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On the cover: Much of twentieth-century American Indian history revolves around issues of allotment policy, landownership, and rights of heirs. Four years after this map of the Rosebud Indian Reservation was published, eastern portions of the reservation were opened to non-Indian settlement.

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The Fractionated Estate: The Problem of American Indian Heirship

MICHAEL L. LAWSON

The most problematic legacy of federal Indian land policies of the nineteenth century has been their peculiar rules and policies regarding inheritance. Because physical partitioning of land allotments upon the death of an allottee was deemed to be inconsistent with the policy goal of establishing individual farms and ranches on reservations, allotted estates were merely divided on paper and continued in federal trust for the benefit of heirs, or they were sold out of trust, almost always to non-Indians, with proceeds being distributed among the decedent's family. These probate practices led eventually to the disuse or alienation of millions of acres of Indian land. The exponential growth of the so-called undivided interests (or, more accurately, unpartitioned interests) in trust allotments rapidly made it infeasible for most heirs to make practical use of the land themselves. They soon found they could only derive economic benefit from their inherited interests by agreeing, in unanimity with all other heirs to a given allotment, to lease out the land and/or its resources (most often, again, to non-Indians). Thus, allotment and its escalating heirship problem not only reduced thousands of tribal members to the status of petty landlords but created as well an administrative conundrum for the federal trustee that may well be without parallel in all the vastness of this nation's bureaucracy.

The federal government recognized Indian heirship as a growing administrative problem even within the first generation following passage of the General Allotment Act of 1887. In 1910, Congress found

A summary of this essay was originally presented in slightly different form at the annual meeting of the American Society for Ethnohistory in Toronto on 3 November 1990.

it necessary to authorize more clearly defined procedures for the determination of heirs and the administration of trust estates, and in 1934, it finally repealed the allotment policy and appropriated funds for tribal land consolidation. Yet, the government provided little else in the way of general mitigation of the heirship problem prior to enactment of the Indian Land Consolidation Act of 1983 (ILCA). The most controversial aspect of this statute, passed with only token tribal consultation, provided that certain minimal interests of Indians who died intestate (without a will) would revert to the ownership of the tribe having jurisdiction over the land, through the legal procedure known as escheat, rather than be divided further among heirs. Congress amended the ILCA in 1984, and the United States Supreme Court ruled in its 1987 decision in *Hodel v. Irving*, a case originating in South Dakota, that the escheat provision of the original statute was unconstitutional.[1] The purpose of this article is to provide a summary history of Indian heirship and to offer at least an interim analysis of the legislation that now represents the federal government's primary solution to this long-standing problem.

Land has been the primary source of conflict and confrontation between American Indians and the Euro-Americans whose culture gained dominance over this nation. One of the most easily discernible differences between these peoples and their respective cultures has been in their concepts of landownership. The American Indians' long tradition of communal use of land and resources, with all of its interwoven cultural and religious significance, proved to be incompatible with the European notions of "civilization" held by those of the dominant culture who formulated federal Indian policy during the latter half of the nineteenth century. Despite the rapid rise of industrialism in the post-Civil War era, the agrarian ideal, as personified by the yeoman farmer, remained deeply ingrained in the national psyche of the United States. Just as the equally strong European notion that no people should hold more land than they could make practical use of led to the practice of extracting huge land cessions from America's native tribes,[2] the universal belief in the supremacy of private landownership led to experiments

1. U.S., *Statutes at Large*, vol. 24, p. 388, Act of 8 February 1887, vol. 36, p. 855, Act of 25 June 1910, vol. 48, p. 984, Act of 18 June 1934, vol. 96, p. 2515, Act of 12 January 1983, and vol. 98, p. 3171, Act of 30 October 1984; U.S., Supreme Court, *Hodel v. Irving*, 18 May 1987, *Supreme Court Reporter* 107 (1987): 2076-93.

2. For a further explanation of this notion, which is attributed to an hypothesis of the philosopher Emer de Vattel, see Herbert T. Hoover, "The Sioux Agreement of 1889 and Its Aftermath," *South Dakota History* 19 (Spring 1989): 73-74.

This Bureau of Indian Affairs photograph of Sioux Indians from the Rosebud reservation and non-Indian officials emphasizes the United States policy of imposing European landownership patterns on the natives of the American west.

in granting separate plots of tribal land to individual Indian families for the purpose of establishing agricultural homesteads.[3]

Although the allotment of Indian lands had been tried as early as 1633, these model experiments in social engineering reached their apex as an expression of national policy with the passage in 1887 of the General Allotment Act. This legislation also represented a culmination of the assimilationist efforts of the Protestant Christian reformers who dominated Indian policy making during that era, and it is often called the Dawes Act, after its principal architect, Senator Henry L. Dawes of Massachusetts, or merely the Severalty Act. It provided, in effect, that tribal members would be allotted individual tracts of land either within their tribe's common lands or reserved areas or within the public domain lands and would thereupon become citizens of the United States. The heads of families were entitled to allotments of one hundred sixty acres, while single persons over eighteen years of age and orphans under eighteen could

3. Markku Henriksson, *The Indian on Capitol Hill: Indian Legislation and the United States Congress, 1862-1907* (Helsinki: Finnish Historical Society, 1988), pp. 165-67.

qualify for forty-acre allotments. The reservation lands remaining after all eligible tribal members received allotments were to be opened up for non-Indian settlement, at least initially with the consent of the tribe, rather than reserved for future generations of Indian families.[4]

In order to ease the Indians' transition into all the rights, privileges, and responsibilities of propertied citizenship, the General Allotment Act provided that title to these allotments would be held in trust by the United States for at least twenty-five years, during which time the land could not be sold, leased, taxed, mortgaged, devised by will, or otherwise encumbered without the consent of the federal government. It was hoped that by the end of this probationary period, the individual allottee, who would then be eligible to receive the usual fee simple title to the land, would have learned how to make productive use of the acreage, to know its market value, and to be ready to assume full responsibility for it, including the payment of taxes. If this was found not to be the case, the law gave the president discretionary power to extend the trust period.[5]

The General Allotment Act was not based on any familiarity with the tribes and their cultures or on an investigation of actual conditions. It rested solely on a theoretical belief in the inferiority of common landownership. The suitability of the Indians and their lands and environments for agriculture was never questioned. The legislation was enacted because of the support it drew from two rather polarized interest groups: eastern theoreticians and humanitarians apparently sincere in their motives to integrate tribal members into the mainstream of the dominant American culture; and land-hungry frontiersmen who saw allotment as an opportunity to acquire more land inexpensively, through the purchase of either the

4. J. P. Kinney, *A Continent Lost—A Civilization Won: Indian Land Tenure in America* (Baltimore: Johns Hopkins Press, 1937), p. 82; *Statutes at Large*, vol. 24, pp. 388-91. For a detailed description and analysis of the General Allotment Act and the reform environment in which it was enacted, see Henry E. Fritz, *The Movement for Indian Assimilation, 1860-1890* (Philadelphia: University of Pennsylvania Press, 1963); Robert Winston Mardock, *The Reformers and the American Indian* (Columbia: University of Missouri Press, 1971); Francis Paul Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976), and *The Great Father: The United States Government and the American Indians*, 2 vols. (Lincoln: University of Nebraska Press, 1984), 2:659-86; Wilcomb E. Washburn, *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887* (Philadelphia: J. P. Lippincott Co., 1975); D. S. Otis, *The Dawes Act and the Allotment of Indian Lands*, ed. Francis Paul Prucha (Norman: University of Oklahoma Press, 1973); and Loring Benson Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy* (1942; reprint ed., Lincoln: University of Nebraska Press, 1975).

5. *Statutes at Large*, vol. 24, pp. 388-91.

"surplus" lands that would be left after the reservations were allotted or the allotments themselves once their restrictions were removed.[6]

The legislators who supported the General Allotment Act admitted that the government's earlier experiments in severalty, which had resulted in the issuance of some twelve thousand allotments, had been fraught with failure because most of the land had passed quickly into the hands of white traders and land companies. These experiments had been initiated in a number of early removal treaties, such as those negotiated with the Cherokee, Chickasaw, and Potawatomi tribes between 1816 and 1818. These treaties allowed certain individual tribal members to select tracts of land within the tribal territory ceded to the United States and remain there after the rest of the tribe was removed to the West. By mid-century, allotment had become part of the tactical arsenal aimed at terminating tribal existence. By accepting fee simple title to lands (with or without restrictions against alienation) and full national citizenship, allottees under the provisions of treaties such as those ratified in the spring of 1854 with the Oto, Missouri, Omaha, and Shawnee tribes were separated from both the tribal estate and their legal status as tribal Indians.[7]

The proponents of the General Allotment Act blamed these earlier failures on the alienability of the land titles and asserted that the results would differ substantially if the lands were protected more strongly from alienation. The practice of allotting tribal land by conveyance to the United States to be held in trust for individual Indian allottees and beneficiaries began in 1882 and, with the passage of the General Allotment Act, became the primary form of tenure for allotments.[8]

The General Allotment Act did not change or amend previous treaties or agreements and did not apply to all reservations (certain

6. Henriksson, *Indian on Capitol Hill*, pp. 170, 177.

7. *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Ed.* (Charlottesville, Va.: Michie, Bobbs-Merrill, 1982), pp. 130, 616; Stephen A. Langone, "The Heirship Land Problem and its Effect on the Indian, the Tribe, and Effective Utilization," in U.S., Congress, Joint Economic Committee, Subcommittee on Economy in Government, *Toward Economic Development for Native American Communities, a Compendium of Papers*, Joint Committee Print, vol. 2 (Washington, D.C.: Government Printing Office, 1969), p. 522; *Statutes at Large*, vol. 7, p. 150, Treaty with the Chickasaws (20 Sept. 1816), p. 156, Treaty with the Cherokees (8 July 1817), p. 185, Treaty with the Potawatamies (2 Oct. 1818), and vol. 10, p. 1038, Treaty with the Confederated Ottoes and Missourias, (15 Mar. 1854), p. 1043, Treaty with the Omahas (16 Mar. 1854), p. 1053, Treaty with the Shawnees (10 May 1854).

