

Preview of S. Willett's "Little Red Probate Book"
INDIAN LAND CONSOLIDATION ACT (ILCA) AS AMENDED BY
THE AMERICAN INDIAN PROBATE REFORM ACT
OF OCTOBER 27, 2004

PLAIN LANGUAGE "OVERVIEW" OF MAIN PROVISIONS

(§ 2213 omitted)

25 U.S.C. § 2201 [202] DEFINITIONS

- *"Indian Tribe/Tribe:"* Any tribe, band, group, pueblo, community or members with trust land held by U.S.
- *"Indian:"* (1) Tribal member, eligible to be member of any tribe; (2) owner of trust/restricted land on October 27, 2004;

(3) Person who meets any of IRA definitions:
 - Member of recognized tribe under federal jurisdiction on 6-1-34
 - Descendant of tribal member and descendant living on reservation 6-1-34
 - Half bloods+ (degree of Indian blood)
- *"Secretary"* means of DOI
- *"Trust Land:"* Tribal or individual land with trust title held by U.S. *"Restricted Land:"* Tribal or individual land with title held by latter subject to same restrictions (on alienation, encumbrance and taxation) as trust land
- *"1st and 2nd Degree Heirs:"* Children, grandchildren, parents, grandparents, siblings
- *"Highly Fractionated:"* Land (1) with 50+ owners and no interest over 10% of allotment or (2) with 100+ owners based on departmental records on date DOI secretary makes determination
- *"Person/Individual:"* Natural person
- *"Eligible Heirs:"* (1) Lineal Descendant within 2 degrees of "Indian" and (2) Owners of trust/restricted land in which an interest already owned.

25 U.S.C. § 2202 [203] OTHER APPLICABLE LAWS

- 25 USC 465 applies to all tribes
- No federal law restricting acquisition of land for Indians of any tribe, reservation or state is overridden

25 U.S.C. § 2203 [204] ADOPTION OF LAND CONSOLIDATION PLANS

- Subject to secretarial approval Tribes may adopt land consolidation plans to reduce fractionation
- Sale/Exchange value must be within 10% of FMV
- Funds from sales and equalized value payments must be used to buy other lands
- Separate trust accounts must be maintained by secretary for each tribe selling or exchanging land
- Mineral interests for sale or exchanged land may be retained by tribe
- Secretary must approve transactions under plans unless the transaction is found *not* to be in tribe's best interest

- Authorizes <FMV conveyances of Cherokee home sites if in trust in 12/99 and lands are described in 2-6-87 approved tribal consolidation plan

25 U.S.C. § 2204 [205] TRIBAL FAIR MARKET VALUE PURCHASES

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Consent Purchases

- All or part of trust/restricted interests under tribal jurisdiction may be purchased for FMV if mandatory percentage of owner consent is obtained
- Required consent: no less than 50% of tract's undivided interests
- Tribal interests can be included in meeting consent requirement
- Indian owner of fractional interest in tract being used/possessed for 3 years before tribal action can match tribal offer
- If within 5 years of individual acquisition, the land is offered for sale or a petition is filed for fee patent, the tribe has 180 days from notification of offer or petition to pay FMV
- No secretarial approval is required for acquisitions under approved land consolidation plans; otherwise approval still required by secretary

Partition

- Partition by sale authorized for lands determined by secretary to be "*highly fractionated*" on date of determination
- "*Highly fractionated*" means 50-99 owners with no interest over 10% of tract or 100+ owners
- Partition is of surface and subsurface unless the two estates were previously severed
- "*Eligible Applicants:*" (1) co-owner tribe with jurisdiction over land and (2) co-owners who are "Eligible Bidders:" member or eligible to be member of tribe with jurisdiction, member of (or eligible for membership in) another tribe or lineal descendant of original allottee who is member or eligible to be member of a tribe.
- "Eligible Applicant" must pay service/notice costs or provide bond under deadline to be established by the secretary.
- The *secretary has* discretion to waive cost payment or bond requirement if the purposes of the act are served.
- "*Eligible Bidder*" also includes tribe with jurisdiction. For California, it means member or eligible for membership in a tribe or a persons who owns trust/restricted interest in same parcel
- No partitions to be approved until 1 year after AIPRA notices are certified by the secretary
- Applicant pays notice service and publishing costs for partition proposal
- Mandatory (notarized) consent to partition needed from: (1) co-owner tribe, (2) individuals who are co-owner-occupants for 3 years for residential or good faith farm/ranch or business or (3) owners of 50% of allotment if any share (except tribe's) is valued over \$1,500.
- Parents/guardians may consent for minors and incompetents
- Secretary may consent for missing heirs, for undetermined heirs and for minors or incompetents without parents or guardians, after diligent search
- Appraisal of FMV occurs after "*highly fractionated*" determination made by secretary
- Notice of request to partition and of appraisal to all owners
- 3 types of notice: (1) *written* (of partition commencement with land description, appraisal results, of right to copy of appraisal of right to object or comment within 90 days, an address for objections/comments and who to contact for further information including sale/auction information); (2) *published* to persons unable to be served or unknown heirs or assigns (2 times in general circulation newspaper in county where land located or 1 time in latter and 1 time in the local monthly tribal newsletter/paper and (3) *posting* in tribal offices and other appropriate places
- After comments are secretarially reviewed, either new appraisal ordered or prior one approved
- If new appraisal was ordered resulting in *higher* valuation, notice by certified mail must be given to tribe with jurisdiction and individuals who submitted written comments or objection to the proposed appraisal or sale of

