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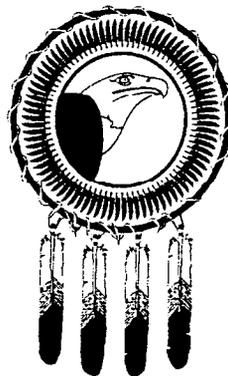
*Tribal Responses to Federal Land Consolidation Policy*

by

Margo S. Miller

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## TABLE OF CONTENTS

	PAGE
EXECUTIVE SUMMARY.....	i
INTRODUCTION.....	1
OVERVIEW OF THE PAPER.....	3
SECTION I: THE HISTORY OF ALLOTMENT POLICY.....	4
THE PROBLEMS WITH ALLOTMENT.....	6
SECTION II: INITIAL ATTEMPTS TO CORRECT THE PROBLEMS.....	9
SECTION III: THE INDIAN LAND CONSOLIDATION ACT.....	10
THE 1984 AMENDMENTS.....	12
SECTION IV: WHY AREN'T TRIBES ACTING?.....	14
A LACK OF INFORMATION.....	15
THE EFFECT OF THE IRVING CASE.....	17
WHY TRIBES CHOOSE NOT TO ACT.....	19
WHAT PREVENTS TRIBES FROM ACTING?.....	20
SUMMARY AND IMPLICATIONS.....	25
SECTION V: RECOMMENDATIONS.....	26
NOTES.....	35
BIBLIOGRAPHY.....	36
APPENDIX I -- TRIBES BY BIA AREA OFFICE.....	39
APPENDIX II -- DEFINITIONS.....	40
APPENDIX III -- TRIBES WITH SPECIAL LEGISLATION.....	41
APPENDIX IV -- INTERVIEWS.....	42

## EXECUTIVE SUMMARY

### THE PROBLEM

The Dawes Allotment Act and the problems it created have plagued Indian tribes for the past one hundred years. Tribal governments have watched Indian land transfer, either through sale (by individual Indian owners) or through inheritance, to non-Indians. Many reservations have become patchworks of hundreds of separate parcels, some owned by the tribe as a whole, some by individuals members, some by non-Indians and the rest by the U.S. Government. Control over individually owned Indian land in particular has become highly fractionated as the number of owners per parcel continues to multiply due to BIA's practice of dividing allotted land on paper among the owners.

This situation has created serious economic and political problems for Indian tribes and individual members. Productive use of Indian land becomes almost impossible, since leasing requires the consent of over half the owners of a parcel of land. When the number of owners is in the hundreds, locating the requisite number to obtain their permission is a monumental task. Furthermore, the BIA controls the leasing of Indian lands once the number of owners exceeds five. Many tribes complain that the BIA is lazy about collecting signatures and leaves the land idle. Other tribes complain that the BIA sets the rental fees above the market rate, thereby discouraging people from leasing the land. This situation frequently prevents tribes from developing their land and improving their members' standard of living.

Allotment has also weakened the political sovereignty of tribes. Proponents claimed the Dawes Allotment Act would increase the independence of American Indians and improve their economic well-being by providing them with their own land and by assimilating them into the mainstream of American life.

Instead, allotment, by preventing tribes from consolidating and thereby productively using their land, has forced them to rely on the Federal Government for assistance. This reliance weakens a tribe's ability to be independent and self-sufficient. Allotment has also created tension between tribal governments and tribal members over who should own allotted Indian lands--the tribe as a whole or individual members. This tension, particularly on reservations that were heavily allotted, can divide a tribe against itself, leaving the tribal government with little or no control over the land on its reservation.

The Indian Land Consolidation Act (ILCA), enacted by Congress in 1983 and amended in 1984, provides tribes with the ability to address these problems. The ILCA authorizes tribes to develop land consolidation plans, allows tribes to prevent non-Indians from inheriting Indian land, and mandates the transfer of minute, essentially worthless, fractionated interests to the tribe. Yet few tribes have taken advantage of these authorities, despite the obvious benefit for their economic and political well-being.

Various theories have been proposed to explain this. BIA staff tends to believe that the inactivity stems either from a conflict within the tribe or from a lack of information. Committee staff, supported by the testimony of numerous tribes, attribute it to a lack of funds available to tribes for buying land from their members.

First Nations (FNFP) wants to test these theories in order to understand why tribes haven't responded to the ILCA. This paper investigates and analyzes the responses of fifteen Indian tribes to the ILCA and attempts to explain their failure to act. Its findings are based on over forty interviews with tribal members and attorneys, BIA and Congressional staff and other land

consolidation experts. The paper identifies both the conditions that make a tribe choose not to act as well as the forces that prevent an interested tribe from acting. It then makes recommendations on how FNEP can help tribes consolidate their land and grapple with the problems created by allotment. The recommendations address both the obstacles faced by tribes that want to act and cannot as well as the self-imposed barriers erected by tribes that believe any action is impossible.

#### THE FINDINGS

**A Lack of Information:** Initially, tribes lacked the information necessary to take advantage of the ILCA. The speed with which Congress enacted the Act and the lack of Congressional hearings left many tribes either unaware of the bill's existence or confused about its provisions. The BIA compounded the problem by failing to issue policy guidelines until two months after the passage of the ILCA and by failing to issue regulations at all.

**The Irving Case:** The confusion among tribes was exacerbated by the Irving case, a suit filed on behalf of three members of the Ogala Sioux tribe over the escheat provision in the 1983 Act. The Supreme Court eventually held that the provision was unconstitutional. The ruling was confusing, and led some people to believe that the escheat provision in the 1984 Act was unconstitutional as well. Still others thought the Court had ruled that the entire ILCA was unconstitutional.

**Tribes That Chose Not to Act:** Once a tribe understands the ILCA, it then decides whether to pursue any of its authorities. Tribes chose not to act for the following reasons:

1. **Location:** tribes whose reservations weren't allotted, particularly those in California and the Southwest, have no need for the ILCA.

2. Resource-Rich Tribes: tribes with an abundance of natural resources often feel as though they have enough land for now and therefore focus on other priorities.

3. Small Reservations: tribes with small reservations are often more interested in acquiring land outside the reservation, then in consolidating the few acres they already own.

4. Internal Conflict: tribes, particularly those on heavily allotted reservations, often face internal tension between members and the tribal government over who should own allotted lands. Many choose not to act in order to avoid aggravating this conflict.

**Tribes That Are Prevented From Acting:**

1. Funding: few tribes are prevented from acting because of inadequate funds. When tribes complain about a lack of money, they're usually unhappy that they can't buy land more quickly, not that they can't buy any land at all. The Federal Government does provide some money for land acquisition, primarily through loans, although none of the programs meet every important tribal need.

2. Tribal Leadership: to successfully enact a tribal inheritance code or land consolidation plan, tribes need strong leaders to coordinate the process, educate members and convince them of the need for action.

3. Tribal Constitutions: some tribal constitutions prohibit tribal governments from becoming involved with allotted lands. These prohibitions probably mask the real barrier to action, since tribes that want to pursue the ILCA can and have been changing them.

4. Frustration: some tribes have chosen not to act out of frustration over the magnitude of the problems caused by allotment, particularly fractionated heirship.

## RECOMMENDATIONS

The recommendations are organized along a spectrum from those involving no outside intervention to those requiring active Federal Government assistance. They are based on the following assumptions: 1) the concept of the reservation should be preserved; 2) the trustee role of the Secretary should be maintained with some modifications; and 3) at the same time, tribes should be as active and independent as possible in determining their own course of action.

- RECOMMENDATION #1: Encourage tribes to hold public forums on fractionated heirship.
- RECOMMENDATION #2: Encourage owners of fractionated interests to write wills.
- RECOMMENDATION #3: Prepare a handbook explaining BIA's will-writing process.
- RECOMMENDATION #4: Encourage BIA to create a task force on estate-planning and probate.
- RECOMMENDATION #5: Hold a congressional hearing on creative alternatives to escheat.
- RECOMMENDATION #6: Draft escheat codes incorporating the ideas discussed at the hearing.
- RECOMMENDATION #7: Allow other owners of fractionated interests to have the first right to purchase fractionated interests.
- RECOMMENDATION #8: Require BIA to produce regulations for the ILCA.
- RECOMMENDATION #9: Draft a model land consolidation plan and tribal inheritance code.
- RECOMMENDATION #10: Encourage tribes to assume responsibility for leasing their allotted lands.
- RECOMMENDATION #11: GAO or CRS should do a study on the federal costs associated with fractionated heirship.
- RECOMMENDATION #12: Provide low-interest loans for tribes to purchase fractionated interests.