8. Otis, *Dawes Act*, pp. 50-51; Prucha, *American Indian Policy in Crisis*, pp. 241-44; Priest, *Uncle Sam's Stepchildren*, pp. 178-79; *Statutes at Large*, vol. 22, p. 341, Act of 7 August 1882; *Cohen's Handbook of Federal Indian Law*, p. 616.

tribes in Oklahoma and New York and what was known as the Sioux Strip in Nebraska were exempted). Neither was it sufficient by itself to allot all Indian lands. Additional legislation was needed to apply its provisions to specific reservations and individuals. For example, legislation in 1888 enabled some residents of the Lake Traverse reservation of the Sisseton-Wahpeton Sioux in Dakota Territory to become the first in the nation to receive allotments under provisions of the general act.[9]

The controversial act of 2 March 1889, which partitioned the Great Sioux Reservation into six separate tribal reserves in North and South Dakota and eventually opened nine million acres to white settlement, also extended the 1887 allotment provisions to the Lakota people but doubled the acreage to three hundred twenty acres for each head of family. Previously, a limited number of Sioux had established family farmsteads under provisions of Article 6 of the Fort Laramie Treaty of 1868. During the legislative debate over partitioning, Congressman Thomas G. Skinner of North Carolina calculated that if the Great Sioux Reservation were divided equally among the approximately twenty-five thousand tribal members, each man, woman, and child would receive an allotment of around eight hundred eighty acres. Even after the partition, an equal division would have resulted in allotments of approximately five hundred acres.[10]

In 1902, a joint resolution in Congress imposed the provisions of the General Allotment Act on all allotments except those in Oklahoma. The general statute of 1887 and subsequent enabling legislation provided that if an allottee died while the property was still in federal trust status, the estate would be divided among heirs according to the laws of descent and partition in the state or territory in which the land was located. However, state courts were precluded from having any probate jurisdiction over these allotments. The secretary of the interior assumed the power to determine heirs, and federal district courts also exercised jurisdiction over allotment inheritance cases. Tribal customs for settling such matters involving property were ignored, although later statutes applied tribal law to certain heirship determinations. The act of 28 February 1891, for example, provided for the legitimization of the children of parents married according to Indian custom and declared children born out of wedlock to be the legitimate issue of their fathers. Although this statute was silent regarding the rights of illegitimate children to inherit from their mothers, the law has been interpreted as meaning that this kind of inheritance would be governed by local statutes.[11]

9. Henriksson, *Indian on Capitol Hill*, pp. 173, 178; Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming*, Contributions in Economics and Economic History, no. 36 (Westport, Conn.: Greenwood Press, 1981), p. 64; Stanley Norman Murray, "A Study of Indian Land Relations as Illustrated through the History of the Lake Traverse Reservation Sioux" (M.S. thesis, University of Wisconsin, 1953), p. 187; *Statutes at Large*, vol. 25, p. 611, Act of 19 October 1888.

10. *Statutes at Large*, vol. 15, p. 637, Treaty with the Sioux Indians (29 Apr. 1868), and vol. 25, p. 890, Act of 2 March 1889; Henriksson, *Indian on Capitol Hill*, p. 183.

In the tradition of Anglo-Saxon law, the probating of an estate was usually resolved either by dividing property physically among heirs, so that each parcel then became a separate estate, or by selling the property and dividing the proceeds, all in accordance with the local laws of succession or the instructions of the decedent's will. The restrictive provisions and agrarian considerations on which the federal allotment policy was built, however, combined to create a much more complex situation for the probating of Indian trust estates. Those who implemented early probate decisions determined that physical partitioning was impracticable because it placed the estates in conflict with the goals of the allotment policy. Indians commonly had large families, and decision makers concluded that a subdivision of the allotted tracts would render them inefficient as practical agricultural units, either for the heirs or for the non-Indians who might come to use or purchase the property in the future. Instead, it was decided that the inherited interests in the allotments would merely be divided on paper and continued in trust for the heirs, who would then be placed in a position similar to tenants-in-common. Unlike heirs who inherited interests in fee-simple lands, the beneficiaries of Indian trust land did not possess the right to file suit for a portion of an estate.[12]

The long-term effect of these peculiar probate policies has been the progressive fractionalization of those estates for which the initial federal trust period was extended. During the more than ninety years between the General Allotment Act and the Indian Land Consolidation Act, most of the original allotments were divided numerous times on paper, the equities grew smaller proportionately

11. *Statutes at Large*, vol. 32, p. 744, Joint Resolution 31 of 19 June 1902, and vol. 26, p. 794, Act of 28 February 1891; U.S., Department of the Interior, Office of Hearings and Appeals, *Digest of Federal Indian Probate Law*, 1 Jan. 1972, p. 17; *Cohen's Handbook of Federal Indian Law*, pp. 633-34, 634n.15.

12. U.S., Congress, House, Committee on Interior and Insular Affairs, *Indian Heirship Land Study: Analysis of Indian Opinion as Expressed in Questionnaires*, Committee Print, no. 27, 2 vols., 86th Cong., 2d sess., Dec. 1960 (Washington, D.C.: Government Printing Office, 1961), 1:1; Langone, "Heirship Land Problem," p. 525; Burt Edward Powell, "Land Tenure on Northern Plains Indian Reservations" (Ph.D. diss., Duke University, 1975), p. 338.

as the number of heirs increased, and individual tribal members, many of whom had no land for their own use, accumulated minimal interests in several scattered estates, sometimes within a number of separate reservations. This heirship problem mushroomed to the point where thousands of Indians were helpless to make effective use of their inherited interests. Thus it was that allotment as a program to eradicate communal land holdings succeeded, ironically, only in creating a bizarre and much less efficient form of common landownership.

The drafters of the General Allotment Act apparently gave little thought to the specific, practical problems of inheritance or generally to the rights and needs of married women or future generations of tribal members. So quickly did both the early allottees and the Indian agents in the field find the general allotment policies to be deficient that Congress was compelled within just four years to begin its nearly half-century effort to modify the original provisions.

By providing allotments of one hundred sixty acres to heads of households and forty acres to minors, the allotment act failed to provide married women with separate rights to land. An Indian woman turned out of her house by her husband, for example, was not entitled to an allotment of her own. Those critical of this omission, including anthropologist Alice Fletcher, demanded the equalization of allotments to men, women, and children, arguing that the young and able-bodied who received only forty acres should not have less land than the old and infirm. In response, Congress enacted an amendatory statute in 1891 that provided entitlement for allotments of at least eighty acres of agricultural land and one hundred sixty acres of grazing land to each Indian.[13]

The policy of selling the reservation lands that remained after allotment ignored the resource needs of future tribal members. Many tribes readily agreed to sell their surplus lands, and many such agreements were approved by Congress. The process was hastened after the United States Supreme Court ruled in the 1903 case of *Lone Wolf* v. *Hitchcock* that Congress possessed the power to dispose of Indian lands without tribal consent. In 1904, the pattern for nonconsent sales was subsequently set through legislation that opened up four hundred sixteen thousand acres of the Rosebud Sioux Reservation in South Dakota. By 1934, some sixty million acres of Indian land had been liquidated in this manner; most of it at the price

13. *Cohen's Handbook of Federal Indian Law*, p. 133; Prucha, *American Indian Policy in Crisis*, p. 257, and *Great Father*, 2:668n; *Statutes at Large*, vol. 26, p. 794, Act of 28 February 1891.

of $1.25 per acre, the proceeds of which were distributed on a prorata basis to tribal members or used to offset agency appropriations.[14]

For a variety of reasons, the allotment policy did not succeed in transforming many Indians who were not already farmers into productive agriculturalists. A seminal cliometric analysis of the General Allotment Act by economic historian Leonard A. Carlson in 1981 concluded that tribal members were generally less successful as farmers on their own individual tracts than they had been previously on their communal lands. This study also demonstrated how the allotment program, through the sale of surplus reservation lands and the eventual opportunities to lease or purchase allotments, served best the economic interests of white settlers rather than Indians. A more recent provocative evaluation of Congress by the Finnish scholar Markku Henriksson concluded that this was generally true of all Indian legislation enacted between 1862 and 1907.[15] Nevertheless,

14. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Statutes at Large*, vol. 33, p. 254, Act of 23 April 1904; U.S., Department of the Interior, Natural Resources Board, *Indian Land Tenure, Economic Status, and Population Trends*, Part 10 of *The Report on Land Planning* (Washington, D.C.: Government Printing Office, 1935), p. 6.

15. See Carlson, *Indians, Bureaucrats, and Land*, and Henriksson, *Indian on Capitol Hill*.

Non-Indian settlers gather at Gregory, South Dakota, in 1908 for the first day's filing on newly opened Rosebud reservation land. The Dawes Act of 1887 provided for sale of surplus lands after eligible tribal members had received allotments.

the allotment policy did have its effect on tribal culture over the long term, to the extent that farming and ranching are now major enterprises in Indian country, albeit rather fragile ones.[16]

On many reservations the granting of land in severalty and the almost simultaneous pro-rata distribution of the proceeds of surplus land sales combined to have a negative effect. Land money erased incentive for farming activities, and, with the encouragement of unscrupulous merchants, its rapid dissipation often left the Indians with little or no funds for farming or ranching equipment. Many allotted lands had less than favorable soil and climatic conditions, and many allottees, including the old and infirm and students attending boarding schools and other minors, were unable to establish even a homestead on their tracts. As a result, much of the land was not only unfarmed but was unused for any productive purpose.[17]

Hoping to generate some kind of income from undeveloped allotments, tribal leaders began pleading with Congress in the early 1890s to lift the restrictions against the leasing of allotted lands. Western settlers also pressured the legislators to permit them to gain access to the "wasted land." The proponents of leasing argued that allottees would benefit from observing the successful operations of non-Indian farmers and ranchers on a portion of their land, and that lease income would allow the tribal members to make improvements on the remainder of their allotments. They also reasoned that leasing revenues might also justify a reduction in the federal appropriations for Indians.[18]

Despite the statutory resolve of Senator Dawes and the other reformers in 1887 to keep allotments absolutely unencumbered and inalienable, these same policy makers were easily swayed just four years later by the arguments favoring leasing. Thus, in the same 1891 statute that provided for the equalization of allotments, Congress agreed to authorize leasing on a limited scale. Any allottee who was found by reason of age or "other disability" to be unable to occupy or improve their land was permitted, with the consent of the

16. John Fredericks III, "Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility," *American Indian Law Review* 14, no. 1 [1989]: 105-106.