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the following: The right to review the appraisal, that land is not to be sold for less than FMV, the right of appeal with the regulation's filing deadline for the appeal along with the time and place of sale or for bid submission

- If the new appraisal results in a lower valuation both notice by certified mail or by publication is permitted
- Ownership information including address(es) for notice purposes will be based upon the secretary's land records on the date the "highly fractionated" determination is made
- The secretary can consent for undetermined heirs of parcels involved or owners whose whereabouts are unknown when any single interest in the asset is more than \$1,500 and minors without parents or guardian
- Public sale or sealed bid process must be for at least FMV
- "Eligible purchasers" are: tribe with jurisdiction, persons who are members or eligible to be members of that tribe, co-owner who is member or eligible to be member of any tribe, lineal descendant of allottee who is a member or eligible to be a member of a tribe
- For California, for lands off reservation or not subject to tribal jurisdiction. Eligible purchasers include tribal members or those eligible to be members or co-owners in the parcel being partitioned
- Other Indian co-owners (members or eligible to be members of other tribes) with the largest (at least 20%) share may match highest bid if tribe with jurisdiction authorizes it by formal enactment. 3-day notice of intent to buy imposed.
- If no bids are received or required consent obtained, the secretary can extend the time to obtain consent, deny the partition request or buy the property for the tribe with jurisdiction with lien imposed
- Grants and low cost loans of 20% of price may be made by secretary to successful bidder
- Partition provisions require secretarial regulations before implementation.
- Ejectment actions in U.S. federal district court are authorized against persons who refuse to execute conveyance instruments.
- U.S. does not bring ejectment actions on new owners behalf but authorizes U.S. to be party to such civil action.

25 U.S.C. § 2205 [206] TRIBAL PROBATE CODES & TRIBAL ACQUISITION OF FRACTIONATED INTERESTS

- With secretarial approval, tribes may adopt inheritance codes for allotted lands that are consistent with ILCA/AIPRA anti-fractionation/tribal self-determination policies
- No code will be approved that forbids inheritance by descendants of the original allottee or an Indian from another tribe unless it allows: (1) disclaimer to eligible heirs, (2) testator's spouse and descendants to keep a life estate, and payment of FMV for the devised interest
- Interests devised to non-Indians may be acquired by the tribe with jurisdiction by payment of FMV (determined as of DOD) to the secretary
- Life estates may be retained by non-Indian devisees. Purchase price is reduced accordingly
- No tribal right of purchase exists for family farms devised to family members (spouse, lineal descendant of testator or of testator's grandparents) when tribal right of purchase is provided for if the property is offered to a non-family member. The right of purchase may be recorded with the mortgage
- A recorded right of purchase does not prevent mortgaging or foreclosure of affected property
- Codes, amendments and acts repealing codes must be secretarially approved. If no timely action is taken by the secretary, the tribal action is deemed approved to the extent consistent with federal ILCA/AIPRA policies
- Secretarial code and repeal approval deadline: 180 days. Deadline for amendment approval 60 days
- Disapproved enactments must be explained by the secretary

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- Tribal codes under ILCA 2000 were to be effective later of: date established in 2206(g)(5) [repealed by AIPRA] or 180 days after approval
- Codes, amendments and acts of repeal apply to the estates of persons who die on or after code effective date for such action

25 U.S.C. § 2206 [207] INHERITANCE

Intestate Inheritance (No Will)

For Easy Reference, See Attached Charts Showing The Inheritance System and Who May Inherit and In What Status (Indian or the Hybrid "Eligible Heir")

- Eligible heirs: spouse, children, grandchildren, great grandchildren, parents and siblings
- Spouses get life estates: 100% in real property; 1/3 personal property
- All spousal life estates throughout this law include the right to consume income
Remainder in real property to eligible descendants (children, grandchildren and great grandchildren) and 2/3 personal property
If no eligible descendants, spouse gets 100% life estate in real property, 100% personal property, remainder in real property to parents (both or either). If none, to siblings with no right of representation
- If no spouse or eligible descendants, to parents (both or either)
- If no parents, to siblings (without right of representation)
- After eligible family, real property to tribe with jurisdiction subject to co-owner purchase option
- If no tribe has jurisdiction, to co-owners equally
- If no co-owners, to U.S. to be sold with funds put in Acquisition Fund
- Adjacent trust or restricted landowners have right of purchase from U.S. at FMV. If multiple applicants, to highest bidder