## INTRODUCTION

The Dawes Allotment Act and the problems it created have plagued Indian tribes for the past one hundred years. Tribal governments have watched Indian land transfer, either through sale (by individual Indian owners) or through inheritance, to non-Indians. Many reservations have become patchworks of hundreds of separate parcels, some owned by the tribe as a whole, some by individual members, some by non-Indians and the rest by the U.S. Government. In addition, control over individually owned Indian land has become highly fractionated as the number of owners per parcel continues to multiply over time. Beginning with the death of the first generation of owners of allotted land, the BIA has simply divided allotted land on paper among the heirs. Now, approximately five generations later, the number of owners per parcel frequently totals in the hundreds.

This situation creates serious economic and political problems for Indian tribes and individual members. Productive use of Indian land becomes almost impossible, since leasing requires the consent of more than half of the owners of a parcel of land. When the number of owners is in the hundreds, locating the requisite number to obtain their permission is a monumental task. Furthermore, the BIA controls the leasing of Indians lands once the number of owners exceeds five. Tribes, such as the Cheyenne River Sioux, complain that the BIA is lazy about collecting signatures and leaves the land idle. Other tribes, such as the Standing Rock Sioux, complain that the BIA sets the rental fees above the market rate, thereby discouraging people from leasing the land. This situation frequently prevents tribes from developing their land and improving their members' standard of living.

Allotment has also weakened the political sovereignty of tribes.

Proponents of the Dawes Act claimed allotment would increase the independence of American Indians and improve their economic well-being by providing them with their own land (to live on and farm) and by assimilating them into the mainstream of American life. Instead, allotment has made tribes and their members more dependent on the Federal Government. Unable to consolidate and thereby productively use their land, tribes are forced to rely on the Federal Government for assistance. This reliance weakens a tribe's ability to be independent and self-sufficient. Allotment has also created tension between tribal governments and tribal members over who should own allotted Indian lands--the tribe as a whole or individual members. This tension, particularly on reservations that were heavily allotted, can divide a tribe against itself, leaving the tribal government with little or no control over the land situation on the reservation.

The Indian Land Consolidation Act (ILCA), enacted by Congress in 1983 and amended in 1984, provides tribes with the ability to address these problems and consolidate their land. The ILCA authorizes tribes to develop land consolidation plans, allows tribes to prevent non-Indians from inheriting Indian land, and mandates the transfer of minute, essentially worthless, fractionated interests to the tribe. Yet few tribes have taken advantage of these authorities, despite the obvious benefit for their economic and political well-being.

Various theories have been proposed to explain this inactivity. BTA staff tends to believe that the inactivity stems either from conflict within the tribe or from a lack of information. Committee staff, supported by the testimony of numerous tribes, attribute the inactivity to a lack of funds

available to tribes for buying land and interests from their members.

This paper investigates and analyzes the responses of fifteen Indian tribes to the ILCA and attempts to find an explanation for their failure to act (see Appendix I for a list of tribes). Its findings are based on interviews with at least one member of each tribe, BIA and Congressional staff and other experts involved with land consolidation. The paper identifies both the conditions that make a tribe choose not to act as well as the forces that prevent an interested tribe from acting. A lack of information, inadequate funding and internal conflict have prevented tribal activity on some reservations; however, other tribes have simply failed to see the need to pursue the ILCA.

#### OVERVIEW OF THE PAPER

Section I describes the origin and provisions of the Dawes Allotment Act of 1887 and discusses the following questions: How did allotment first come about? What problems did it create? Why do these problems continue to impose such a burden on Indian tribes?

Section II briefly reviews the 95 years between the passage of the Dawes Act and the passage of the Indian Land Consolidation Act of 1983. Since the Dawes Act prohibited tribes from doing anything with their land without the Federal Government's approval, what action did Congress take to address the problems created by allotment?

Section III analyzes the 1983 Indian Land Consolidation Act and the 1984 amendments in detail. What authorities do they provide for tribes that want to consolidate and acquire land? How did various tribes react to them during the Senate hearings on the legislation?

Using this background as a framework, Section IV addresses the main

policy question: given that the ILCA as amended provides the authority necessary for tribes to consolidate their land and address the problems created by allotment, why haven't tribes begun to use this new authority? What prevents them from acting? How much of this inactivity stems from Congress' and the BIA's failure to inform tribes about the Act? Are tribes being prevented from acting by outside forces? Or are they choosing not to act, and if so, why?

Section V makes recommendations on how First Nations (FNFP) can help tribes consolidate their land and grapple with the problems created by allotment. The recommendations address both the obstacles faced by tribes that want to act and cannot, and the self-imposed barriers erected by tribes that believe that any action is impossible.

#### SECTION I: THE HISTORY OF ALLOTMENT POLICY

The conflict over land between American Indians and the U.S. Government came from two sources. First, many Indian societies have a tradition of communal land ownership, believing that land should be owned and shared by the entire tribe. This idea of communal ownership conflicts directly with the European notion of individual ownership.

Second, European settlers had come to America to acquire their own land, but the Indians occupied much of the land that these settlers desired. Only Congressional resistance prevented Indian tribes from losing their land entirely. Instead, the Federal Government would allot, or divide, a reservation among individual Indians and allow settlers to purchase any "surplus" lands which remained after allotment.

During the late 1800s, other reasons were put forward to allot Indian lands. Christian reformers, who saw themselves as advocates and protectors of

Indians, wanted them to adopt the white man's customs and assimilate themselves into the mainstream of American society. These evangelical Protestants believed deeply in principles of individualism and individual salvation. As a result, they viewed tribal institutions and customs, particularly the reservation, as obstacles to full scale integration. As one reformer put it, "...if civilization, education and Christianity are to do their work, they must get at the individual. The deadening sway of savage tribal life must be broken up!" (1). The reformers believed that Indians would acquire the "habits of thrift, industry and individualism needed for assimilation into the white culture" (2) by owning and farming their own plots of land.

Eventually, the reformers got what they wanted. In February 1887, the President signed the General Allotment Act (also known as the Dawes Act). The Act authorized the President to divide reservations and allot tracts of land to individual Indians. Each head of a household received 160 acres, single individuals over 18 received 80 acres and children under 18 received 40 acres.

Indians were unused to owning their own land and were often ill-equipped to handle challenges to their ownership. To prevent them from being defrauded of their property, the Federal Government held each allotment in trust for twenty-five years. During that time, the land could not be sold, leased or exchanged. Indian owners were not required to pay taxes on their land as long as it remained in trust. After the trust period expired, when the person was thought to be "sufficiently de-Indianized to conduct his own affairs" (3) and had learned how to farm and "value" his land, he was given title to it and allowed to dispose of it as he wished. The Federal Government sold any

"surplus" land (i.e., land remaining after allotment) to homesteaders on behalf of the tribe. Proceeds went to the Federal Treasury to be used by Congress for the benefit of the Indians.

#### THE PROBLEMS WITH ALLOTMENT

Although the reformers hailed the Dawes Act as the "Indian Emancipation Act" (4), allotment failed to produce the promised improvement in Indians' economic well-being. Instead, allotment weakened tribes' self-sufficiency by creating three major problems for tribal governments and their members, problems that continue to plague them today: checkerboard ownership, fractionated heirship and lost Indian land.