17. Prucha, *Great Father*, 2:671; Michael L. Lawson, "Indian Heirship Lands: The Lake Traverse Experience," *South Dakota History* 12 (Winter 1982): 218-19.

18. Lawson, "Indian Heirship Lands," p. 219; *Cohen's Handbook of Federal Indian Law*, pp. 134-35; Otis, *Dawes Act*, pp. 107-8; U.S., Department of the Interior, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1886* (Washington, D.C.: Government Printing Office, 1886), p. xix.

secretary of the interior, to enter a lease agreement, the terms of which were limited to three years for farming and grazing lands and ten years for mining lands. Because few leases were approved under these terms, public pressure soon brought about a liberalization of the leasing provisions. Congress alternately eased and tightened the restrictions until finally enacting legislation in 1910 that reduced the constraints to the point where any allotment could be readily leased for up to five years. By 1921, such leases required only the approval of the superintendent of the reservation. By 1934, more than 13.9 million acres of allotted lands were being leased.[19]

Leasing compromised the best interests of the allotment policy. In common with treaty rations and pro-rata distributions, it tended to encourage idleness. The leasing out of a majority of allotments on some reservations transformed allottees or their heirs into "a race of petty landlords" whose only nongovernment subsistence depended on the meager unearned income derived from their allotment interests.[20]

Leasing also served early to make Indian agents aware of complications emerging from the extraordinary policies regarding the inheritance of trust lands. The leasing of an allotment in heirship status required the consent of all the heirs. As the heirs themselves died and equities in the estates grew ever smaller, leasing often became the only viable option for deriving income from the inherited interests. Yet, potential lessees often shied away from heavily fractionated tracts because of the difficulty of obtaining the consent of all the heirs. As a result, thousands of acres of allotted lands still remained idle. For those heirship lands on which leases were negotiated successfully, the burden of distributing the proceeds of the lease among the heirs according to their fractional interests in the estate fell upon the Office of Indian Affairs (which did not officially become the Bureau of Indian Affairs until 1947). By the 1930s, the government's cost in managing a lease often exceeded the value of the lease.[21]

Between 1899 and 1904, the federal government again contradicted the intentions of severalty land and complicated its own allotment

19. Prucha, *Great Father*, 2:672; *Statutes at Large*, vol. 26, p. 794, Act of 25 February 1891, vol. 28, pp. 286, 305, Act of 15 August 1894, vol. 30, p. 62, Act of 7 June 1897, vol. 31, p. 221, Act of 31 May 1900, vol. 36, p. 855, Act of 25 June 1910, and vol. 41, p. 1225, Act of 3 March 1921; *Indian Land Tenure, Economic Status, and Population Trends*, p. 7.

20. *Indian Land Tenure, Economic Status, and Population Trends*, pp. 2, 7.

21. Roy W. Meyer, *History of the Santee Sioux: United States Indian Policy on Trial* (Lincoln: University of Nebraska Press, 1967), pp. 327, 332; Powell, "Land Tenure on Northern Plains Indian Reservations," p. 338.

The problems of the realty offices of the Bureau of Indian Affairs in obtaining the signatures of heirs on land sales and lease forms are dramatized in these companion cartoons, which appeared in one of the many federal studies of the heirship situation.

record keeping, passing legislation that provided the secretary of the interior with the general discretion to grant rights of way and easements through Indian reservations and allotted lands. This authority allowed railroads, telephone and telegraph lines, gas and oil pipelines, and electrical power lines to crisscross allotments, often decreasing their agricultural potential.[22]

Another modification of the allotment policy evolved from a demand for the sale of allotted lands on the part of both tribal members and non-Indian settlers. For those allotments that could not be easily utilized, leased, or partitioned in any beneficial way, the solution seemed to be to lift the trust restrictions against outright alienation. To this end, legislation in 1902 authorized the secretary of the interior to sell allotments in heirship status and divide the proceeds among the heirs. Under this law, a single "competent" heir could petition for the sale of an entire allotment. Four years later, Congress authorized the secretary to allow original allottees to dispose of their land. Since tribal members seldom had the means to purchase the allotments approved for sale, the land passed inevitably into non-Indian ownership. By 1934, approximately 3.7 million acres of allotted land had been alienated from Indian ownership through the vehicle of supervised sales.[23]

The selling and leasing of allotted lands and inherited interests gradually turned the Indian office into a giant real-estate and banking enterprise. The broad powers of the secretary of the interior over Indian lands and funds were delegated to agency superintendents, and proceeds from the lease or sale of allotments were also maintained under federal trust and deposited in Individual Indian Money (IIM) accounts at agency banks. Proceeds from the sale of an allotment were sometimes used to purchase other tracts for allottees or heirs. Because these lands were held in fee-simple title by the Indian owners but were subject to restrictions against alienation, they became known as "restricted fee allotments" as opposed to "trust allotments" held in trust for individual tribal members. As has often been the case throughout its history, the Indian office had neither the manpower nor resources to perform its administrative tasks adequately. The demand for the lease or sale of allotted lands

22. *Statutes at Large*, vol. 30, p. 990, Act of 2 March 1899, vol. 31, p. 790, Act of 15 February 1901, vol. 31, p. 1083, Act of 3 March 1901, and vol. 33, p. 65, Act of 11 March 1904.

23. Ibid., vol. 32, pp. 245, 275, Act of 27 May 1902, and vol. 34, p. 182, Act of 8 May 1906 (the Burke Act); *Indian Land Tenure, Economic Status, and Population Trends*, pp. 6, 15-16.

became so brisk by 1913 that the agency reported a backlog of forty thousand requests involving sixty million dollars worth of land.[24]

Escalating criticism of the trust and citizenship provisions of the General Allotment Act led to further legislative revisions in 1906. It had become apparent by then that the citizenship conferred with allotments had proven to be a disadvantage to many tribal members because it created the incongruous situation of placing their persons, but not their allotments, outside the protection of federal courts at a time when many local authorities were reluctant to enforce state laws where Indians were concerned. The Indian office discovered that citizenship greatly retarded its program to mitigate liquor trafficking on reservations. The issue was brought to the fore in 1905 when the United States Supreme Court in *Matter of Heff* overturned the conviction of a man who had sold liquor to an allotted Indian because the allottee, as a citizen, was "outside the reach of police regulations on the part of Congress."[25]

In reaction to the Heff decision, Congressman Charles H. Burke of South Dakota, who later became commissioner of Indian affairs, introduced legislation that would postpone citizenship for future allottees until the end of the twenty-five-year trust period, during which time the federal government would maintain exclusive jurisdiction over them. The Burke Act of 1906 also authorized the president to extend the initial trust period on allotments if conditions so warranted, further delaying citizenship. For those allottees judged to be sufficiently competent to manage their lands and other affairs, however, this statute authorized the secretary of the interior to issue fee patents for their allotments, and personal citizenship thereby, even before the expiration of the initial trust period.[26]

In common with so many other of the well-intentioned revisions of allotment policy, the implementation of this law opened yet another avenue for the rapid alienation of allotments. While those who desired citizenship could apply for a determination of their competency, federal officials proceeded to force about ten thousand allottees or their heirs to accept fee patents without their application or consent. This work was done either through the use of commissions, which purported to establish the competency of individuals, or by the arbitrary issuance of fee patents to tribal members whose Indian blood quantum was one-half or less. Most of those who received fee patents, with or without consent, either

24. *Cohen's Handbook of Federal Indian Law*, pp. 615-16, 631; Prucha, *Great Father*, 2:874.

25. *In re* Heff, 197 U.S. 488, 509 (1905).

26. *Statutes at Large*, vol. 34, p. 182, Act of 8 May 1906 (the Burke Act).

sold their lands or lost them through the foreclosure of a mortgage within a short time. The practice of issuing the so-called forced fee patents was halted in 1921, and legislation in 1927 and 1931 authorized the cancellation of such patents under certain conditions. However, because these laws stipulated that the patentee could not have sold or mortgaged the land in the interim, only about four hundred seventy of the forced fee allotments were ever restored to trust status. By 1934, the issuance of fee patents, forced or otherwise, had accounted for the loss of about twenty-three million acres of Indian land.[27]

The allotment policy not only alienated tribal members from their land, but it also became a rationale for taking away their given names. In order that Indian family members might all be known by the same surname on agency allotment and probate records, the government set about to replace the customary Indian system of personal name-giving, substituting either English family names or loose English translations of Indian names for those in the native language and then introducing Christian first names. By 1909, for example, the famous Santee Sioux physician, Charles A. Eastman, who had himself been known as Ohiyesa previously, had revised the names of some twenty-five thousand Sioux people as part of his role as a special Indian agent.[28]

Finally coming to the realization that allotment could not be implemented uniformly in all Indian communities, Congress sought to correct deficiencies in the administration of allotted lands and inherited estates through a major revision of the General Allotment Act in 1910. Among the many provisions of a law signed on 25 June of that year was one that permitted tribal members, for the first time, to devise their trust estates by will, subject to the approval of the secretary of the interior. This act also specified the secretary's authority to determine the heirs of those allotment interest holders who died intestate. This authority was established as being exclusive of state courts and legislatures, except in Oklahoma and Arkansas, and of primary federal court jurisdiction, although this power in

27. Richmond C. Clow and Janet McDonnell, Institute of Indian Studies, University of South Dakota, "A Report on the Bureau of Indian Affairs' Fee Patenting and Cancelling Policies, 1900-1942," prepared for the Bureau of Indian Affairs, Aberdeen Area Office, Branch of Rights Protection, 1 June 1981, pp. 11-13, 18, 27-28, 31, 39-40, 43-44; *Statutes at Large*, vol. 44, p. 1247, Act of 26 February 1927, and vol. 46, p. 1205, Act of 21 February 1931; *Indian Land Tenure, Economic Status, and Population Trends*, p. 6.