Single Heir Rule

- Size of share (as 5%) is determined by condition of records at time of the probate
- <5% intestate interests pass, alternatively, to *oldest* child, grandchild or great grandchild with life estate for spousal occupants
- If no family heirs exist, then, to tribe with jurisdiction. If none, to co-owners equally. If none, to U.S. to be sold with funds deposited in Acquisition Fund subject to adjacent trust or restricted landowners' right of purchase
- Occupant spouse on <5% interest receives a life estate. Remainder to the single heir most closely related from among the categories listed immediately above
- Single heirs, at probate, may renounce in favor of any single: (1) ineligible heir, (2) any "Indian" related by blood, (3) co-owner in parcel or (4) the tribe with jurisdiction
- Such renunciations will be given effect in probate
- Tribes may adopt a different intestate distributee or selection method for the single heir
- A copy of the tribal single heir rule must be given to the secretary

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- The secretary has 90 days to determine whether the tribal rule is too difficult to administer or does not conform with ILCA as amended
- Accepted tribal single heir intestate distribution schemes have a deferred effective date.
- Tribal changes in the single heir rule don't apply to: (2) decedents whose DOD is less than 1 year after secretarial certification or (2) to those occurring before a copy of the tribe's rule is provided to the secretary

<5% Forced Sale (Probate Purchase Option)

- <5% intestate interests are subject to forced sale through action styled probate purchase option (without owner's consent)

Special Intestate Rules

- *Right of representation*: Means to stand in shoes of a deceased immediate ancestor. Any predeceased heir not survived by children is not counted.

E.g. If the decedent had one predeceased child with no children. He also had two living children and one predeceased child who was survived by two kids. The grandchildren share their parent's interest in the estate. Accordingly, child A gets 1/3, child B, 1/3 and predeceased child C's two children each get half of C's 1/3 or 1/6 each. Expressed in the lowest common denominator: A has 2/6. B has 2/6. C-1 has 1/6. C-2 also has 1/6
- An intestate heir must survive the decedent by 120 hours. If not, the heir is treated as predeceased
- Heirs except spouses with life estates are presumed to receive their interests in the same trust or restricted status as the decedent from whom they take

Testate Succession (Will)

Land

- Following any federal law or tribal code applicable, trust or restricted land can be devised to: (2) lineal descendants, co-owners in the same property, the tribe with jurisdiction over the land or to any "Indian"
- Devises to an "Indian" or tribe with jurisdiction are *deemed* to be in trust or restricted status
- Devises to testator's lineal descendants or a co-owner inheriting in the same property are *presumed* to be in trust or restricted status
- The presumption is dispelled by devise language of clear intent to pass a life estate or an interest in fee

See Attached Chart Showing Eligible Devisees Broken Down to Show Differences Between IRA and Non-IRA Tribes

Personal Property

- Trust Personalty means funds or securities that the secretary holds in trust or supervises
- Dispositions of trust personalty are governed by federal law or tribal codes where applicable
- Eligible devisees' personalty is maintained and managed by DOI as trust assets
- Personalty passing to ineligible devisees is directly distributed to them

Invalid Will Gifts

- Land: Not properly devised or disposed of by valid will passes at law (by intestacy)
- Personalty: Not disposed of by valid will passes at law (by intestacy)

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Joint Tenancy Presumed

- A devise of a single allotted interest to multiple beneficiaries will be construed to be a joint tenancy with right of survivorship
- A single devise to multiple beneficiaries will be construed as a tenancy in common if the will contains a clear expression of that intent
- The rule assuming joint tenancy will not be applied if the decedent's date of death is less than one year after the secretary certifies the AIPRA 2004 amendments

Off Reservation Land Inheritance

- Indian Reservation means: (1) lands in Oklahoma within boundaries of a tribe's former reservation, (2) lands within a tribe's current or former reservation or (3) areas where the secretary is to give special assistance or consideration to a tribe's land acquisition or interest therein
- General: Off reservation lands pass in trust to an Indian devisee and in fee to other devisees
- California is not subject to the general rule

Estate Planning Assistance

- Estate planning assistance must be conducted in accordance with any tribal probate code or consolidation plan
- The secretary will provide such assistance only to the extent that Congress appropriates funds for the activity
- It will aid landowners transfer trust or restricted assets to selected recipients
- Estate planning assistance is supposed to "dramatically" increase the use of wills and "substantially" reduce the quantity and complexity of Indian estates
- It will aid landowners in accessing information to carry out transactions

Probate Code Development and Legal Assistance Grants

- Secretarial grants are available to tribes for probate code development and estate planning services to members
- Grants are available to legal services offices (non-profit) that provide legal assistance under federal poverty guidelines to tribes and Indian people for purposes of aiding tribes develop probate codes and provide estate planning and other services to Indian people
- Other organizations may apply for grants in areas where no non-profit legal services are present under procedures to be developed
- Congressional appropriations for the above services are authorized