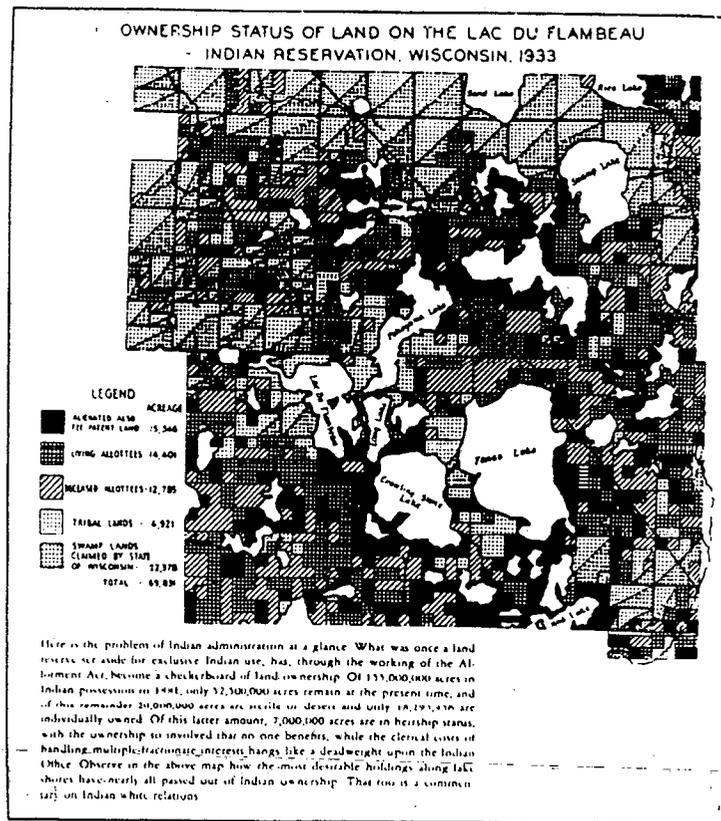
Checkerboard Ownership: During the fifty years between the passage of the Dawes Act and the end of allotment, reservations became composed of tribal trust and fee land, individual Indian trust and fee land and non-Indian owned land (see Appendix II for definitions of these terms). As a result, maps of Indian reservations came to look like checkerboards. Figure 1 shows the current status of ownership on the Lac du Flambeau reservation in Wisconsin.

The Dawes Act prohibited the sale, lease or exchange of trust and restricted land. The prohibition was intended to prevent Indian owners from losing control or being defrauded of their land. However, it also prevented tribes and individual members from collecting enough acreage to create an economically viable plot of land, since they often owned parcels that were not contiguous to one another.

Fractionated Heirship: Because the Federal Government did not permit Indians to write wills until 1910, inheritance was determined by the laws of the state or territory in which the land was located. Ordinarily, heirs can ask the relevant state court to partition the land, either for sale or "in

FIGURE 1

MAP 11: Lac du Flambeau, 1933 [Indians at Work: Reorganization Number]



kind." They then receive either their share of the proceeds from the sale of the land or they receive a portion of the land itself. In the case of allotted land, the courts have held that partition can only occur if all the heirs agree to it and the Secretary of the Interior approves. As a result, land is rarely divided; instead, the BIA simply divides the land on paper and holds the interests in trust for the heirs. Over time, the number of owners per parcel has grown geometrically. The following passage, describing one parcel on the Sisseton-Wahpeton reservation in 1982, illustrates the havoc fractionated heirship can create.

Sisseton Wahpeton Allotment No. 1305 on the Lake Traverse Reservation provides an extreme example of the present complexity of the heirship problem, for it may well be one of the most fractionated parcels in the world. The original allottee...died in 1891. By 1937, there were 150 heirs to the allotment and probating the estate cost \$2,400 and required more than 250 typewritten pages. At present there are 439 heirs and the lowest common denominator used to determine fractional interests is 3,394,923,840,000.

A portion of the allotment consisting of 40 acres of farmland is currently leased at the rate of \$1,080 per year. When it comes time to distribute this money, it requires three full days for a realty clerk to calculate the heirship interest values. A breakdown of the current lease distribution reveals that more than two-thirds of the heirs receive less than \$1 from the estate, that approximately one-third receive less than 5 cents, and that the interest of 100 of the heirs entitles them to a fraction of 1 cent. The largest interest holder receives \$82.85, but value of the smallest heir is \$.0000564. At the current lease rate, it would require 177 years for the smallest heir to earn 1 cent, and 88,652 years to accumulate \$5, which is the minimum amount for which the Bureau of Indian Affairs will issue a check. If this portion of the allotment was sold at its appraised value of \$8,000, the share of the smallest heir would be \$.000418, and if it were physically partitioned, the smallest heir would be given title to approximately 13 square inches. (5)

This proliferation of owners makes any productive use of allotted land almost impossible since leasing requires approval by a majority of them as well as

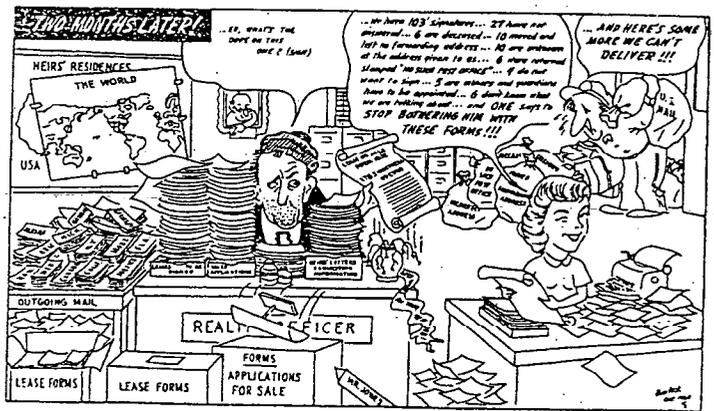
the Secretary of the Interior. When an owner receives little revenue from his interest, he has no incentive to care about decisions concerning the tract of land. As a result, owners frequently fail to reply to BIA's requests for approval to lease a particular parcel, while others, realizing that their signature is required for unanimity, will demand a bonus before signing (6). Many owners, because their interests are miniscule, may never realize they own an interest in the first place (see Figure 2).

Loss of Indian Lands to Non-Indians: The most immediate effect of allotment was the alienation, or loss, of Indian land to non-Indians. In 1886, Indian tribes owned 138 million acres, many more acres than were needed for allotment; by 1934 when allotment ended, Indian-owned land had shrunk to 48 million acres, some 20 million of which was desert or semi-desert. Tribes lost roughly 60 million acres through "surplus" land sales to settlers, immediately after the Dawes Act passed. Indians lost another 30 million to non-Indians in three ways: 1) through inheritance by non-Indians; 2) through fraud (many Indians sold the title to their land, not realizing that the loss of that piece of paper meant they could no longer use the land); or 3) through sales by individual Indians who had gained title to their land after the expiration of the trust period. \*

These problems create headaches for the Federal Government as well. Administrative expenses (for probating wills, managing individual allotments, determining heirship interests, negotiating land sales and lease agreements,

\*Indian owners obtained title to their land in one of two ways: by default, once the twenty-five year trust period expired; or by being judged "competent" by the Secretary of Interior. "Competency" alone led to the loss of 23 million acres since after 1917 any person with more than 50% Indian blood was considered competent.(7) This led to cases of people in insane asylums being judged competent.

FIGURE 2



notifying heirs and dividing the income from a parcel of land among them) are costly and becoming more so. As the number of owners multiplies over time, these tasks become increasingly complex and require more and more people and computers. Overseeing 86,586 acres of allotted land on the Lake Traverse Reservation requires the full attention of five realty and probate specialists. The BIA spends \$17,560 per year to administer the current lease on allotment no. 1305, which earns only \$1,080 in yearly revenue. (8)

## SECTION II: INITIAL ATTEMPTS TO CORRECT THE PROBLEMS

During the period between the Dawes Act and the ILCA, Congress did little to address the problem of allotment, with one notable exception. At the urging of John Collier, an outspoken critic of allotment and then Commissioner of Indian Affairs, Congress passed the Indian Reorganization Act of 1934 (IRA). Collier pushed hard for the IRA, saying "the allotment system has not changed the Indian into a responsible, self-supporting citizen...It has merely deprived vast numbers of them of their land, turned them into paupers and imposed an ever-growing relief problem on the Federal Government" (9).

The IRA ended allotment for all tribes, extended the trust period for Indian land ownership indefinitely, and authorized the Secretary of the Interior to transfer any remaining surplus land to tribes. The IRA authorized the Secretary to acquire additional land for tribes and provided an annual appropriation of \$2 million to purchase this land. It also allowed tribes to organize tribal governments and to adopt a constitution and by-laws, subject to ratification by a majority vote of adult members of the tribe. Only tribes that voted to accept the IRA could exercise the authorities it provided (70 tribes, out of 262, rejected the Act). The Act failed to address either the

problem of fractionated heirship or the loss of Indian lands through inheritance.

During the fifty years between the IRA and the ILCA, Congress failed to pass any general legislation which would help all tribes deal with the problems created by allotment. Congress did enact a series of bills at the behest of particular tribes, beginning in 1946. Each bill provided a specific tribe with the authority to develop either a land consolidation plan or a tribal inheritance code (see Appendix III for a list). These bills provided the model for the Indian Land Consolidation Act of 1983.