28. Prucha, *Great Father*, 2:673-74; Raymond Wilson, *Ohiyesa: Charles Eastman, Santee Sioux* (Urbana: University of Illinois Press, 1983), pp. 120-28.

relation to tribal courts has never been defined clearly. In addition, the 1910 statute delineated more clearly the power of the secretary to administer trust estates, including the power to sell or purchase heirship lands and grant fee patents to heirs.[29]

Following this legislation, the secretary of the interior issued the first orders regulating the determination of heirs and the approval of wills. More comprehensive regulations were issued in 1915, and these were revised in 1923, 1935, and 1938. The commissioner of Indian affairs appointed hearing examiners to conduct probate hearings. Agency superintendents were authorized to assist tribal members in the drafting of wills and to conduct probate hearings in the absence of a hearing examiner. Each will and probate required the preparation of a complete case report, which was transmitted with recommendations regarding approval to the commissioner, who in turn reported the case to the secretary. The secretary then issued an order determining heirs or approving or disapproving of a will. Until 1943, the secretary issued an order in every Indian probate case.[30]

After 1910, any Indian who still held an interest in a trust allotment, which might have initially been inalienable under any circumstance, could seek approval to sell, lease, or even partition that interest, to devise it by will or make a gift conveyance of it to other family members, or to receive fee-simple title to it. About the only transaction that an Indian owner could not initiate was the execution of a mortgage of the trust interests. Alas, in 1956, Congress also eliminated this restriction and thus created yet another possible means of alienation through foreclosure by creditors.[31]

All of the legislative tinkering with the original provisions of the General Allotment Act did little to halt the exponential growth of fractionated interests in the allotments that remained in trust. Consequently, federal policy makers have spent much of this century searching for an adequate solution to the problem of Indian heirship. In 1926, heirship was one of the problems focused on in the comprehensive investigation of reservation conditions and federal Indian administration commissioned by Interior Secretary Hubert Work. The Institute for Government Research, an independent organization that later became the political branch of the Brookings Institution in Washington, D.C., conducted the study. Because the

29. *Statutes at Large*, vol. 36, p. 855, Act of June 25, 1910; Ethel J. Williams, "Too Little Land, Too Many Heirs—The Indian Heirship Land Problem," *Washington Law Review* 46 (1971): 723-24; *Cohen's Handbook of Federal Indian Law*, pp. 634-35.

30. *Digest of Federal Indian Probate Law*, pp. vii-viii.

31. *Statutes at Large*, vol. 70, p. 62, Act of 29 March 1956.

nine researchers involved in this project were directed by political analyst Lewis Meriam, the results of the study, published in 1928 as *The Problem of Indian Administration*, has become more commonly known as the Meriam Report.[32]

As a solution to the heirship problem, the Meriam Report recommended that the government establish a revolving fund that would permit tribes to purchase inherited interests and consolidate fractionated allotments into units that would be workable economically. It suggested that revolving loans to individuals should have liberal repayment terms in order to prevent any further loss of trust land and to halt the use of revenues from inherited interests as a means of sustaining tribal members in a life of "irresponsible idleness." The study also urged that tighter restrictions be placed on the sale of inherited lands. Recognizing the escalating burden borne by the government in the management of heirship lands, Meriam's report discouraged further allotments because it found that they resulted in "an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians."[33] In response to these recommendations, the Herbert Hoover administration considered a proposal to allow tribes to purchase heirship lands on a deferred payment basis, with the federal government holding the mortgages. Even though this plan would have cost only one hundred thousand dollars per year, the fiscal constraints of the Great Depression precluded its implementation.[34]

The Meriam Report set the stage for the major policy reforms of the New Deal era that were established under the auspices of President Franklin Roosevelt's Indian commissioner, John Collier. This former social worker and activist did not consider the expectation of inheritance to be a vested right and concluded that Congress had the authority to modify the rules of descent pertaining to Indian trust land. Thus, Collier's original draft of what became the Indian Reorganization Act of 1934 (IRA) provided for the exchange of inherited interests for a proportional share in the tribal estate through the medium of "certificates of interest." These certificates, which could be issued with or without heir consent, would guar-

32. Frank C. Miller, introduction to Lewis Meriam, et al., *The Problem of Indian Administration* (1928; reprint ed., New York: Johnson Reprint Corp., 1971), p. ix. *See also* Donald T. Critchlow, "Lewis Meriam, Expertise, and Indian Reform," *Historian* 43 (May 1981): 325-31.

33. Meriam, et al., *Problem of Indian Administration*, pp. 40-41.

34. Powell, "Land Tenure on Northern Plains Indian Reservations," pp. 339-41; U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Purchase of Allotments of Deceased Indians*, S. Rept. 1203, 72d Cong., 2d sess., 1933.

antee use rights to certain tracts and could be subject to division by inheritance, although the land units themselves would remain in tribal ownership. However, the storm of protest that arose from allottees and heirs, who saw this plan as a scheme to confiscate their interests for the benefit of landless tribal members, soon forced Collier to modify his proposals. In the end, Congress also proved unwilling to test its authority either to limit inheritance or to provide for involuntary land exchanges.[35]

Although the major thrust of the IRA, which is also known as the Wheeler-Howard Act, was to provide for the partial restitution of tribal sovereignty through the establishment of federally approved constitutional governments, it also implemented and, in some cases, expanded the recommendations of the Meriam study regarding allotted lands. Sections 4 and 5 of the statute prohibited further allotments, extended indefinitely the trust periods and alienation restrictions on existing allotments, and provided for the restoration to tribal ownership of surplus lands on which there had been no settlement. The IRA also provided for the voluntary transfer of individual allotments to tribal ownership and appropriated limited funds for tribal land consolidation and the purchase of additional lands for reservations. Similar provisions were also extended to the Oklahoma tribes through the Oklahoma Indian Welfare Act of 1936.[36]

Although various circumstances prevented the government from realizing the IRA's full reform potential, the repeal of the allotment policy, in and of itself, represented a legislative watershed. "The allotment system with its train of evil consequences," proclaimed Commissioner Collier, "was definitely abandoned as the backbone of the national Indian policy," and the concept of common landownership was "reaffirmed."[37] This policy shift came after a total of 246,569 allotments had been made, accounting for 40,848,172 acres of land, and after the Indian trust-land base, which had approximated 138 million acres at the time of the General Allotment Act, had been reduced to around 52 million acres.[38]

The end of allotment did not stop the further compounding of heirship interests through the passage of time, and the IRA proved ultimately to be deficient in providing for the consolidation of either reservation lands "checkerboarded" by non-Indian holdings or individual allotments fractionated by the ever-growing number of heirs. The promise of the "Indian New Deal" was crippled by chronic underfunding of its programs and the IRA's limited applicability. In their devotion to tribal self-determination, Collier and other architects of the legislation established that the law would apply only to those tribes that voted to accept its provisions. For a variety of reasons, not the least of which was Indian distrust of the government, a number of tribes, representing nearly 40 percent of the nation's Indians, rejected the IRA.[39]

35. Powell, "Land Tenure on Northern Plains Indian Reservations," pp. 341-43.
36. *Statutes at Large*, vol. 48, p. 984, Act of 18 June 1934, and vol. 49, p. 1967, Act of 26 June 1936.
37. *Report of the Commissioner of Indian Affairs, 1934*, pp. 78-80.
38. Langone, "Heirship Land Problem," p. 525; *Indian Land Tenure, Economic Status, and Population Trends*, p. 6.

In August 1938, a group of Indian New Deal policy makers, including Commissioner Collier and Associate Solicitor Felix S. Cohen, convened in Glacier Park, Montana, for a three-day conference on Indian land problems. A committee instructed to review probate procedures made a number of specific recommendations, which included restricting the sale of heirship lands to heirs, other tribal members, or the tribe itself and limiting the right of inheritance to those interests that would comprise a viable economic unit and then only to lineal descendants, thereby excluding collateral relatives. It was suggested further that the right to devise property by will also be limited to allotments that were economic units and that the designated beneficiaries of such wills be restricted to heirs or tribal members. Regarding spousal inheritance, the committee recommended that the rights of nonmember spouses be limited to either life use or a designated interest and that the inherited property rights of all surviving spouses be terminated upon remarriage. The conference rejected a recommendation to limit inheritance to those having an Indian-blood quantum of one-half or more and voted to give further consideration to a proposal to restrict the inheritance rights of Indians who already possessed an economic unit.[40]

The recommendations of the Glacier Park conference were never implemented. The Great Depression continued to place financial restraints on government programs, and the exigencies of World War II soon distracted federal attention from Indian affairs. Although the Interior Department took little action to resolve the heirship problem in the 1940s, it did revise its administration of Indian probates. By orders issued in 1943 and 1944, the secretary of the interior delegated to the commissioner of Indian affairs the authority to determine heirs and probate the estates of all Indians except those

39. Lawson, "Indian Heirship Lands," p. 226.
40. "Resume of Proceedings," Conference on Indian Allotted and Heirship Land Problem, 14-17 Aug. 1938, Glacier Park, Montana, Department of the Interior, Natural Resources Library, Washington, D.C.

belonging to the Osage tribe in Oklahoma. The secretary retained only the prerogative to review the commissioner's decisions upon appeal. This change created a procedure of initial and appellate probate decisions similar to that which is still in place.[41]

Under new regulations issued by the secretary in 1947, examiners of inheritance within the Bureau of Indian Affairs (BIA) were empowered to make the initial decisions regarding estates and heirs, and their judgments were appealable only to the secretary, thus eliminating the role of the commissioner. These probate examiners operated out of eight district offices under the direct administrative supervision of the BIA's chief counsel in Washington, D.C. Because of the large number of allotments in the north-central section of the country, nearly half of the Indian probate offices were located in that region (at Minneapolis, Minnesota; Bismarck, North Dakota; Pierre, South Dakota; and Billings, Montana). The other offices were at Carson City, Nevada; Phoenix, Arizona; Portland, Oregon; and Shawnee, Oklahoma. Finally in 1949, the secretary's authority regarding the review of appeals was delegated to the solicitor, the legal officer of the Department of the Interior.[42]