ILCA 2000 Modifications (Sec. 207)

- Section 207(g) which set for the effective dates of ILCA 2000's probate provisions is deleted

Federal Law

- The term includes all special tribal probate statutes
- AIPRA 2004 does not amend or affect any tribal probate statute or federal law that involves land or allotments on particular reservations

Rules of Interpretation

- Section 207's rules of interpretation apply in probate unless one of the following is present: contrary testamentary intent is demonstrated or there is contrary federal law or contrary tribal code provisions

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- Wills are construed to apply to all property, real and personal, that the testator owned at death
- Regarding gifts to a class of beneficiaries (E.g. “my uncles”), persons not related by blood are excluded
- Gifts to classes related by blood (E.g. “my sisters”), include both full and half relatives
- “Next of Kin,” “Family,” and similar terms mean persons who would inherit at law including spouses. This class (family) is determined as of the testator’s date of death
- Other classes are determined as of the date the devise is to take effect in enjoyment (use and enjoyment)
- “Die without Issue” or similar expression: The individual referred to has had no lineal descendants at any point and none will be born in the future (E.g. posthumously)
- “Born out of wedlock”: Such persons are considered the child of the natural mother and father (Cross reference 25 USC 371)
- “Lapsed” gifts: Certain gifts are saved when the will beneficiary dies before the testator. The beneficiary must be the descendant of testator’s grandparent(s) and himself be survived by issue. The beneficiary’s lineal descendants take the same share as they would by right of representation if their were no will (Cross reference 43 CFR 4.261)
- “Void devises:” Property subject to a failed or lapsed devise passes into the residue of the estate with distribution as directed in the will’s residuary clause unless a tribal probate code provides otherwise
- “Family Cemetery Plots: “ If a will is silent regarding the disposition of the plot, it passes by intestacy

Heirship By Killing

- “Heir By Killing:” A person (who would inherit) who knowingly and willfully kills or participates in killing the decedent
- An heir by killing takes no interest in the killed individuals trust or restricted assets real or personal under a will or at law (intestacy)
- The heir by killing is treated as predeceased
- The inheritance prohibition applies to any form of taking from the killed party including: intestacy, under a tribal code, as surviving spouse, under a will, a reversion, vested remainder, by survivorship, contingent remainder, executory interest or future interest
- If there is joint ownership or obligation held by the killer and the decedent in trust or restricted assets, real or personal, the assets or obligations pass to the decedent’s estate with the killer treated as predeceased
- If there are multiple co-tenants or obligees, the killer is treated as having predeceased the decedent and the other co-tenants or obligees. The killer’s interest becomes part of the decedent’s estate
- Unique rule for murdered joint tenant with right of survivorship: The decedent’s joint tenancy interest is severed despite the JTWROS status. It passes to his estate. All other JTWROS interests remain in joint tenancy as originally created
- The exotic “Life Estate Pur Autre Vie:” In a situation where “A” gets a life estate measured by the murdered decedent’s life—not “A’s” own life which is the normal rule—the decedent’s normal life span is projected. “A’s” life estate lasts for the duration of the projected normal life span of the decedent
- If a person is charged by law with voluntary manslaughter or homicide, any interest that would otherwise pass to the killer will not be vested or distributed until the charges are resolved.
- Dismissal or withdrawal of such charges entirely the heir by killing issues and property is distributed normally
- Following conviction and exhaustion of all appeals, the killer’s interest passes as though he predeceased the decedent. In the case of joint tenancy (WROS), the severance rules outlined above would apply
- The heirship by killing rules are interpreted broadly so as to ensure that killer’s do not profit from wrong doing

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Spouses

Marriage After Will Made

- Under certain conditions, spouses of testators who make wills before the testator and spouse marry *may* receive an intestate share of the testator's estate
- The forced spousal intestate share does not apply to wills made before the effective date of these testate provisions
- The forced spousal share provisions do not apply if the spouse is non-Indian and the will devises trust/restricted assets to Indian devisees
- It does not apply if the will was made in contemplation of the marriage
- The forced share provisions do not apply if the will clearly indicates that it is to be binding despite any subsequent marriage
- It does not apply if the testator provided for the spouse outside of the will and that such provision was intended to operate as a substitute for provision under the will
- Intent in the latter case can be shown by the testator's statements or by inference arising from relevant evidence

Married At Time Will Made

- A surviving spouse left out of a will made during marriage takes an intestate share under certain circumstances
- The following conditions permit an intestate spousal share: (1) the testator and surviving spouse were married continuously, without separation for 5 years preceding the testator's death, (2) the couple together have a surviving child, (3) the spouse has made substantial payments to buy or improve the testator's trust or restricted land, or (4) the spouse is under a legal obligation to continue making loan payments for a significant period
- An exception to the above provision exists if evidence shows that the spouse and child were adequately provided for outside the will