### SECTION III: THE INDIAN LAND CONSOLIDATION ACT

The Indian Land Consolidation Act (ILCA) originated in the House as an amendment to S. 503, a bill providing the Devil's Lake Sioux Tribe of North Dakota with the authority to develop a land consolidation plan and a tribal inheritance code. After holding only one hearing on the ILCA, the House Interior Committee attached it to S. 503. The House passed the bill as amended and sent it to the Senate. Because it was so close to the end of the 98th Congress, the Senate passed S. 503 without referring it to the Indian Affairs Committee at the urging of Committee members who feared that the opportunity to enact such an important piece of legislation would not come again. The President signed the ILCA on January 12, 1983.

The Indian Land Consolidation Act (ILCA) made dramatic changes in the amount of discretion and control tribes had over the land consolidation and heirship problems described above. The goals of the legislation are: 1) to allow tribes to consolidate their land; 2) to eliminate undivided fractionated interests in Indian trust or restricted land (see Appendix II for definitions); and 3) to slow or prevent the loss of Indian trust or restricted

land. The ILCA addresses the three major problems created by allotment as follows:

Checkerboard Ownership: all tribes can acquire land and have the Secretary place it in trust. Trust land is a "double-edged sword." Although it is exempt from taxation and protected against alienation, the tribe cannot sell or exchange trust land without the Secretary's approval. Tribes can develop land consolidation plans authorizing the Secretary to sell or exchange land or fractionated interests for the purpose of consolidating tribal landholdings within the reservation or eliminating fractional interests. The Secretary must approve the plan as well as all sales and exchanges (previously, tribes could neither sell nor exchange land without an act of Congress). The BIA must hold any proceeds from exchanges or sales in trust; tribes can only use this money to purchase more land. Tribes can purchase allotted land providing: 1) 50% of the owners, or the owners of 50% of the interests approve; 2) the parcel has more than 15 owners; and 3) the tribe pays "full market value" for the property. If any owner is in "actual use and possession" and can match the tribal offer, he can buy the entire tract. Before the ILCA, tribes had to obtain the consent of all the owners before buying a parcel of allotted land.

Fractionated Heirship: when the owner of a parcel of land dies, any interest representing 2% or less of the total acreage that has earned less than \$100 in the year preceding the owner's death "escheats," or transfers, to the tribe, regardless of whether or not the owner left a will. Unlike other authorities in the ILCA, escheat occurs automatically, regardless of whether or not the tribal government supports it.

Loss of Indian Lands to Non-Indians: tribes can adopt inheritance codes

prohibiting non-Indians (or non-tribal members) from inheriting land on the reservation. A surviving ineligible spouse and children can retain a "life estate" on their share of the property, which allows them to use the land for the rest of their lives. If the owner dies without a will, all interests that would have gone to ineligible heirs now escheat to the tribe. If the owner leaves a will, these interests can only escheat if the tribe pays fair market value for them. Because tribes are often short of cash, a Department of Interior administrative law judge (ALJ) can hold the property in probate for up to two years while the tribe obtains the necessary funds.

#### THE 1984 AMENDMENTS

While preparing the ILCA for the President's signature, the enrolling clerk made several errors transcribing the bill, errors that rendered two sections of the bill incomprehensible. No one noticed the errors, and the President signed the garbled version into law. Although the codifiers fixed the errors, the House and Senate Committees felt that Congress should pass corrected legislation. Accordingly, the House passed H.J. Res. 158 in February 1983. After holding several hearings, the Senate Indian Affairs Committee reported an amended version of H.J. Res. 158. Both houses agreed to the changes, and the President signed the bill on October 30, 1984.

The 1984 amendments made several important changes to the ILCA, many in response to concerns raised during the Senate Committee's hearings. These changes include:

- o tribes can buy one or more interests in a parcel without having to buy the entire tract; this allows tribes with limited funds to begin slowly accumulating fractionated interests;
- o the owner of an interest in a parcel which the tribe is trying to purchase can only match the tribe's offer if he has been in "actual

use and possession" for three years or more; further, if he buys the property and tries to sell it within five years, the tribe has first right of purchase; this prevents an owner from buying a parcel of land for the sole purpose of reselling it to a non-Indian;

- o an owner can will his escheatable interest(s) to another owner of interests in the same parcel; this allows the owner to avoid transferring his interests to the tribe;
- o the income period changes from one year prior to the owner's death to any year in the five following his death; this protects owners of interests in mineral or timber land which may not earn much money in a bad year;
- o if an owner can prove that an escheatable interest is capable of earning \$100, he can inherit it; and
- o tribes can enact an alternative to escheat as long as it accords with the principal purpose of the Act (to prevent the further descent or fractionation of interests that have no real value and cannot earn any meaningful income).

Escheat is the most controversial provision in the ILCA for several reasons. First, many tribes resent Congress forcing them to take away their members' inheritances. Members don't always understand that the tribe has no choice about escheat and become angry with the tribe for taking their interests away. Even members of tribes with a history of communal ownership don't want to relinquish their ownership because of an "emotional attachment to the land, no matter how small or valueless" (10). Escheat therefore creates an intense conflict between tribal governments and their members. As the Chairman of the Blackfeet Tribe put it:

The escheat provision has created more anguish among our members than any other piece of federal legislation in recent memory. Our older members do not consider even the smallest interests in land to be so insignificant that they can just be taken from them. They consider such interests to be part of the invaluable heritage they are to pass on to the next generation. They see escheat as doing nothing less than cheating them out of their property...The old people ask the Tribe to refuse to take the escheated interests, but the Tribe is legally required to take them. They then ask the Tribe to purchase the interests. The

Tribe would like to but lacks the funds with which to do so. Thus, the present provision has created tensions between tribes and their members. (11)

On reservations with a large number of members who own 2% interests, this conflict can be paralyzing (see Figure 3).

Second, escheat does not require tribes to pay compensation before the interest transfers to the tribe. Although the ILCA allows tribes to pay compensation voluntarily, many tribes were unaware they had this option. Finally, the ILCA provides no federal funding to tribes to pay compensation. Therefore, tribes, like the Blackfeet, that want to compensate members are often unable to do so.

#### SECTION IV: WHY AREN'T TRIBES ACTING?

Since the enactment of the ILCA and the 1984 amendments, very few tribes have sought to take advantage of its provisions. According to the BIA, only Fort Peck and Fort Berthold have submitted tribal inheritance codes for the Secretary's approval; their requests are pending. Five tribes have submitted land consolidation plans. The Secretary has approved two plans--for the Cherokee of Oklahoma and the Pojoaque Pueblo in New Mexico. The Bureau is still evaluating the other three (Fort Berthold, Fort Belknap and the Kaw tribe in Oklahoma). No tribes have submitted alternatives to escheat, although the Sisseton-Wahpeton tribe did convince Congress to enact their proposed tribal inheritance and escheat codes as separate legislation in 1984. The ILCA clearly provides tribes with the authority they need to correct the problems created by allotment. Yet only a few tribes have acted, and no one theory seems to explain why. In the sections that follow, I use my findings, based on over forty interviews with tribal members, attorneys and other land consolidation experts, to offer insights as to why tribes haven't

FIGURE 3  
OWNERS OF FRACTIONATED INTERESTS  
ON SELECTED RESERVATIONS  
JANUARY-JULY 1983

	TOTAL TRACTS	TOTAL OWNERS	2% OR LESS OWNERS	PERCENTAGE OF 2% OWNERS
BLACKFEET	5,075	36,545	18,653	51%
CHEYENNE RIVER	9,404	41,516	8,347	20%
CROW	6,750	59,346	30,658	52%
PINE RIDGE	11,330	95,019	48,392	51%
ROSEBUD	10,812	89,257	50,384	56%
STANDING ROCK	6,206	108,032	51,842	48%
YAKIMA	4,466	34,833	16,768	48%

\*\*NOTES\*\*

1. "2% or less owners" refers to the number of heirs who own one or more interests which represent 2% or less of the particular tract.
2. Figures for Standing Rock, Cheyenne River, Pine Ridge and Rosebud may be erroneous due to duplications in input. However, the percentage is correct.

Source: Bureau of Indian Affairs Testimony, Hearing on H.J. Res. 158,  
July 26, 1983, p. 10.

pursued the ILCA and to provide a framework for proposing changes that will allow them to act in the future.

#### A LACK OF INFORMATION

"Reservations are very isolated--geographically, culturally, socially. And information is very difficult to obtain."

