B).  
<sup>296</sup> Powers of Indian Tribes, 55 Interior Dec. 14 (1934).  
<sup>297</sup> 25 U.S.C. § 2205(a)(1).  
<sup>298</sup> 25 U.S.C. § 2205(a)(2)(A).  
<sup>299</sup> 25 U.S.C. § 2205(a)(2)(B).  
<sup>300</sup> Act of Nov. 7, 2000, Pub. L. 106-462, § 102, 114 Stat. 1992 (2000).  
<sup>301</sup> 25 U.S.C. § 2205(a)(3)(A).  
<sup>302</sup> 25 U.S.C. § 2205(a)(3)(B).  
<sup>303</sup> 25 U.S.C. § 2205(a)(3)(B)(i).  
<sup>304</sup> 25 U.S.C. § 2205(a)(3)(B)(ii).  
<sup>305</sup> 25 U.S.C. § 2205(a)(3)(B)(iii).  
<sup>306</sup> 25 U.S.C. § 2206(a)(2)(D).  
<sup>307</sup> 25 U.S.C. § 2206(a)(2)(D)(iii)(II).  
<sup>308</sup> 25 U.S.C. § 2206(a)(2)(A).  
<sup>309</sup> 25 U.S.C. § 2206(a)(2)(B).  
<sup>310</sup> 25 U.S.C. § 2205(b)(1).  
<sup>311</sup> 25 U.S.C. § 2205(b)(2)(A).  
<sup>312</sup> 25 U.S.C. § 2205(b)(2)(B).  
<sup>313</sup> 25 U.S.C. § 2205(b)(2)(C).  
<sup>314</sup> 25 U.S.C. § 2205(b)(2)(D).

- <sup>315</sup> 25 U.S.C. § 2205(b)(2)(E)(i).  
<sup>316</sup> *Id.*  
<sup>317</sup> 25 U.S.C. § 2205(b)(2)(E)(ii).  
<sup>318</sup> 25 U.S.C. § 2205(b)(3)(A)-(B).  
<sup>319</sup> 25 U.S.C. § 2205(b)(4)(A).  
<sup>320</sup> 25 U.S.C. § 2205(b)(4)(B).  
<sup>321</sup> 25 U.S.C. § 2205(b)(5)(A)-(B).  
<sup>322</sup> 25 U.S.C. § 2207.  
<sup>323</sup> 25 U.S.C. § 2206(j)(1).  
<sup>324</sup> 25 U.S.C. § 2206(j)(2)(A)(i).  
<sup>325</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(I).  
<sup>326</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(II)(aa).  
<sup>327</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(II)(bb).  
<sup>328</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(III).  
<sup>329</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(IV).  
<sup>330</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(V)(aa).  
<sup>331</sup> 25 U.S.C. § 2206(j)(2)(A)(ii)(V)(bb).  
<sup>332</sup> 25 U.S.C. § 2206(j)(2)(A)(iii).  
<sup>333</sup> 25 U.S.C. § 2206(j)(2)(A)(iii)(I).  
<sup>334</sup> 25 U.S.C. § 2206(j)(2)(A)(iii)(II).  
<sup>335</sup> 25 U.S.C. § 2206(j)(2)(A)(iii)(III).  
<sup>336</sup> 25 U.S.C. § 2206(j)(2)(A)(iii)(IV).  
<sup>337</sup> 25 U.S.C. § 2206(j)(2)(A)(iii).  
<sup>338</sup> 25 U.S.C. § 2206(j)(2)(B)(i).  
<sup>339</sup> 25 U.S.C. § 2206(j)(2)(B)(ii).  
<sup>340</sup> 25 U.S.C. § 2206(j)(2)(B)(iii)(I).  
<sup>341</sup> *Id.*  
<sup>342</sup> *Id.*  
<sup>343</sup> 25 U.S.C. § 2206(j)(3)(A)(i).  
<sup>344</sup> 25 U.S.C. § 2206(j)(3)(A)(ii).  
<sup>345</sup> 25 U.S.C. § 2206(j)(3)(A)(iii).  
<sup>346</sup> 25 U.S.C. § 2206(j)(3)(B)(i).  
<sup>347</sup> 25 U.S.C. § 2206(j)(3)(B)(ii).  
<sup>348</sup> 25 U.S.C. § 2206(j)(3)(B)(iii).  
<sup>349</sup> 25 U.S.C. § 2206(j)(4).  
<sup>350</sup> 25 U.S.C. § 2206(j)(5)(A).  
<sup>351</sup> *Id.*  
<sup>352</sup> 25 U.S.C. § 2206(j)(5)(B).  
<sup>353</sup> 25 U.S.C. § 2206(j)(5)(C).  
<sup>354</sup> 25 U.S.C. § 2206(j)(6).  
<sup>355</sup> 25 U.S.C. § 2206(i)(1).  
<sup>356</sup> 25 U.S.C. § 2206(i)(2).  
<sup>357</sup> 25 U.S.C. § 2206(i)(3)(A)-(G).  
<sup>358</sup> 25 U.S.C. § 2206(i)(3)(A).  
<sup>359</sup> 25 U.S.C. § 2206(i)(3)(B).

<sup>360</sup> 25 U.S.C. § 2206(i)(4)(C).

<sup>361</sup> 25 U.S.C. § 2206(i)(5).

<sup>362</sup> 25 U.S.C. § 2206(j)(6)(A).

<sup>363</sup> 25 U.S.C. § 2206(j)(6)(B).

<sup>364</sup> 25 U.S.C. § 2206(j)(6)(C).

<sup>365</sup> 25 U.S.C. § 2206(j)(7).

<sup>366</sup> 25 U.S.C. § 2209.

<sup>367</sup> 25 U.S.C. § 2210.

<sup>368</sup> 25 U.S.C. § 2205(d)(1).

<sup>369</sup> 25 U.S.C. § 2205(d)(2).

<sup>370</sup> Pub. L. No. 109-157, 119 Stat. 2949 (2005); Pub. L. No. 109-221, 120 Stat 336 (2005).

<sup>371</sup> 25 C.F.R. §§ 15, 18, 152, 179 (2006); 43 C.F.R. §§ 4, 30 (2006).

<sup>372</sup> Indian Trust Management Reform, 71 Fed. Reg. 152 (Dep't of Interior Aug. 8, 2006).