Children

Pretermission

- Pretermission exists when children are born or adopted after a will is made and the lack of provision for such children is not intentional
- Pretermitted children receive an intestate share of the testator's trust or restricted assets, real and personal

Adoption

- Adopted children by methods recognized in 25 USC 372a have the same rights as natural children
- Children adopted out are not considered the child of the natural parent(s)
- Children adopted out may inherit from the natural kin (not parents) if a relationship has been maintained with the adoptee
- When a natural parent marries a child's adoptive parent there is no impact upon inheritance from the natural parent
- Despite 25 USC 372a and the above rules governing rights of adopted out children, tribes may otherwise define the inheritance rights of such children

Divorce

- Final divorce or annulment of a marriage terminates the right to be considered a "surviving spouse"
- Subsequent remarriage in effect on the date of death recreates the status of surviving spouse
- A separation decree in effect at death has no impact on the marital state and does not alter spousal rights

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- When a marital partner dies before a final divorce decree is entered, a previously executed property rights settlement may be given effect by the secretary of interior
- Divorce or annulment revokes spousal gifts in wills as of the date the final decree is entered
- Property involved in spousal gifts passes as though the spouse predeceased the testator
- When divorced spouses remarry, revoked spousal gifts are revived

After Born Heirs

- A child conceived prior to a decedent's death who survives 120 hours from birth is deemed to have survived the decedent

Advancements

- Under certain circumstances, gifts of trust personalty made in a will but given to an intestate heir during the decedent's life will be treated as an advance gift of the bequeathed assets
- The conditions under which this will occur are: (1) the decedent wrote that the lifetime gift was an advancement or (2) the heir acknowledged the advancement in writing.
- Property considered as advancements is considered in computing the shares given to heirs in estate distribution
- Advancements are valued as of the date they came into the heirs possession or the decedents death whichever is later
- No advancement is created when the recipient of the lifetime gift dies before the decedent absent a written statement by the decedent to that effect

Heirs Related Through Two Lines

- Heirs who would take trust assets through two separate lines of inheritance, receive only one share
- They receive the larger share

Notice

- To the greatest extent "practicable" the secretary of interior will notify trust or restricted landowners about the provisions of AIPRA 2004
- The secretary may combine the landowner notice with the mandatory notice requirements of Sec. 8 of AIPRA 2004
- Sec. 8 requires the department to give tribes and landowners notice of the amendments within 180 days of enactment, describe the effect of the amendments, list estate planning options including consolidation by deed and exchange of interests and provide a toll free number for obtaining information about assets and estate planning.
- Sec. 8 requires that such notice is to be made by mail, publication and other methods calculated to reach the target population.
- It also requires that the secretary certify that proper notice has been given in the Federal Register
- Under Sec. 8, Section 207 (25 USC 2206), the inheritance provisions of AIPRA 2004, do not apply to any estate in which the decedent's date of death is less than one year after the secretary certifies notice of the amendments was given

Renunciation

- Persons 18 or older may renounce interests in trust or restricted assets, real or personal
- Renunciations can be full or partial, including retention of a life estate and of will or intestate shares
- Renunciations must be in writing, acknowledged and filed in probate prior to the entry of the final estate order
- Renounced/disclaimed interests are not considered as having vested in the renouncing party

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- Renounced interests are not considered transfers or gifts
- Eligible recipients of trust or restricted land are: (1) eligible heirs, (2) eligible devisees under a valid will or (3) the tribe with jurisdiction over the renounced asset
- Renounced assets retain trust or restricted status
- Eligible recipients of trust personalty are persons eligible to receive trust personalty under Sec. 207(b)(3) (25 USC 2206(b)(3) [“any person or entity”])
- Renunciations not made to eligible recipients are without effect
- A renunciation is considered accepted when included as a part of the final estate order and there has been no refusal of the interest
- All disclaimers executed before AIPRA 2004’s effective date are ratified
- Renunciations of <5% interests by “single heirs” cannot be made in favor of more than one individual

Consolidation Agreements in Probate

- During probate, adjudicators may approve written consolidation agreements by eligible heirs or devisees
- The interests must be on the decedent’s property inventory in probate
- The agreements can provide for exchanges or gifts to achieve consolidation of interests
- When the heirs or devisees already own an interest in the parcel(s) to be consolidated, they are exempted from complying with rules governing deed conveyances for trust or restricted lands
- Consolidation agreements are deemed final when implemented in a final estate order in probate
- Property subject to consolidation agreements are not generally available for purchase via probate purchase option (Sec. 207(e) [25 USC 2206(p)])
- An exception to the above rule exists when a consolidation agreement is disapproved in probate

Landowner Information Requests

- Land information is available to landowners by written request to the secretary
- As to each trust or restricted tract owned, the secretary will provide the location, identity of each co-owner and the percentage share owned by each