--Skye Houser

Insufficient information about the Act and its provisions prevented tribes from initially taking advantage of their new authority. The House Interior Committee invited only three tribes to testify at its one hearing on the 1983 bill, and all three were from the Southwest, an area with few allotted reservations. Congress passed the ILCA quickly at the end of the 98th Congress, leaving many tribes wondering where the legislation had come from and what it was supposed to accomplish, and still others in complete ignorance of its existence. As Pete Taylor, counsel to the Senate Indian Affairs Committee, stated during a hearing on the 1984 amendments: "I believe a lot of the reaction in Indian country stems from the fact that we did not have these hearings (on the 1983 bill). As a result, this legislation is not fully understood in Indian country." (13).

The BIA also failed to inform Indian tribes about the ILCA in a timely fashion. After its enactment, the Bureau created a task force to develop a manual on the bill's provisions and to draft the regulations. The task force did produce policy guidelines on escheat and tribal inheritance codes which were eventually sent to all of BIA's field offices, but not until two months after the President signed the ILCA. BIA attributes the task force's initial problems completing the regulations to a shortage of personnel and funding. The task force's already slow pace halted entirely after the Dakota Plains Legal Services filed a court case on behalf of several members of the Ogala

Sioux Tribe, claiming that escheat violated the Fifth Amendment of the Constitution. Eventually, the Supreme Court ruled that the 1983 escheat provision was unconstitutional. Even now, the regulations remain on hold, pending an opinion from the Justice Department on the constitutionality of the 1984 escheat provision. The BIA still plans to finish them by the end of this year.

BIA staff acknowledge that the lack of information provided to tribes created confusion about the ILCA, although they claim that most tribes are now aware of the Act. Nevertheless, some tribes remain unaware of the ILCA. For example, the Executive Director and tribal attorney of the Lac Courte Oreilles Tribe in Wisconsin had never heard of the ILCA. Other tribes only learned about the ILCA after a member received an escheat notice from an administrative law judge.

Stan Webb, Director of Technical Services for the BIA, stated: "our people still need a lot more training. Many of them just don't understand the ILCA." Tom Wilson, the attorney for the Saginaw-Chippewa tribe in Michigan, agrees. The tribe has had no response about its proposed land consolidation plan. Mr. Wilson believes that the BIA hasn't responded because "no one in the area office understands how the ILCA works."

The level of understanding and willingness to inform tribes varies from area office to area office. For example, Jim Wolf, Chief Realty Officer in the Portland office, said that all the tribes in his area understand the Act. Many held tribal meetings on the ILCA, and Mr. Wolf provided training for interested tribes. In the Billings, Montana area, Chief Realty Officer Larry Morrin said: "All the tribes in my area know about the ILCA. We held meetings and made presentations to tribal governments, to individual members,

and to anyone else who asked." The tribes I spoke to in these two areas corroborated their statements.

#### THE EFFECT OF THE IRVING CASE

The court case ("Irving") mentioned above created further further confusion among tribes. In October 1983, the Aberdeen area administrative law judge notified several members of the Ogala Sioux tribe of South Dakota that certain fractionated interests they expected to inherit would instead escheat to the tribe. Shortly thereafter, Dakota Plains Legal Services filed suit on behalf of three members of the tribe, including one named Mary Irving, claiming that escheat was a "taking of property without just compensation" in violation of the Fifth Amendment.

The District Court ruled in favor of the Federal Government and upheld the constitutionality of escheat, saying that the appellees had no vested interest in the property before the owners' deaths. The Court further ruled that Congress had plenary authority to abolish the power of Indians to will their property and to change the rules of intestacy succession.

The Court of Appeals reversed the decision, concluding that the decedents did have the right to control the disposition of their property at death, that the appellees had standing to invoke such a right, and that the taking of that right without compensation violated the Fifth Amendment. The Court also ruled that the 1984 escheat provision was unconstitutional as well.

The Supreme Court upheld the Court of Appeals on the 1983 Act, but reversed the Court of Appeals' ruling on the 1984 Act. This ruling on both the 1983 and 1984 escheat provisions confused tribes, as discussed below. The Court also ruled that decedents have the right to pass on property to their

heirs, as guaranteed by the Fifth Amendment, but their heirs do not have the right to receive compensation until they acquire these interests.

Although the Court ruled unanimously in favor of the appellees, the justices split as to why escheat was unconstitutional. Seven justices concluded that the Federal Government had no right to revoke a decedent's right to will his or her property. However, Justices Stevens and White said that escheat was a violation of "due process," since the decedents had not received adequate notice that their right to transfer property was being altered.

The Irving case continues to slow the implementation of the ILCA. Many people didn't realize that the Supreme Court's decision affected the escheat provision in the 1983 Act only (i.e., only the escheats occurring between January 12, 1983 and October 30, 1984 must be returned). Others think that the Supreme Court ruled that the entire ILCA was unconstitutional. In fact, when I spoke to an attorney at the Native American Rights Fund about the ILCA, he said: "Well, you do realize that the entire Act was ruled unconstitutional...".

The 1984 amendments partially restore "due process" by allowing Indians to will their escheatable interests to other owners of fractionated interests in the same parcel (it may still be a "taking of property without just compensation" to limit the choice of heirs). However, the question of whether the ILCA provides tribes with enough notice remains unclear. Pete Taylor believes it's "shaky" since there's no language in the Act specifically referring to notice. The BIA maintains that escheat is constitutional, claiming that the Act's existence for the past two and a half years insures that tribes are aware of it). The Bureau has asked the Justice Department to

determine whether, in Justice's opinion, it can withstand a constitutional challenge. The BIA sent the request to Justice in August 1987, and as of March 1988, is still waiting for an answer. At least one tribe, the Winnebago tribe, has put its land consolidation plan on holding, pending receipt of a written statement from BIA on the constitutionality of escheat.

If Justice decides that the provision can withstand a challenge, then BIA will go ahead with escheat ("and probably get sued again," according to one BIA official). For now, BIA field offices continue to provide administrative law judges with information about escheatable interests. However, the ALJs are holding escheat in abeyance pending an opinion from Justice.

#### WHY TRIBES CHOOSE NOT TO ACT

Once a tribe understands the ILCA, the tribal government then decides whether to pursue any of its authorities. Tribes chose not to act for the following reasons:

Location: Tribes whose reservations weren't allotted, particularly those in the Southwest and California, have no need for the ILCA. For example, the Saginaw-Chippewa Tribe isn't concerned about fractionated heirship since their reservation only contains 20 parcels of allotted land. Of those, only 10 are in multiple ownership.

Resource-Rich Tribes: According to Jim Wolf, Chief Realty Officer, many tribes in the Portland area have other priorities. The Puyallup tribe is working on trade agreements with several Asian countries. The Quileute and the Makah are preoccupied with their fisheries. Because these tribes have sufficient resources, they see no need to acquire more land for now.

Small Reservations: Some tribes with very small reservations, particularly in the Sacramento area, are more interested in acquiring land

outside the reservation than in consolidating the few acres they already own.

Conflict Between Tribal Governments and their Members: This conflict, discussed earlier, is the most difficult problem to address. Many tribal members think escheat is synonymous with land consolidation, and therefore believe that any tribal activity on the ILCA will deprive them of their property. Although land consolidation does not have to involve escheat, several tribes have chosen not to act anyway for fear of stirring up this conflict.

According to Larry Morrin, tribal leaders in the Billings area have chosen not to pursue land consolidation because of this conflict. "Escheat is a hot issue in the Billings area, and tribal members are touchy about it."

Wayne Nordwall, a solicitor in the DOI's Phoenix office, believes "tribes don't want to alienate their membership by acting in these areas. Often there's no consensus within a tribe as to what to do. Members resent escheat because they see it as impinging on their rights."

With few exceptions, tribal officials were reluctant to discuss this conflict with an outsider. One exception was Mario Gonzales, tribal attorney for and member of the Ogala Sioux tribe: "I believe the ILCA has real merit, but because of pressure from members, the tribal council took the position that they were against the Act and escheat in particular. They just couldn't act on the ILCA because of this conflict. The real problem is that lots of members just don't understand the Act."

#### WHAT PREVENTS TRIBES FROM ACTING?

Funding: Many tribes claim that their inability to fund land acquisition is the barrier which prevents them from acting on the ILCA. Although Congress didn't provide an appropriation for the ILCA, the House and Senate Committee

staff did discuss the issue, according to Wayne Nordwell. In the end, the staff decided that federal funds were too scarce, particularly since OMB would object strenuously to an open-ended funding bill, and no one could accurately estimate how much the tribes would need.