While Congress failed to enact any general legislation dealing with the heirship problem for nearly a half-century following the IRA, it did pass several laws, beginning in the 1940s, which provided for the establishment of land consolidation programs and tribal inheritance codes on particular reservations. Among the nine tribes that sought and received such special legislation were the Sisseton-Wahpeton (1974, 1984), Standing Rock (1980), and Devils Lake (1983) Sioux in North and South Dakota. Some tribes also developed their own successful programs, including the Cheyenne River and Rosebud Sioux in South Dakota.[43]

Disparaging of government efforts to deal with the problem of fractionated allotments, the Rosebud Sioux Tribe launched its own innovative land consolidation program in 1943, establishing the Tribal Land Enterprise (TLE) as a sub-chartered corporation of the tribe with its own board of directors. The TLE was authorized to purchase the inherited interests of tribal members. However, the payments were not to be made in cash but rather in stock certificates in the corporation, which were initially valued at one dollar per share and were to be adjusted periodically to reflect the appraised value of the TLE's total purchased land base. Tribal members could then use their stock certificates to purchase or lease land assignments from the corporation, hold them as investments, or sell them to others, including nonmembers and non-Indians (although TLE voting rights and land assignments were limited to Rosebud tribal members.)[44]

41. *Digest of Federal Indian Probate Law*, p. viii.

42. Ibid.; U.S., Congress, House, Committee on Interior and Insular Affairs, *Survey Report on the Bureau of Indian Affairs*, Committee Print, no. 14 (Washington, D.C.: Government Printing Office, 1954), p. 15.

43. *Statutes at Large*, vol. 88, p. 1468, Act of 26 October 1974, vol. 98, p. 2411, Act of 19 October 1984, vol. 94, p. 537, Act of 17 June 1980, and vol. 96, p. 2515, Act of 12 January 1983.

In order to control future heirship problems, the TLE provided that land assignees could designate only one beneficiary for each one-hundred-sixty-acre tract. If an assignee died with more than one heir and had not made such a designation, then the heirs had to decide among themselves who would take the assignment. In cases where no heirs were found eligible to assume the assignment, the stock certificates or deposits for the land were to be distributed to

Delegates from the Rosebud reservation discuss land matters on a visit to the Chicago Indian Office in 1943, the year in which the Rosebud Sioux Tribe began an innovative land consolidation program.

44. Frank Pommersheim and Anita Remerowski, *Reservation Street Law: A Handbook of Indian Rights and Responsibilities* (Rosebud, S.Dak.: Sinte Gleska College Press, 1979), p. 145.

the heirs. The certificates themselves could also be devised by will or otherwise passed on to heirs. Although the Rosebud TLE has had problems, including periods when the corporation paid no dividends and lacked sufficient capital to redeem outstanding certificates, it has been touted as being the best tribal land-exchange program in the nation. By 1979, the corporation had acquired over four hundred thousand acres of inherited lands and issued nearly 1.9 million shares.[45]

The 1950s witnessed one of the most confused eras of Indian administration as a vocal element in Congress strove to terminate federal services to tribes. Proposals to resolve the heirship problem were also introduced in every legislative session throughout the decade, but none were given serious consideration. While withdrawal policies were being discussed and implemented on Capitol Hill, an understaffed and underfunded Indian bureau was losing ground in its effort to manage the heirship burden. In 1952, the BIA reported that out of the 115,130 allotments that remained in trust, 54,674 had been fractionated as a result of the death of the original allottee. A special outside survey team reported in 1954 that the agency faced a backlog of 2,987 probate cases and 11,000 unapproved land transactions. The probate backlog was growing at a rate of approximately 11 percent each year.[46]

As an example of a complicated heirship situation, this report cited a case where the estate of an allottee who had died in 1891 had still not been fully probated (this may have been the infamous Lake Traverse Allotment No. 1305, which this article describes more fully later). Because the process was not initiated until 1921, twenty-nine of the fifty-eight originally determined heirs had themselves died during the course of the prolonged probate procedures. As a consequence, the BIA had only managed to probate the estates of twenty-five of these decedents by 1952. By that time, the cost of the probate proceedings had doubled the appraised value of the estate. The survey team also provided examples of how minimal values and multiple interests had combined to create absurd probate situations in the case of estates left in the form of personalty, such as IIM accounts, rather than real property. In one case, a decedent left $38.22, which was divided among fifty-six heirs. Ten of the heirs received ten cents, twenty-one received three cents, and the rest received varying amounts ranging up to nine dollars.[47]

45. Ibid., pp. 145-49; Williams, "Too Little Land, Too Many Heirs," p. 731.
46. *Survey Report on the Bureau of Indian Affairs*, pp. 14, 16, 33.
47. Ibid., pp. 14-15.

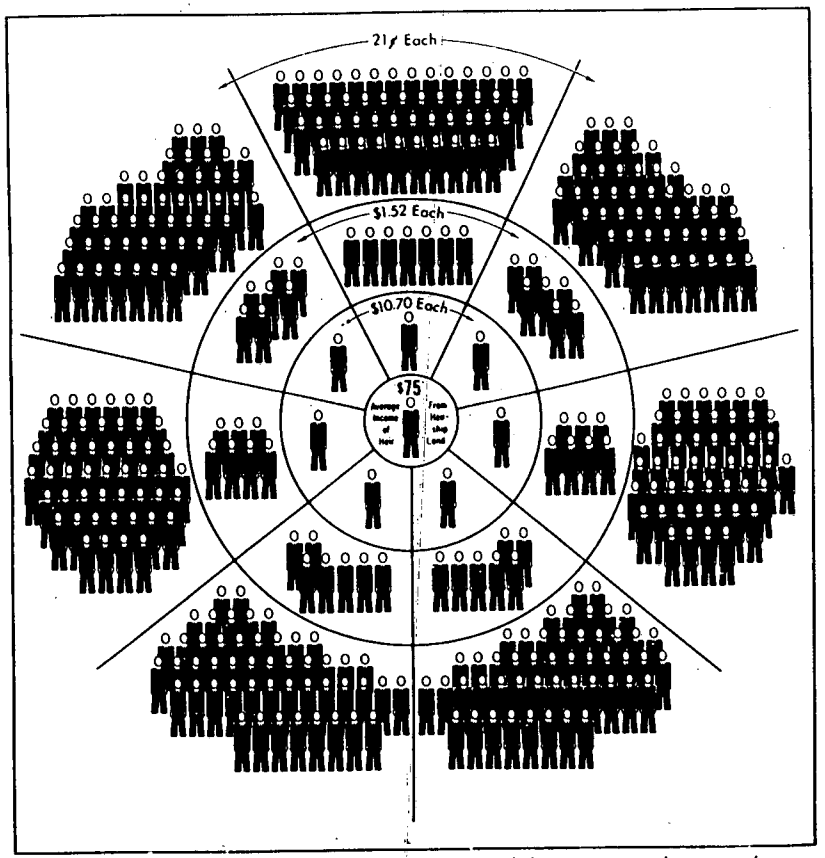
Congress enacted legislation in 1956 that permitted individual owners of allotted Indian trust land to execute a mortgage or deed of trust to such lands, subject to the approval of the secretary of the interior. This act was created to encourage Indian landholders to use commercial credit to the maximum extent possible, with the supervision of the federal government. Yet, coming after a generation of efforts focused on consolidation, this statute had the effect of reintroducing the specter of potential land loss. Tribal members eagerly took advantage of the law, mortgaging more than eight hundred fifty thousand acres in Montana and the Dakotas alone by 1986, mostly for agricultural loans. However, many of these mortgages are now in default, and the affected Indian farmers and ranchers face the danger of losing the land to their creditors through foreclosure.[48]

In 1959, the General Accounting Office (GAO), the government's independent auditing agency, found that the annual cost of managing heirship lands exceeded one million dollars. In keeping with the termination mentality of the era, the GAO blamed the problem on the government's trust relationship with the tribes and recommended the automatic issuance of fee patents to all competent heirs.[49] One agency spokesman offered that Indians were "sufficiently competent to realize the [monetary] benefit of being incompetent."[50]

In 1960, the House Committee on Interior and Insular Affairs, as it prepared to formulate corrective legislation, initiated what remains as the government's most comprehensive investigation of Indian heirship. Based on a survey of nine thousand heirs, tabulated by the Bureau of the Census, and analyzed by consultants from the Library of Congress, this study was published in two volumes in 1961. This research brought the problem into focus for congressional review and enunciated what was called the "rule of heirship land," i.e., that increased fractionalization equals increased federal costs and decreased heir income.[51]

The committee survey found that half of the more than twelve million acres then in heirship status was owned by six or more heirs, that an equal amount of the acreage was being used by non-Indians,

48. *Statutes at Large*, vol. 70, p. 62, Act of 29 March 1956; Fredericks, "Indian Lands: Financing Indian Agriculture," pp. 106-7.
49. Powell, "Land Tenure on Northern Plains Indian Reservations," pp. 346-47, 346n.
50. Statement of John R. Kurelich, in U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Indian Heirship Land Problem: Hearings before the Subcommittee on Indian Affairs on S. 1392*, 87th, Cong., 1st sess., 9-10 Aug. 1961 (Washington, D.C.: Government Printing Office, 1961), p. 84.
51. *Indian Heirship Land Study*, 1:xiii-xv.