Trust Pilot Project

- The secretary will consult with tribes and individual landowners in developing the trust pilot program
- The object of the pilot is to create devices for managing fractionated land
- Guidelines, regulations and procedures will be developed
- In connection with the trust pilot program, the secretary’s power and authority involving transaction approval is unimpaired
- Trusts must be secretarially approved
- The government may distribute payments directly to approved trusts
- A private trustee’s powers do not exceed those of the secretary and shall not interfere with those of the secretary
- 30 pilot projects are authorized
- A report to congress will be made regarding the viability of the trust pilots before the project term expires (The provision does not state what the pilot project term is)
- A recommendation about whether the project should be made permanent will also be made to congress

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Notice of Probate to Heirs

- Before the probate hearing or decision in the estate, the secretary will try to provide written notice of the proceeding to each of the heirs
- A search of contact information will be made in public records, written and electronic directories, by inquiry to family members of heirs, co-heirs, the heirs' tribe and the tribe with jurisdiction over the land
- A missing person search will be procured from an independent firm if "the property" at issue has a value of >\$2000

Missing Heirs

- An heir may be presumed missing 60 days after completion of notice efforts upon certain conditions
- In probate, it is determined that the alleged missing heir has had no contact with other heirs of the decedent or the department relating to trust assets, real and personal for 6 years before the hearing
- Any person may ask for an extension of time to locate the missing party before the heir is declared missing upon a showing of good cause
- Extensions will be granted for reasonable periods
- A declaration that a person is missing will be made in probate only after a review of the efforts has been made and a finding of compliance with this subsection's requirements has been made
- The effect of declaring a person "missing" will be to treat that party for purposes of inheritance as predeceasing the decedent whose estate is being probated

Probate Purchase Option

- Any interest, including a spousal share, may be sold in probate for FMV to an eligible purchaser
- "Eligible Purchaser" means: (1) eligible heir or eligible devisee taking an interest in the same parcel, (2) co-owners in the same parcel or (3) the tribe with jurisdiction over the land
- Exercise of purchase option: (1) An application to purchase must be filed by an eligible purchaser before distribution of the interest to be acquired, (2) The eligible heirs, devisees and life tenants consent to the transaction [except owners of <5% interests] and (3) The purchase price must equal FMV
- If there are multiple bidders, the interest must be sold at public auction or by sealed
- The FMV of the interests to be sold must be appraised. Notice of FMV must be sent to heirs, devisees and tribe
- Notice of the availability of an interest for purchase with details of the auction or sealed bid process must be sent to the heirs, devisees and tribe with jurisdiction.
- Notice to *other* eligible purchasers will be made by posting in at least 5 conspicuous places

Forced Sale (Probate Purchase Option Without Consent)

- No consent to sale is required for <5% interests passing by intestacy
- First, the secretary determines that an interest is <5% based upon the state of the title records at the time the determination is made
- Consent is required of heirs who were living on the parcel to be purchased on the decedent's date of death
- Proceeds of sale are to be distributed to heirs or devisees based upon the size of their respective interests
- Proceeds of sale are treated as trust property if the interest from which they are derived would have been a trust or restricted asset in the heir or devisee's hands

25 U.S.C. § 2207 [208] Full Faith and Credit

- The secretary will give full faith and credit to tribal law reflected in approved tribal codes

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- Tribal codes under the 2004 amendments will apply only to estates in which the decedent's date of death is after a code's effective date

25 U.S.C. §2208 [209] Secretarial Authority: Instrument Issuance; End Trust Status

- The secretary has authority to issue instruments of conveyance to complete a sale or land exchange under this chapter
- The secretary has the authority to terminate trust status of allotted lands or interests therein where authorized by law

25 U.S.C. §2209 [210] Trust Status of Acquired Interests

- All lands acquired for individuals or tribes under this chapter will be taken in trust

25 U.S.C. §2210 [211] Tax Exemption

- Allotted or tribal lands acquired under ILCA as amended by AIPRA are exempt from federal, state and local taxes

25 U.S.C. §2211 [212] Tribal Powers Not Enlarged

- Tribal powers are determined by a tribes organic laws: constitution, by-laws and organizational documents
- This chapter does not enlarge tribal powers beyond what is authorized in tribal organic documents