Despite the denial of federal appropriations, insufficient funding prevented only one tribe I spoke to from acting--the Blackfeet tribe of Montana. Their income comes almost entirely from oil and gas sales, a poor source of revenue lately. Moreover, the tribe is currently repaying several loans from the BIA and the Farmer's Home Administration (FmHA).

Though the 98th Congress denied funding, other Congresses did provide money to tribes for land acquisition (see Figure 4). All the tribes I spoke to were aware of these programs, and had used at least one of them, except the Salt River Tribe. Nonetheless, these programs do not meet every important tribal need. First, the interest rate for FmHA and BIA loans is high. FmHA's interest rate is tied to the T-bill rate, which was prohibitively high during the early 1980s. BIA's interest rate varies, although the Blackfeet and Umatilla tribes borrowed money in FY 1985 at interest rates of 11.25% and 10.75%, respectively.

Second, FmHA loans require a tribe to use the land it acquires as collateral. Principal and interest payments are due regardless of whether or not the land is productive. If the land fails to produce adequate revenue and the tribe doesn't have an alternative source of income with which to repay the loan, the Federal Government takes the land. The Winnebago tribe is currently in this situation. This requirement (using the land as collateral) is why the Salt River tribe has avoided FmHA loans. Only one tribe I spoke to, the Ogala

FIGURE 4

FEDERAL FUNDING FOR LAND ACQUISITION

PROGRAM	AMOUNT AVAILABLE	DRAWBACKS
Indian Reorganization Act of 1934	\$2 million	No funding appropriated since FY 1950.
Farmer's Home Administration Loans	\$2 million (FY 1987)	Land acquired becomes collateral for the loan; if tribe becomes unable to repay loan, the Fed. Gov't. takes the land. Interest rate is tied to T-bill; tribes consider this too high.
BIA Revolving Fund Loans	\$50 million (FY 1974)	No appropriation since FY 1974; loans are limited to money in the fund. Only 10% of the loans have been for land acquisition since FY 1974.
Community Development Block Grants	\$27 million (FY 1988)	Land must be used for a housing or economic development project. Only 2-3% of the funding is used for land acquisition. Funding used primarily by tribes without land bases.
Annual Appropriations Bills	Amounts vary	Not a frequent occurrence. Amounts provided usually small. Almost always for a particular tribe to acquire a specific

Sioux, managed to obtain a waiver which allowed the tribe to commit only the income from the land as collateral.

Third, none of these programs provide money for tribes to purchase fractionated interests. These interests rarely produce much income. Therefore, tribes are reluctant to borrow money to purchase them without having a reliable alternative source of revenue with which to repay the loan. After borrowing \$1.3 million from the BIA to purchase fractionated interests, the Blackfeet tribe ran into trouble repaying the loan and has asked Congress' help re-structuring it. Private banks are reluctant to loan money to Indians to purchase interests or even entire parcels since they cannot foreclose on the land if the tribe defaults on the loan.

Inadequate funding for buying fractionated interests can increase an already existing tension between tribal governments and their members or create tension where none exists. Several tribes, including the Crow, stated that many of their members wanted to sell their interests to the tribe. Members would become frustrated and resentful when the tribe couldn't afford to buy them.

Even tribes with funding available to buy land face a real dilemma as to what kind to purchase. Should the tribe buy large, non-Indian owned parcels or should it buy fractionated interests from members? Fractionated interests are already in trust, but they are often unproductive. Non-Indian owned land is not in trust and is productive, but buying it doesn't help the fractionated heirship problem nor does it relieve a member of an interest he wants to sell. Even though members resent it, tribes usual purchase whole parcels. Tribes with funds available may also face competing demands on them. For example, the Standing Rock Sioux tribe has difficulty allotting funds for land

consolidation since members have other priorities, such as education, all of which compete for relatively few dollars (Calvin Jones).

Tribal Leadership: The three most important new authorities the ILCA provides tribes--section 204 (land consolidation plans), section 205 (tribal inheritance codes) and section 207 (alternatives to escheat)--all require coordination and leadership by the tribe's governing body. Drafting these codes is the easy part since most tribes have attorneys, on or near the reservation or in Washington, D.C., who are capable of producing them. Those tribes that have successfully enacted either a tribal inheritance code or a land consolidation plan have had strong, well-organized tribal leaders.

For example, the Sisseton-Wahpeton tribe convinced Congress in 1984 to enact its tribal inheritance and escheat codes into federal law, a remarkable feat for several reasons. First, both codes were much stricter than those in the ILCA. The inheritance code limits inheritance to only enrolled tribal members, and escheat applies to parcels of 2.5 acres or less, regardless of their value. Second, because their codes are now federal law, future tribal governments and members will have a difficult, if not impossible, time changing them. Finally, Congress enacted the bill, despite BIA's protest that the tribe should adopt them through the ILCA. Both Bert Hirsch, the tribe's attorney, and Jerry Flute, the former chairman, credit their success to the series of public forums, held by the tribal government to educate members and allow them to comment on the bill, and to strong tribal leadership.

Coordination: According to David Tovey, Director of Economic Development, lack of coordination, brought about by understaffing in the tribal office, has prevented the Umatilla tribe from acting on the ILCA. The tribe has committed funds by tribal resolution and has additional money from

settlement cases set aside for land acquisition. "The problem isn't money. It's more a problem with coordination. We need a coordination plan."

Tribal constitutions: Some tribal constitutions prohibit tribal governments involvement with allotted lands (e.g., Cheyenne River Sioux). Cheyenne River is not attempting to change its constitution and was unwilling to say why. More than likely, a constitutional prohibition masks the real barrier, since tribes whose members want them to pursue the ILCA can easily change their constitutions, just as the Salt River tribe is currently doing.

Frustration: Some tribes have chosen not to act out of frustration over the magnitude of the fractionated heirship problem and its seeming insolubility. For example, land acquisition and consolidation have always been a top priority for the Quinault tribe, particularly since its reservation was one of the few that was allotted entirely. The forest industry lobbied hard for total allotment since the reservation is almost all timber land. Before allotment, the tribe owned 200,000 acres. In 1967, eighty years after the enactment of the Dawes Act, the tribe owned 1,900 acres. Today, the tribe owns 10,000 acres.

Joe DeLaCruz, President of the Quinault Business Council claims his tribe hasn't acted on the ILCA because "the Act doesn't even begin to address the problem; it just transfers the headache from BIA and the owners of the fractionated interests to the tribe." The tribe doesn't like to buy fractionated interests because it can't do anything with the land. "It's difficult to use the land because there are so many owners. It also doesn't produce much, if any, income." Members are reluctant to sell their interests since many don't live on the reservation. Therefore, they view their interests as the only tie they have to it. The tribe is also unhappy about

the incremental solution offered by the ILCA. Instead, the tribe wants the Federal Government to buy all the available fractionated interests since "we've already spent an enormous amount of time and money trying to correct the Government's mistake (the Dawes Act)."

#### SUMMARY AND IMPLICATIONS

Each tribal response to the ILCA requires a different approach by First Nations (FNFP) and in some cases, Congress. Tribes that have chosen not to act because they have relatively unallotted reservations, because they believe they own enough land, or because they have small reservations they want to enlarge not consolidate don't need help right now. Tribes with unallotted reservations should never have trouble with land consolidation. Tribes that believe they own enough land tend to have money and (usually) a strong tribal government and are therefore also unlikely to need help in the future. Tribes with small reservations that decide to address fractionated heirship in the future will find the recommendations proposed below helpful.

The tribes that will find the recommendations below the most useful are those with an internal conflict between the tribal government and the members, those with inadequate funds, those whose tribal leadership is weak or unorganized, and those who have decided not to act out of frustration.

The recommendations are organized loosely along a spectrum, from those involving no outside intervention to those requiring active Federal Government assistance. They are based on the following assumptions: 1) the concept of the reservation should be preserved; 2) the trustee role of the Secretary should be maintained with some modifications; and 3) at the same time, tribes should be as active and independent as possible in determining their own course of action.