As individual income from heirship land decreases over the years, the federal government's administrative problems increase. Estimating an average of seven heirs per probate, this chart projects that a sole owner's income of seventy-five dollars would diminish to twenty-one cents per heir by the fourth generation. At the same time, the number of signatures needed by the Bureau of Indian Affairs to lease the land would increase from one to three hundred forty-three.

and that 3 percent of the land was not being used at all. An analysis of the heirs who responded from the states of North and South Dakota and Nebraska, where the largest number of allotments had been made, found that a majority did not live on a reservation. Less

than one-third lived on any trust land and less than one-fifth farmed or ranched on their own heirship land. The average heir held an interest in between three and four estates, from which they received a total annual income of between fifty and one hundred dollars, the majority were also found to have interests on more than one reservation.[52]

With the Indian heirship land study in hand, Congress tried throughout the 1960s to enact legislation that might help mitigate the problem that Senator Frank Church of Idaho described as an "unconscionable mess."[53] Beginning with Church's introduction of a new heirship bill in 1961, there ensued a long round of proposals and counter-proposals between Congress and the BIA. The participants in this prolonged debate tried without success to find a solution that might balance the concerns of heirs in safeguarding their individual property rights and of tribes in preventing the further erosion of trust lands with the government's need to relieve its administrative burden. The House Subcommittee on Indian Affairs wanted to increase the constraints on individual property rights and expand administrative discretion in the issuance of fee patents. The Senate Subcommittee preferred to increase the scope of private property rights and provide increased funding for land consolidation.[54]

The BIA failed ultimately to endorse any of the congressional initiatives. Commissioner Philleo Nash proposed instead that the secretary of the interior be given wide discretion to allow tribes to purchase title to idle or unproductive heirship tracts without heir consent. Such purchases would be made on an installment plan through the issuance of "certificates of indebtedness," reminiscent of John Collier's proposed certificates of interest, that would evidence the tribe's obligation to pay heirs their proportional share of the appraised value of the allotments. The BIA's posture was that tribal and public interest in maintaining Indian ownership should not be secondary to the maximization of individual wealth. The Senate doubted the efficacy of this plan and argued that the certificates would also become a part of the heirship tangle. The Justice Department also ruled that the scheme would violate the vested

52. Ibid., 1:53-54; Williams, "Too Little Land, Too Many Heirs," p. 712.
53. *Indian Heirship Land Problem*, p. 72.
54. U.S., Congress, Senate, *A Bill Related to the Indian Heirship Land Problem*, S. 1392, 87th Cong., 1st sess., 1961; Powell, "Land Tenure on Northern Plains Indian Reservations," pp. 348-50. The separate approaches of the House, Senate, and BIA are evident in the Senate Committee on Interior and Insular Affairs hearings entitled *Indian Heirship Land Problem*.

property rights of individual owners by failing to provide full and just compensation prior to divesting them of their title equities.[55]

The BIA had long advocated a rule of primogeniture, which would eliminate the inheritance rights of all heirs who did not have an interest above a certain minimum and permit estates to pass to a single heir or escheat to the tribe, but it declined to support such legislation when it was introduced in 1966. Instead, it proposed an alternative primogeniture policy based on a minimum fraction of ownership, the involuntary exchange of certain interests, and the establishment of an increased loan fund for land consolidation. Unable to agree with this approach, Congress made no discernible progress toward solving the heirship problem until the 1980s.[56]

As the 1960s came to a close, Indian Commissioner Robert L. Bennett listed heirship lands among the six basic problems affecting the BIA's relations with Congress that were "of longstanding duration with little prospect of immediate solution."[57] Remedies proposed from various quarters during this period included limiting inheritance to a spouse or other single heir in a prescribed order, or to a limited number of heirs (not more than fifteen), or to just lineal descendants, or to members of the same tribe, or to those with a certain minimum Indian-blood quantum (at least one-quarter). Other proposals restricted inheritance to those heirs who had a certain minimal interest in an estate as measured by either acreage (two and one-half acres), percentage (16 or 32 percent), or appraised cash value ($100), with a provision that all interests below these thresholds would escheat to the tribe.[58]

Many observers suggested the reduction of the unanimous consent requirement for the partition or sale of allotments. Indian claims attorney Marvin J. Sonosky, for example, proposed in 1961 that the consent requirement be lowered to 50 percent of the owners

55. Powell, "Land Tenure on Northern Plains Indian Reservations," pp. 349-50; John A. Carver, Jr., Assistant Secretary of the Interior, to Senator Clinton P. Anderson, Chairman, Committee on Interior and Insular Affairs, 10 July 1961, and Byron R. White, Deputy Attorney General, to David E. Bell, Director, Bureau of the Budget, 8 Aug. 1961, both in *Indian Heirship Land Problem*, pp. 7-9, 12-14.

56. Powell, "Land Tenure on Northern Plains Indian Reservations," p. 350; U.S., Congress, House, Committee on Interior and Insular Affairs, *Indian Fractionated Land Problems: Hearings before the Subcommittee on Indian Affairs on H.R. 11113*, 89th Cong., 2d sess., 24-25 Feb. 1966 (Washington, D.C.: Government Printing Office, 1966).

57. Quoted in Prucha, *Great Father*, 2:1100.

58. Williams, "Too Little Land, Too Many Heirs," pp. 726-27; Langone, "Heirship Land Problem," p. 543; Bertram E. Hirsh, "Draft of a Bill Pertaining to the Inheritance of Trust or Restricted or Fee land on the Lake Traverse Reservation, North Dakota and South Dakota, and for other Purposes," 1981, Floral Park, N.Y.

in cases where there were less than ten heirs, and to 25 percent where there were ten or more interest holders. This same formula was incorporated in separate bills that were introduced in 1969 by Senators George S. McGovern of South Dakota and Henry M. Jackson of Washington. Sonosky also urged that the consent requirements for leasing heirship lands be dropped in cases where extreme fractionalization prevented effective use of the land.[59]

Several critics proposed that the federal revolving fund for tribal land consolidation be increased to as much as $55 million and that either the federal or tribal governments be empowered and funded to condemn heirship lands for consolidation purposes. Stephen Langone, a legislative analyst who studied the problem for the Joint Economic Committee of Congress in 1969, suggested that individual land consolidation programs be initiated in conjunction with tribal programs to permit the free exchange or purchase of interests between individual owners, tribes, and the government and thereby maximize the full potential for consolidation. He also proposed that heirs either be compelled to pay the administrative costs of land transactions and probates out of their estate revenues or to forfeit their proportional interests.[60]

In a 1971 study of the heirship problem in the *Washington Law Review*, Ethel J. Williams sketched the components that an ideal solution to the Indian inheritance dilemma would have to include. First, it would have to protect the equity of all heirs and guarantee the realization of a fair market value for their vested property right. An ideal solution would likewise need to safeguard tribal control over the land and at the same time permit it to be put to its most productive use. From the standpoint of federal administration, an optimum solution would also reduce the costs of managing trust land, thereby saving the taxpayers money.[61]

While Congress tried to grapple with possible solutions to the heirship problem, the Department of the Interior once again revised the administrative structure for Indian probates. On 1 July 1970, the Office of Hearings and Appeals was created and, as part of it, the

59. *Indian Heirship Land Problem*, pp. 161-62; U.S., Congress, Senate, *A Bill Relating to the Indian Revolving Loan Fund and the Indian Heirship Land Problem*, S. 522, 91st Cong., 1st sess., 22 Jan. 1969, and *A Bill to Provide for the Resolution of the Indian Fractionated Ownership Problem, and for other Purposes*, S. 920, 91st Cong., 1st sess., 4 Feb. 1969.

60. *Bill Relating to the Revolving Loan Fund*, S. 522 (1969); Williams, "Too Little Land, Too Many Heirs," pp. 733-34; Hirsh, "Draft of a Bill Pertaining to Inheritance"; Langone, "Heirship Land Problem," pp. 543-44.

61. Williams, "Too Little Land, Too Many Heirs," pp. 724-25.

Interior Board of Indian Appeals (IBIA) and the Hearings Division. The Hearings and Appeals office was made independent of the Office of the Solicitor (it now functions under the assistant secretary of the interior for policy, management, and budget). The IBIA was established as a three-member, quasi-judicial tribunal to review appeals of final decisions made by the BIA. The function of the former examiners of inheritance was transferred from the BIA to the Hearings Division. The hearing examiners, who now have the title of administrative law judges for Indian probate, continued their authority to conduct public hearings and make initial decisions, which were then made appealable to the IBIA.[62]

The authority to approve Indian wills was brought under this new structure on 1 March 1971 when the secretary of the interior delegated to the departmental solicitor the duty of examining wills and issuing reports on them to Indian agency superintendents. This authority was further delegated to regional and field solicitors. It included the power to approve the form of wills pertaining to trust property only. The department also issued guidelines in 1971 for the drafting and approving of such wills. Indians who wished to devise both fee and trust property were encouraged to have a single will drawn up by a private attorney because government agents do not have the authority to approve wills involving fee property and the wills of trust property do not require their approval as long as they are valid otherwise. However, two separate wills are permissible in some jurisdictions.[63]

Indian agency superintendents continued to be the first link in the probate chain, functioning in a manner similar to executors or administrators of estates under state law, by preparing essential data on decedents and their trust property for the administrative law judges in their region. This information generally includes an inventory of property, a family history, and a listing of any claims against the estate. The gathering of this data is assisted by the BIA's regional computerized title plants, which store information on all federal Indian realty. At present, there are seven regional administrative law judge offices and five regional BIA title plants. The reservations in the Dakotas, for example, are served by administrative law judges in Rapid City and Minneapolis and by the title plant in the Aberdeen Area Office of the BIA. If the decedent died intestate

62. *Digest of Federal Indian Probate Law*, pp. viii-ix; *Cohen's Handbook of Federal Indian Law*, pp. 636-37.