25 U.S.C. §2212 [213] Fractional Interest Acquisition Program

- With the consent of any owner or heir in probate, the secretary may acquire any fractional interest in trust or restricted lands by paying FMV for a tribe with jurisdiction. Acquired interests are in trust
- The previous "pilot" program to acquire fractionated allotted interests for tribes is now permanent
- Acquisition appropriations are authorized as follows: 2005 at \$75 million; 2006 at \$95 million and 2007 at \$145 million
- A report to congress was to be made three years from the date the secretary certified the 2000 ILCA amendments. (No certification of ILCA 2000 was made)
- The report to congress under ILCA 2000 was required to include findings regarding whether the pilot should be made permanent and extended to individuals as well as tribes
- Under AIPRA, the report to congress is to include an indication of how the program should be enhanced to increase the resources available to tribes and individual landowners
- Requirements of the acquisition program: (1) to promote the policies of ILCA 2000, (2) give acquisition priority to 2% interests invalidated under *Babbitt v. Youpee* (1997), (3) consult with tribes and coordinate federal and tribal acquisition plans, (4) contract with tribes or tribal entities to perform some or all of the acquisition functions and (5) minimize administrative costs associated with the acquisition program by eliminating alleged duplication of documents, proceedings and transactions
- Interests acquired by the secretary may be purchased by a co-owner by immediate payment of the purchase price or on terms if property is pledged by the co-owner as security for payment of the price and it is determined that payment will be timely made
- Except for foreclosure, no application to terminate trust status or lift restrictions will be approved
- Special rules: (1) if there are multiple applicants to purchase, sale will be to the applicant with the largest share and (2) if the tribe owns an interest in the parcel there will be no sale to a co-owner without tribal consent
- Under the acquisition program, the secretary has a lien on all revenue

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- All revenue from acquired property will be paid to the secretary until the lien is removed
- Until the lien is removed, the secretary can approve transactions involving acquired land on behalf of the tribe
- Tribal interests are subject to all lease/use transactions associated with the parcel but the tribe is not considered a "party" to the agreement and sovereign immunity is not impaired
- Revenue will be deposited in the acquisition fund
- Liens will be removed under a variety of situations: Primarily, when the purchase price is paid.
- Additional situations include secretarial findings that: (1) administrative costs exceed revenues, (2) it will take an unreasonable period to recoup the purchase price, (3) a decrease in property value makes income generation insufficient to timely recoup purchase price.
- Periodically in consultation with tribes' liens will be removed

2213 Omitted

25 U.S.C. §2214 [215] Fair Market Value/Geographic Unit Valuation

- In implementing the acquisition program, a system for valuing different types of lands and improvements may be developed
- The system developed by the secretary may permit FMV valuations to be based upon geographic units

25 U.S.C. §2215 [216] Acquisition Fund

- The secretary will establish a fund from which to disburse congressional appropriations for acquisition of fractional interests
- The fund will also be used as a repository for all revenue generated by acquired interests and monies paid by Indian individuals to acquire interests from the secretary
- Revenue from acquired lands is to be used for acquisitions on the reservation from which it was generated
- Acquisition funds monies can be used to buy interests under a tribes fair market acquisition program (§2204)

25 U.S.C. §2216 [217] Trust and Restricted Land Transactions

Encouragement of Consolidation

- Federal policy encourages and is to assist consolidation of fractionated land
- It promotes transactions by and among Indian individuals and between individuals and tribes with jurisdiction so as to maintain the trust status of land
- Land ownership information (names/addresses of owners, location of parcel, share sizes of individual owners) will be given upon request to: (1) other landowners on the same reservation, (2) the tribe, (3) any person eligible to be a member of the tribe with jurisdiction or (4) any person using, applying to use or consolidate trust or restricted land

Restrictions on Terminating Trust or Restricted Status

- A tribe may match the amount a landowner is offered for land on its reservation
- If there is no sale and the owner is simply trying to take property out of trust or restricted status, the tribe may acquire the interest from the owner by paying FMV for the land
- No right of purchase exists if an interest in a family farm is conveyed to a family member provided that the tribe is given an opportunity to buy the property if it is ever put up for sale to a person who is not a family member

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- “*Family Member*” means descendant of landowner, descendant or spouse of the decedent/landowner
- The tribe’s right of purchase may be recorded as a part of the deed for the property involved.
- Recordation of the restriction under §207(c) (2) (A) does not preclude mortgaging or foreclosure of the land to which it attaches

No Conveyances to Non-Indians

- AIPRA does not authorize the sale of trust or restricted land to non-Indians

Estimates of Value and Waiver

- Only after being provided with an estimate of value may an individual Indian sell, exchange or gift deed an interest in land for less than FMV
- Approval of a <FMV transaction to a select group of individuals or tribes (identified below) is not a breach of trust
- The sale, exchange or gift deed of land below FMV does not affect trust or restricted status
- An estimate of value may be waived, in writing, if the transaction for no or nominal consideration is to the owner’s: spouse, sibling, ancestor, descendant or collateral “heir”
- An estimate of value may also be waived if the grantor owns a <5% interest and the grantee or recipient is a co-owner in the same land or the tribe with jurisdiction

Restriction on Elimination of Trust Status or Lifting Restrictions

- The secretary will not approve an application to terminate trust status or lift restrictions for 5 years after a conveyance under these provisions is approved
- When an individual or tribe owns a trust or restricted interest in a parcel and also a fee interest, they may ask the secretary to take the fee interest into trust status
- Upon receipt of such a request, the secretary “*shall* forthwith” take the interest into trust