## SECTION V: RECOMMENDATIONS

Tribes can take several approaches in dealing with the problems created by allotment, many of which require no federal funding. Money is not the most important need of the majority of tribes I spoke to, although it is what tribes request most frequently. Many tribes that complain about inadequate funds could easily pursue other equally effective strategies while they attempt to obtain more funding. In fact, when tribes complain about a lack of money, they're usually unhappy that they can't buy land more quickly, not that they can't purchase any at all. Federal funding will also be difficult to obtain given the current Administration and the size of the deficit. Therefore, FNFP should concentrate on pursuing Recommendations #1-#10 which require little or no money, but will have a profound impact on the problems created by allotment. Recommendation #11, which proposes that GAO or CRS analyze the federal costs incurred because of fractionated heirship, should also be pursued early on. Once the study is finished, FNFP can use the findings to make a case for the savings obtainable if the Federal Government provides low-interest loans for tribes to purchase fractionated interests.

Tribes whose only barrier is inadequate funds can go directly to Congress for a special appropriation (tribes have done this in the past; the Quinault tribe received \$1 million in the FY 1988 Interior Appropriations bill for land acquisition). Tribes with other problems can pursue less expensive strategies and borrow from existing federal programs when necessary. Any tribe that assumes responsibility from the BIA for leasing its allotted land (Recommendation #10) should increase its revenue, assuming tribal charges of BIA's ineptitude and laziness are true.

**RECOMMENDATION #1: Hold public forums on fractionated heirship.**

FNFP should encourage tribal governments to hold public forums on fractionated heirship and how to deal with it (e.g., tribal inheritance codes). Both tribal attorney Bert Hirsch and former chairman Jerry Flute credit the successful enactment of the Sisseton-Wahpeton's tribal inheritance code and escheat bill to the hearings they held in every district on the reservation. The forums allowed tribal members to express their concerns and propose changes to the bill. They also calmed members' fears that the tribe was trying to take their land. By involving as many members as possible in the debate, the tribal government was able to take action, even though the Sisseton-Wahpeton reservation has one of the worst fractionated heirship problems in the country.

Tribal members often equate escheat with action on land consolidation. Therefore, any talk of enacting a tribal inheritance code makes them nervous. Public forums allow a tribe to educate its members and deal with any internal conflict between the government and the members without having to broadcast the conflict to the outside world. FNFP could work either with tribal attorneys or tribal governments to arrange these forums, using Sisseton-Wahpeton as a model. Public forums will be the most successful for tribes with strong, persuasive leaders that are capable of educating and convincing members to support the legislation.

Tribes whose members don't trust the tribal government may find the forums unsuccessful. Although Recommendation #2 will improve the fractionated heirship problem for all tribes, it is the only recommendation proposed for tribes with severe internal conflict between members and the tribal government.

**RECOMMENDATION #2:** Encourage owners of fractionated interests to write wills. FNFP should urge tribal governments (or an outside organization like BIA for tribes whose members don't trust their government) to encourage members that own fractionated interests to write wills. Will-writing dramatically decreases the number of owners per parcel over time without aggravating any internal conflict since the tribal government is neither taking the interest itself nor dictating who should inherit it.

Some tribal governments will refuse to encourage will-writing since it can conflict with tribal practices (members may resist for the same reason, even if the tribal government is willing to encourage it). For example, will-writing on the Crow reservation isn't common because "members don't like to deal with the hereafter; they want to deal with the here and now. Our tradition says that you don't talk or think about the afterlife" (Barney Old Coyote).

Will-writing has increased since the enactment of the ILCA. Members have realized that if they fail to leave a will, any minute interests they own will escheat to the tribe. Keith Burroughs, an administrative law judge in the Billings area said: "We now see wills that say: 'I'm leaving my land interests to nephew Joe because he already owns an interest in the same parcel'. Clearly, this illustrates the importance and the impact of the ILCA."

**RECOMMENDATION #3:** Prepare a handbook explaining BIA's will-writing process. FNFP should draft a handbook on estate planning and will-writing which explains BIA's will-writing process. Although many tribes already encourage their members to write wills, they could be more effective if they better understood BIA's process. A handbook would be particularly helpful for

tribes, like the Winnebago, who want to encourage will-writing but are uncertain how to do so.

**RECOMMENDATION #4:** Encourage BIA to create a task force on estate-planning and probate.

FNFP should encourage BIA to create its proposed task force on estate-planning and probate. Many BIA field employees have little or no understanding of will-writing practices, and few offices have attorneys working in the real estate section. As Howard Piepenbrink stated: "many of our people out there don't have the requisite skills. That's why I want to create this estate-planning and probate task force--to improve the will-drafting ability of BIA personnel."

Not all BIA area offices lack will-writing expertise. The Portland area office has provided workshops on will-writing to all eleven agencies in the area and to all interested tribes and members. According to Jim Wolf, "we've been encouraging will-writing as an unwritten policy. It helps us as much as the tribe." David Tovey of the Umatilla tribe agreed that the area office has encouraged will-writing on the reservation. "People in the office are very willing to sit down with a member and work out a will. What makes it easier for many members is that most of the office staff are members of the tribe." Although Howard Piepenbrink is probably aware of which area offices actively encourage will-writing, FNFP should encourage him to consider whether the expertise and approach already in practice in the Portland and Billings area offices could serve as a model for other offices.

**RECOMMENDATION #5:** Hold a congressional hearing on creative alternatives to escheat.

FNFP should encourage either the House Interior or Senate Indian Affairs Committee to hold a hearing on creative alternatives to escheat and invite

tribes with innovative ideas and approaches. The Blackfeet and Rosebud Sioux, among others, have developed such alternatives, but they have no way to share their ideas with other tribes. If the Committees are reluctant, FNFP could use either a Justice Department opinion that escheat is unconstitutional or a threat by a tribe to file suit over escheat (if Justice opines that it is constitutional) to persuade them.

The following tribes are exploring or have implemented creative ideas and should be included in any such hearing:

Cheyenne River Sioux has a program which allows members to exchange interests with each other and the tribal government in order to consolidate their land.

Blackfeet Tribe proposed two alternatives to escheat during the 1984 hearing on the ILCA: 1) a computerized land exchange, and 2) family corporations.

Under the second alternative, the tribe would encourage families to set up a corporation to manage and lease all their interests, thereby consolidating these interests in one entity.

Rosebud Sioux created the Tribal Land Enterprise (TLE) in 1943. TLE, which operates like a corporation, leases and manages the tribe's land. With the revenue it earns from leasing, TLE buys additional land, both fractionated interests and entire parcels, thereby avoiding the need to borrow.

To reduce fractionated heirship, TLE buys interests from members in return for "certificates of interest", which members can either cash or trade for a "TLE assignment". A TLE assignment entitles a member to an integrated block of land equal in size to the acreage of the individual interests he sold to TLE. At death, the owner can only designate one beneficiary of his assignment.

**RECOMMENDATION #6:** Draft escheat codes incorporating the ideas discussed at the hearing.

FNFP should help tribes draft escheat codes incorporating the ideas discussed at the congressional hearing. Tribes already have the authority under Section 207 of the ILCA to draft alternatives to escheat, although no tribe has exercised it yet.

**RECOMMENDATION #7:** Allow other owners to have the first right to purchase fractionated interests.

FNFP should encourage tribes to enact or amend inheritance codes allowing owners of interests in a particular parcel to have the first right of purchase of escheatable interests when one of the other owners dies. This avoids escheat (and the conflict it creates), allows the tribe to avoid purchasing fractionated interests (which rarely produce much income) and still prevents tribal land from becoming more fractionated. The Umatilla tribe's inheritance code gives first right of purchase to members and second right to the tribe.

**RECOMMENDATION #8:** Require BIA to produce regulations for the ILCA.

FNFP should urge either the Senate Indian Affairs or the House Interior Committee to include language in the Interior Appropriations bill directing the BIA to produce regulations for the ILCA by a certain point in time. Regulations are important for two reasons: first, according to Stan Webb, BIA field personnel would take the ILCA more seriously and demand more training if the Act had formal regulations. Second, BIA currently takes one to two months to evaluate a proposed land consolidation plan or tribal inheritance code. With firm guidelines, both the BIA field and Washington, D.C. staffs could analyze and approve these plans more quickly.

Unfortunately, BIA is notoriously slow at issuing regulations. Congress has also reduced the Bureau's funding and personnel in recent years. As a

result, BIA staff may be unable to produce the regulations in a timely manner. Therefore, FNFP should not invest all its energy in this recommendation.