63. *Cohen's Handbook of Federal Indian Law*, pp. 636-37; interviews with Howard Piepenbrink, Chief, Branch of Titles and Research, Division of Real Estate Services, Bureau of Indian Affairs, Washington, D.C., 10-11 Oct. 1990.

leaving a small estate of less than one thousand dollars in an IIM account, the agency superintendent has the authority to hold an informal hearing to determine heirs and to make what is called a "summary distribution" of the property.[64]

In 1980, Congress provided for a limited expansion of the class of people to whom an Indian could devise property by will. Because various states had changed their laws to provide for spousal inheritance of the entirety of an estate in cases of intestacy (to the exclusion of other descendants), this statute permitted tribal members to will their property not only to immediate heirs but also to any lineal descendant or to any other Indian person who might be eligible to hold an interest in trust property.[65]

Three of the smaller Sioux reservations in South Dakota provide examples that illustrate the extreme level to which fractionalization and administrative complexity had risen by the early 1980s. In 1982, Allotment No. 1305, consisting of eighty acres on the Lake Traverse reservation of the Sisseton-Wahpeton Sioux Tribe, was found to have 439 heirs. The lowest common denominator (LCD) used to determine fractional interests in this tract was 3,394,923,840,000. A forty-acre portion of the allotment was then being leased at a rate of $1,080. A breakdown of the lease distribution, which cost the BIA an estimated $17,560 per year to administer, revealed that more than two-thirds of the heirs received less than one dollar per year from their interest in the property. Approximately one-third realized less than five cents, and the interest of one hundred of the heirs entitled them to a fraction of one cent. The largest interest holder received $82.85, but the value of the smallest owner's share was $.0000564. At that rate, it would have taken 177 years for the smallest heir to earn one cent, and 88,562 years to accumulate five dollars, which was the minimum amount for which the BIA would issue a check. If this forty-acre parcel could have been sold at its appraised value of eight thousand dollars, the share of the smallest owner would have been $.000418, and if it had been physically partitioned, this heir would have received title to approximately thirteen square inches.[66]

64. *Cohen's Handbook of Federal Indian Law*, p. 636; interviews with Piepenbrink; Pommersheim and Remerowski, *Reservation Street Law*, p. 136. Other offices for administrative law judges of Indian probate are in Albuquerque, Billings, Phoenix, Sacramento, and Tulsa.

65. *Statutes at Large*, vol. 94, p. 1207, Act of 26 September 1980.

66. Title Status Report No. 347-1352 (1982), Title and Records Section, Aberdeen Area Office, Bureau of Indian Affairs, Aberdeen, S.Dak. (hereinafter referred to as TRS, AAO, BIA); Lease No. 35205, Allotment No. 1305, Realty Records, Bureau of Indian Affairs, Sisseton Agency, S.Dak.; interview with Shirley De Couteau, Realty Specialist, Bureau of Indian Affairs, Sisseton Agency, S.Dak., 9 Feb. 1982.

A survey of thirty of the most heavily fractionated allotments on the Lake Traverse reserve, conducted by this writer in 1982, revealed that the average estate had 196 heirs and that the average heir had interests in fourteen other allotments. If these tracts would have been sold in that year, the average payment to the smallest heir would have been thirty-six cents, and if partitioned, the smallest heirs would have been entitled to an average of 174 square feet. At the average 1982 lease rate, it would have required these heirs an average of 1,344 years to realize five dollars from these estates.[67]

In 1983, a forty-acre allotment on the Yankton Sioux reservation (No. 10326-A) was found to have 1,075 owners, including 13 non-Indians who held interests in fee title (2 of them as life estates, meaning they had the right to ownership throughout their lifetimes). The Indian heirs were from thirteen different reservations, most (640) from the Pine Ridge Sioux reserve. The LCD for this allotment was 1,030,382,265,600, and only 8 of the owners had a share of 2 percent or more. The tract was not being leased, but if it had been it would have cost the BIA approximately forty-three thousand dollars to distribute the annual lease income, which may not have been more than one thousand dollars. Although this allotment had more than twice as many heirs as Lake Traverse Allotment No. 1305, the proportional share of the smallest heirs was much greater. Nevertheless, if the tract had been leased for one thousand dollars, it would have taken 16,340 years for the smallest owners to earn five dollars. The allotment would have to have been sold for $30,334 in order for these owners to receive one cent. If the tract had been physically partitioned, these owners could have claimed only sixty-seven square inches or less than one-half square foot.[68]

As a final example, Allotment No. 56-A, a seventy-two-acre tract on the Crow Creek Sioux Reservation, had 502 heirs in 1983, only six of whom owned a share of 2 percent or more. The LCD for this allotment was fifty-seven digits long:

422,928,436,064,611,462,839,873,060,573,527,180,037,703,675,438,004,160,000.

Expressed as a fraction, the share of the smallest owners was

685,843,200/1,375,139,991,799,967,953,796,391,435,811,164,924,408,493,364,411,150.

Yet, these minimal heirs owned a greater proportional share of this tract than did the smallest owners of either Lake Traverse Allotment No. 1305 or Yankton Allotment No. 10326-A.[69]

67. Calculations are based on data drawn from Land Indexes, Title Status Reports, and Probate Records maintained by TRS, AAO, BIA.
68. Title Status Report No. 346-10326-A (1983), TRS, AAO, BIA.
69. Title Status Report No. 342-56-A (1983), TRS, AAO, BIA.

Interest among legislators in providing a general solution to the heirship problem, which had languished throughout the 1970s, peaked again in 1982. A bill (H.R. 5856) introduced by Congressman Morris K. Udall of Arizona on 23 February of that year moved at surprising speed through Congress without much public attention. Staff members of the House Committee on Interior and Insular Affairs, of which Udall was chairman and Franklin Ducheneaux, a member of the Cheyenne River Sioux Tribe of South Dakota, was chief counsel, drafted the bill. Apparently, the legislation was proposed with little or no outside initiative, either from the tribes or the Interior Department.[70]

Aimed primarily at providing the first general authority for tribes to establish land consolidation programs and the adoption of tribal inheritance codes, the Udall bill, without proposing any additional appropriations, contained several provisions for at least an initial mitigation of the heirship problem. Of these, the one that would prove the most controversial was also the only one that was involuntary on the part of the tribes. It provided that upon the death of an owner of Indian trust land, any interest in the decedent's fractionated estate that amounted to 2 percent or less of the total acreage of a given tract and which had not earned at least one hundred dollars in income within the year prior to death, would escheat to the tribe having jurisdiction rather than descend to such minimal heirs. It provided further that these small interests would escheat whether or not they had been devised previously to the heirs by a will.[71]

The House interior committee held a hearing on the Udall bill on 20 May 1982 to which it invited representatives from only three tribes to testify, all of which were from the Southwest, a region with relatively few allotted reservations. The committee then attached the bill to one that had been introduced on 19 February 1981 by Senator Quentin N. Burdick of North Dakota (S. 503) to establish a land consolidation plan and tribal inheritance code for the Devils Lake Sioux Tribe of the Fort Totten Reservation in his home state. The House then passed its amended version of the combined bills on 6 December 1982 and sent it to the Senate. Because it was so

70. U.S., Congress, House, *A Bill to Provide for the Consolidation of Indian Lands, for the Elimination of Small Fractional Interests in Indian Lands, and for other Purposes*, H.R. 5856, 97th Cong., 2d sess., 16 Mar. 1982; interviews with Piepenbrink.
71. U.S., Congress, House, Committee on Interior and Insular Affairs, *Authorizing the Purchase, Sale, and Exchange of Lands by the Devils Lake Sioux Reservation, North Dakota, and for Other Purposes: Report on S. 503*, H.R. Rept. 97-908, 97th Cong., 2d sess., 30 Sept. 1982 (hereafter cited as H.R. Rept. 97-908).

late in the extended "lame duck" session of the Ninety-seventh Congress, the Senate passed the legislation without referring it to its Select Committee on Indian Affairs. Reportedly, this procedure was followed at the urging of the committee members themselves, who were afraid that they might not again have an opportunity to enact such important legislation regarding Indian lands. Yet, in fact, the whole strategy of the architects of the bill appears to have been to pass the measures with a minimum of debate. Apparently, they concluded that it would be better to get some kind of solution in place, and correct its weaknesses later through amendatory legislation, rather than to run the risk of having these proposals bog down in controversy as so many previous heirship bills had done. Thus, with President Ronald Reagan's signature on 12 January 1983, the Indian Land Consolidation Act of 1983 (ILCA) became law.[72]

Beyond its escheat provision for minimal estate shares, the ILCA extended to all federally recognized tribes the provisions of Section 5 of the Indian Reorganization Act regarding the exchange of lands, whether or not a tribe had originally voted against the IRA. The consent requirement for the tribal purchase of allotted lands was lowered from 100 percent to more than 50 percent of the owners or more than 50 percent of the undivided interests in any tract where there were fifteen or more owners. Exempted from this provision was any tract for which the acquisition was objected to by those owners who held 50 percent or more of the total interests. Any Indian owner who was in actual use and possession of the tract was given the right to purchase it by matching the tribal offer. Finally, the statute authorized tribes to adopt their own inheritance codes to provide more restrictive limitations than were previously found in general federal law on the rights of nonmembers and non-Indians to inherit trust land within the tribe's jurisdiction. However, the right

72. Margo S. Miller, "Tribal Responses to Federal Land Consolidation Policy," Policy Analysis Exercise, Master in Public Policy Program, Harvard University, Kennedy School of Government, 12 Apr. 1988, p. 15; Statement of Gerald Anton, President, Salt River Pima-Maricopa Indian Community, Sacaton, Ariz., in U.S., Congress, Senate, Select Committee on Indian Affairs, *Amendments to the Indian Land Consolidation Act: Hearing on H.J. Res. 158*, 98th Cong., 1st sess., 26 July 1983 (Washington, D.C.: Government Printing Office, 1983), pp. 31-32; U.S., Congress, Senate, *A Bill to Authorize the Purchase, Sale, and Exchange of Lands by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota, and for Other Purposes*, S. 503, 97th Cong., 1st sess., 19 Feb. 1981; "Indian Land Consolidation," P.L. 97-459, *U.S. Code Congressional and Administrative News*, 97th Cong., 2d sess. (1982), Bd. vol. 4, *Legislative History*, pp. 4415-25; Miller, "Tribal Responses to Federal Land Consolidation Policy," p. 10; interviews with Piepenbrink; *Statutes at Large*, vol. 96, pp. 2515, Act of 12 January 1983.

of non-Indian and nonmember spouses and children to retain inherited interests in a life estate was protected. In cases where an Indian decedent devised interests by will to persons ineligible to inherit under the new tribal codes, the law gave the tribe an opportunity to purchase such interests prior to probate. Such devisees were given the option of either accepting the money or retaining a life estate in their interests.[73]

The BIA endorsed the ILCA generally, even though it had recommended several technical amendments. For example, it suggested an escheat provision that would have affected owners of less than a 2½ percent interest whose total interest was determined to be worth less than two hundred dollars. However, attorneys within the Indian division of the Interior Department solicitor's office, and particularly Wayne Nordwall who represented that office at the congressional hearings, favored the legislation more enthusiastically.[74] After the legislation was enacted, John W. Fritz, the deputy assistant secretary of the interior for Indian affairs, who functioned in the position previously titled the commissioner of Indian affairs, lauded the ILCA as a "legislative milestone."[75]

While preparing the final amended version of the Udall bill for floor votes, the printers made several transcription errors. As a result, two sections of the actual document that the House and Senate passed, and which the president signed into law, were garbled beyond comprehension. Although the printing was corrected by those responsible for codifying the statute, those members of the House and Senate committees who had supported the measure felt obliged to have Congress enact corrective legislation. Accordingly, Representative Udall introduced a joint resolution (H.J. Res. 158) to make technical corrections in the ILCA on 23 February 1983, just six weeks after the original bill had been signed.[76]

In the meantime, the ILCA had become effective immediately upon its being signed into law. The estates of tribal members who

73. *Statutes at Large*, vol. 96, p. 2515.