25 U.S.C. §2217 [218] Reports to Congress

- Before the authority for the acquisition project expires, Interior will report to congress the number of interests purchased and the impact of the purchases on BIA’s financial and realty record keeping systems
- The report must include findings about whether the program should be modified to make acquisition funds available to tribes and individuals

25 U.S.C. §2218 [219]Approval of Leases, Rights of way and Natural Resource Sales

- With the proper percentage of written consent from allotted landowners, the secretary may approve transactions including leases, rights of way if such transactions are in the best interest of the owners
- This section does not apply to uranium or coal leases
- Transaction consent percentages: (1) 5 or fewer owners: 90%,
(2) >5 but <11: 80%
(3) >10 but <20: 60%
(4) More than 20: a majority
- The secretary’s determination regarding the number of heirs and share sizes will be based upon departmental data as it exists when the use agreement or other transaction is submitted for approval by the secretary
- Tribes are not to be considered owners of two percent interests invalidated under *Babbitt v. Youpee* (1997)

- The secretary may approve transactions on behalf of the estate if the heirs are undetermined or if the heirs are determined but cannot be located

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- A lease approved by the secretary meeting percentage of consent requirements listed above is binding on all owners in the allotment
- When tribes have interests in land subject to transactions approved under the percentage of consent provisions, they are not treated as “parties” to the agreement nor is sovereign immunity affected
- Proceeds from approved land use agreements are distributed to owners pro rata
- Nothing in §2218 affects the Agricultural Resources Management Act or Title II (Navajo provisions) of ILCA 2000 which provide for specific consent percentages on particular reservations

25 U.S.C. §2219 [220] Alaska

- These amendments do not apply to Alaska
- Nothing in the amendments may be construed to support the proposition of tribal jurisdiction over allotments or interests in land in Alaska

25 U.S.C. §2220 [221] Owner-Managed Interests

Uses and Interests Allowed and Conditions

- OMI status permits owners to enter into certain surface leases without secretarial consent.
- OMI is not applicable to mineral leases
- Leases for OMI lands cannot exceed 10 years.
- All owners must sign leases
- Leases must meet the requirements of the OMI provision as to type, length, conformance with applicable leasing regulations and need for secretarial approval
- OMI status cannot be created until 1 year notice of AIPRA is published by the secretary

Requirements

- Requirements: (1) consent of all owners over 18 or of parents/guardians of minors, with no revocation in place, (2) Unless fraud or undue influence is found, requests will be granted by the secretary who must approve OMI applications

Effect

- Tribal jurisdiction is not altered by OMI status
- Successors to owners are bound by prior agreements
- OMI status does not impair secretarial authority
- The secretary is not responsible for lease revenue during OMI status
- Persons using or holding any OMI interest is considered to have consented to tribal jurisdiction

Revocation

- Revocation of OMI status does not affect leases
- Secretary's duties of collecting and accounting for future revenues from former OMI lands run from the effective date of revocation
- Revocation must be by all owners or parents/guardians of minors
- No revocation is effective until the secretary receives the final owner request

25 U.S.C. §2221 [222] Notice of AIPRA and Effective Date

- No less than 1 time a year, the secretary shall provide landowners with forms for address changes or other information updates along with other regular reports issued
- Within 180 days of AIPRA enactment the secretary shall notify landowners and tribes of the amendments, including: a statement of effect on inheritance, estate planning options, consolidation by deed/exchange and like possibilities
- Notice will be by mail, newspaper notice and publication in the Federal Register
- The secretary must certify that the notice requirements have been met with publication thereof in the Federal Register
- §207 (Inheritance provisions) of AIPRA, except estate planning assistance provisions, will not be applied to estates in which the decedent's date of death is less than one year after secretarial certification

Miscellaneous Provisions in Sections 8, 9 and 10 of AIPRA

- 25 U.S.C. 348 through which 25 U.S.C. 372 incorporated state law of succession under the GAA is amended to eliminate use of state intestacy laws, replaced by federal laws (§207(a) of AIPRA) and regulations or applicable tribal laws as enacted by congress or codes approved by the secretary under ILCA
- 25 U.S.C. 464 is amended to provide for the application of federal law and regulations and tribal statutes/codes
- All provisions but II, III and IV of §205(c)(2)(1)(i) are severable in the event any provision of the AIPRA amendments are invalidated
- The secretary is authorized to adopt regulations to implement the AIPRA amendments

Disclaimer and Instruction

Consult the statute(s) for the details of each provision. This overview is not presented as an exhaustive representation of ILCA as amended by AIPRA but merely highlights of the combined acts to facilitate understanding of the law and to permit the reader to access particular provisions of interest in a user friendly way. Other tools to be used with this overview are the ILCA development chart since 1983, the eligibility chart for intestate inheritance, the descent pattern chart for intestate inheritance and the eligible devisee chart for testate succession