**RECOMMENDATION #9:** Draft a model land consolidation plan and tribal inheritance code.

FNFP should ask the House Interior or Senate Indian Affairs Committee to set-aside money in the Interior Appropriations bill for BIA to contract out the drafting of a model land consolidation plan and tribal inheritance code. FNFP may also want to recommend which Indian organization(s) should receive the contract since it is critically important that tribes not feel as though the model codes are the answer. Instead, a model code should suggest appropriate language, explain what the language is attempting to accomplish, and discuss alternatives. BIA has expressed interest in producing these codes, but lacks the personnel, funding and expertise necessary.

Providing tribes with model codes will allow them to be less dependent on BIA for information and assistance when enacting their own codes. Moreover, a similar format for inheritance codes in particular will allow administrative law judges (ALJs) to understand them more easily and more quickly. ALJs opposed the provision in the ILCA allowing tribes to draft their own inheritance codes since they must already learn the probate laws for at least four states. The more similar the format, even if the provisions differ from tribe to tribe, the more responsive and accepting the ALJs will be.

**RECOMMENDATION #10:** Encourage tribes to assume responsibility for leasing their allotted lands.

FNFP should encourage tribes to become responsible for leasing their allotted lands. Tribes already have the necessary authority under P.L. 93-638, and several tribes, including Salt River, have already obtained a 638 contract.

The tribe determines the rental, decides who to lease the land to and collects the necessary signatures. BIA retains final approval. Any tribes whose land was leased at below market rates or whose land was left idle by the BIA should realize an increase in revenue if they begin leasing the land themselves.

There are two problems with this recommendation. First, tribes have had trouble getting adequate reimbursement from BIA for administrative expenses under 638. And second, according to Wayne Nordwall, tribes may need access to BIA's database for parcels with a large number of owners. This could create privacy act problems if members object to the tribe having this information.

**RECOMMENDATION #11:** GAO or CRS should do a study on the federal costs associated with fractionated heirship.

FNFP should propose that GAO or CRS produce a study on the costs of administering fractionated interests which details exactly what the Federal Government spends to manage allotted land, to track down heirs, to probate wills, etc.

BIA has repeatedly contended that the Federal Government would save an increasing amount of money on administrative costs over time if fractionated heirship could be reduced or eliminated. By documenting these savings, FNFP can build an effective case for a federally-funded low-interest loan program (discussed below). The biggest problem will be obtaining the necessary information from BIA's agency offices since these offices frequently complain that they are understaffed and already overloaded with projects.

**RECOMMENDATION #12:** Provide low-interest loans for tribes to purchase fractionated interests.

FNFP should urge the House Interior or Senate Indian Affairs Committee to provide a low-interest loan program for tribes to purchase fractionated interests from their members.

Currently, the Federal Government provides only limited funding to tribes to purchase these interests. Moreover, tribes are reluctant to borrow what money is available since the interest rate is high, and fractionated interests often fail to produce much revenue. The tribe also comes under pressure from members and non-Indians who want the tribe to purchase entire parcels, a tempting proposition since these parcels produce far more revenue than the interests do. Tribes will have an easier time buying fractionated interests if they can borrow money solely for this purpose.

Congress may be reluctant to appropriate the funds necessary for a new loan program given the current economic and budgetary environment. In addition, despite complaints by BIA and Congress about how expensive administrative costs are for fractionated heirship, politically it's much easier to continue to pay these costs, which are spread out over time, than it is to appropriate money upfront for a program whose savings accrue over time. FNFP can fight this by using the findings of the study discussed above.

To build the strongest case possible, FNFP should also use the experiences of tribes who have been actively purchasing fractionated interests as evidence of the money tribes and the Federal Government can save by solving this problem. The Yakima, for example, has been actively buying interests for approximately thirty years. According to a tribal representative, the tribe's ability to lease allotted lands improved markedly as the number of owners declined. Other tribes, such as the Cheyenne River Sioux, should have similar experiences to report.

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8. Ibid, p. 11.
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APPENDIX I -- TRIBES BY BIA AREA OFFICE

ABERDEEN AREA

Sioux Tribe, Cheyenne River Reservation, South Dakota  
Cgala Sioux Tribe, Pine Ridge Reservation, South Dakota  
Rosebud Sioux Tribe, Rosebud Reservation, South Dakota  
Sisseton-Wahpeton Tribe, Lake Traverse Reservation, North and South Dakota  
Standing Rock Sioux Tribe, Standing Rock Reservation, North and South Dakota  
Winnebago Tribe, Winnebago Reservation, Nebraska

BILLINGS AREA

Blackfeet Tribe, Blackfeet Reservation, Montana  
Crow Tribe, Crow Reservation, Montana

MINNEAPOLIS AREA

Saginaw-Chippewa Tribe, Isabella Reservation, Michigan  
Chippewa Tribe, Lac Courte Oreilles Reservation, Wisconsin

PHOENIX AREA

Salt River Tribe, Salt River Reservation, Arizona

PORTLAND AREA

Confederated Salish and Kootenai Tribes, Flathead Reservation, Montana  
Quinault Tribe, Quinault Reservation, Washington  
Umatilla Tribe, Umatilla Reservation, Oregon  
Yakima Tribe, Yakima Reservation, Washington

## APPENDIX II -- DEFINITIONS

**Condemn**--power of an Indian tribe to take land or interests in land for a public purpose.

**Decedent**--a deceased person, chiefly used in law.

**Devise**--act of giving or disposing of real property by will.

**Devisee**--person to whom lands are given by will.

**Encumbrances**--impediment; claim (e.g., a mortgage) against a property. contracts, mortgages, liens.

**Escheat**--the transferring of land to a tribe without payment after the owner's death.

**Fee Land**--land held by owner without restrictions prohibiting sale or lease. Unlike trust or restricted land, Indians pay state and federal taxes on fee land. However, in many cases, courts have ruled that if fee land is within the reservation, the owner doesn't have to pay taxes.

**Fractionation**--to divide or break up; to separate into different portions.

**Intestate**--having made no valid will; not disposed of by will

**Life Estate**--the ability to use a tract of land until your death, even though title is held by someone else. For example, an Indian with a non-member spouse might will his property to his children and bestow a "life estate" on his wife, entitling her to live on the property until her death.

**Trust versus Restricted Land**--

1. trust land is land to which the U.S. holds legal title and tribes hold beneficial title; both the tribe and its members can occupy and use the land and benefit from any income it may produce, but they do not own it, since the deed reads "property of the U.S.". In other words, the U.S. government holds the land in trust for the tribe.

2. restricted land is land to which the tribe holds legal title to the land, but the government can place restrictions on what the tribe can do with the land. For example, the tribe must have the consent of the Secretary of the Interior to sell or exchange a piece of land. The deed is in the tribe's name however, and they have true ownership of the property and extant mineral, water and other property rights. In other words, tribe owns both beneficial and legal title, but the government can place restrictions on the title.

With both trust and restricted land, the tribe pays no state or federal taxes.

APPENDIX III

TRIBES WITH SPECIAL LEGISLATION AND DATE OF ENACTMENT

TRIBAL INHERITANCE CODE LEGISLATION

Yakima -- 1946

Nez Perce -- 1972

Warm Springs -- 1972

Umatilla -- 1978

Standing Rock Sioux -- 1980

Devil's Lake Sioux -- 1982

Sisseton-Wahpeton Sioux -- 1984

LAND CONSOLIDATION LEGISLATION

Yakima -- 1955

Spokane -- 1968

Swinomish -- 1968

Sisseton-Wahpeton Sioux -- 1974

Devil's Lake Sioux -- 1982

APPENDIX IV -- INTERVIEWS

TRIBAL MEMBERS AND ATTORNEYS:

Blackfeet--Don Dubray, Director of Land Management  
Daniel Press, Attorney (Heron & Burchette)

Cheyenne River--Wayne Ducheneaux, Chairman

Chippewa (Lac Courte Oreilles)--Bill Codotte, Executive Director  
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Crow--Michael Doss, Delegate  
Barney Old Coyote, Tribal Manager

Ogala Sioux--Carol Barbero, Attorney (Hobbs, Straus, Dean & Wilder)  
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Quinault--Joe DeLaCruz, President

Rosebud Sioux--Ben Black Bear, Tribal Land Enterprise  
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Saginaw-Chippewa--Richard Tillman, Planner  
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Salt River--Richard Wilks, Attorney (Shea & Wilks)

Sisseton-Wahpeton--Jerry Flute, Former Chairman  
Bert Hirsch, Attorney

Standing Rock Sioux--Mary Barney, Attorney (Sonosky & Chambers)  
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