74. Kenneth L. Smith, Assistant Secretary, Indian Affairs, to Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs, 9 Sept. 1982, in H.R. Rept. 97-908, pp. 12-19; interviews with Piepenbrink.

75. Statement of John W. Fritz, Deputy Assistant Secretary, Indian Affairs, 26 July 1983, in *Amendments to the Indian Land Consolidation Act*, p. 5.

76. Miller, "Tribal Responses to Federal Land Consolidation Policy," p. 12; U.S., Congress, House, *Joint Resolution to Make Technical Corrections in the Act of January 12, 1983 (Public Law 97-459)*, H.J. Res. 158, 98th Cong., 1st sess., 23 Feb. 1983; U.S., Congress, Senate, Select Committee on Indian Affairs, *To Make Technical Corrections in the Act of January 12, 1983 (Public Law 97-459)*, S. Rept. 98-632, 98th Cong., 2d sess., 24 Sept. 1984, p. 2 (hereafter cited as S. Rept. 98-632).

died after 12 January 1983 were thus made subject to the escheat provisions of the statute, which had been set forth in Section 207 of the act. On 3 March 1983, the BIA issued a memorandum to its area directors advising them of the escheat provisions and providing them with instructions to follow until such time as regulations implementing the law could be promulgated fully. Tribal members concerned that their tribe would take away their interests were advised to either purchase additional shares from co-owners to bring their ownership above 2 percent, convey their interests to co-owners or relatives and reserve a life estate in the tract, or, if feasible, partition the tract in such a way as to enlarge the owner's proportional share.[77]

The joint resolution to clear up garbled wording in the ILCA passed the House on 19 April 1983 without further hearings and was referred to the Senate Select Committee on Indian Affairs for consideration. Prompted by adverse tribal reactions to the ILCA, the Senate committee held a hearing on the bill on 26 July 1983, at which time a number of amendments were proposed.[78] Most tribal representatives who testified at the Senate hearing were critical of the ILCA and the manner in which it was enacted. Norman Hollow, chairman of the Assiniboine and Sioux tribes of the Fort Peck reservation in Montana, for example, criticized Congress for not providing greater consultation with the tribes when the ILCA was first being considered in 1982. He called for the repeal of the act and the scheduling of a series of field hearings in order "to grant the opportunity for reservation people to appear and express their concern."[79]

Of all the sections of the land consolidation law, tribal leaders and their attorneys were most vociferous in their objections to the involuntary escheat provisions. "We do not want what it gives us," stated Paul Iron Cloud, a member of the Oglala Sioux Tribe of the Pine Ridge reservation in South Dakota. "We, as a tribe, do not want to take over people's land without compensation."[80] On Pine Ridge, the nation's most allotted Indian reserve, the BIA estimated that approximately 51 percent of the 95,019 owners who held interest in the reservation's 11,330 allotted tracts would be subject to the 2-percent restriction embodied in Section 207 of the ILCA.[81]

Oglala Sioux tribal members Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette each had parents or uncles who died within

77. John W. Fritz to All Area Directors and Superintendents, 2 Mar. 1983, in *Amendments to the Indian Land Consolidation Act*, pp. 12-14.
78. S. Rept. 98-632, p. 2.
79. *Amendments to the Indian Land Consolidation Act*, p. 35.
80. Ibid., p. 38.
81. Ibid., p. 10.

six months of the enactment of the ILCA to whom they or their children were potential heirs or named devisees. After being notified that a probate hearing had been scheduled for the week of 24 October 1983 to determine if the Oglala Sioux Tribe had the right to escheat to interests in the Chester Irving estate that might otherwise have descended to her, Mary Irving filed suit against Secretary of the Interior James Watt in the United States District Court for South Dakota on behalf of herself and the interests represented by Pumpkin Seed and Bissonette. The complaint claimed that Section 207 of the ILCA represented a taking of property to which tribal members had a vested right without just compensation in violation of the Fifth Amendment to the United States Constitution. It also requested both preliminary and permanent injunctions against enforcement of the escheat provision by the Department of the Interior.[82]

This case was bound to break new legal ground, for no previous decisions had ever addressed a sovereign's attempt to abolish inheritance completely and require certain property to escheat at death. After deliberating over the possible precedents, Judge Andrew W. Bogue articulated, probably unknowingly, the same view of Indian inheritance that John Collier had expressed a half-century before. He ruled that the plaintiffs had only a mere "expectancy of heirship" rather than a vested property right entitled to constitutional protection. He concluded further that since Congress had the plenary power to enact statutes affecting heirship, the escheat provision of Section 207 did not violate the taking clause of the Constitution.[83]

In a footnote to his opinion, Judge Bogue disagreed with the policy implemented by the ILCA. He stated that the argument that tribal ownership of heirship land would "benefit the Indian population as a whole is simply not valid in this court's experience" since the benefits derived from tribal lands "do not filter down to the vast majority of the Indian people" on the reservations. Because in his view land consolidation would not function as contemplated, he opined that Congress "would be well-advised to examine closely the practical effect of legislation such as [the ILCA]."[84]

Attorneys for the plaintiffs began immediately to plan an appeal of the Bogue decision. In the meantime, Congress had suspended

82. U.S., District Court, District of South Dakota, Western Division, *Irving* v. *Watt*, Civil No. 83-5139, 15 Dec. 1983, *Indian Law Reporter* 11 (Mar. 1984): 3009-10; U.S., Court of Appeals, Eighth Circuit, St. Louis, Mo., *Irving* v. *Clark*, *Federal Reporter, 2d Series* 758 (1985): 1260.
83. *Irving* v. *Clark*, p. 1262n; *Irving* v. *Watt*, pp. 3009-10.
84. *Irving* v. *Watt*, p. 3010n.

further consideration of the joint resolution to amend the ILCA until the summer of 1984. On 31 July, the Senate select committee held a second hearing in order to measure views of the ILCA after it had been implemented for some time. In response to concerns raised during its hearings, the committee recommended several changes in the original legislation. The House and Senate agreed to the new language in early October, and President Reagan signed the amended and comprehensible ILCA on 30 October 1984.[85]

The new legislation loosened the restrictive language of Section 207, permitting minimal interests to be devised by will to other owners of the same tract and allowing for a rebuttal of the statutory presumption that a minimal interest was without significant economic value. While the 2 percent cutoff was maintained, the valuation requirement of the interests was changed from having earned less than one hundred dollars in the year preceding the decedent's death to being "incapable" of earning less than one hundred dollars in any one of the five years from the date of the decedent's death. This new language was aimed at protecting minimal interests in mineral or timber lands, where revenue values were subject to wide fluctuation. Where the minimal interest had earned less than one hundred dollars in any of the five years preceding death, the statute presumed, subject to rebuttal, that it was incapable of earning one hundred dollars in any one of the five years following death. In addition, the new language allowed tribes to adopt codes providing for the disposition of minimal interests that could take precedence over the escheat provisions of Section 207, provided these tribal laws prevented the further descent or fractionalization of such minimal interests.[86]

The amended ILCA permitted tribes to purchase one or more interests in an allotment without having to buy an entire tract and revised the consent requirement for such purchases. Whereas the original law required the consent of a simple majority of the owners of the undivided interests in any tract where there were fifteen or more owners, the amended statute permitted the tribal purchase of "any tract" with the consent of the ownership, regardless of how many interest holders there were. The right to match a tribal offer

85. U.S., Congress, Senate, Select Committee on Indian Affairs, *To Amend the Indian Land Consolidation Act of 1983: Hearings on H.J. Res. 158*, 98th Cong., 2d sess., 31 July 1984 (Washington, D.C.: Government Printing Office, 1984); "Indian Land Consolidation Act, Amendment," *U.S. Code Congressional and Administrative News*, 98th Cong., 2d sess. (1984), Bd. vol. 5, *Legislative History*, pp. 5470-81; *Statutes at Large*, vol. 98, p. 3171, Act of 30 October 1984.

86. *Statutes at Large*, vol. 98, pp. 3171-73.

for purchase of such a tract was limited further to owners who had been in actual use and possession of the tract at least three years prior to the tribal initiative. If within five years of a purchase by an actual user the tract was offered for sale or proposed for removal of its trust restrictions, the law now provided that the tribe would have 180 days in which to acquire the property by paying the owner the fair market value of the tract. Finally, the new language further restricted the right of nonmembers or non-Indians to receive a life estate in their inherited interests. This right was limited to a spouse and/or children whose interest equaled 10 percent or more of a tract of land or who actually occupied the tract as a home at the time of the decedent's death.[87]

Just eleven days prior to the enactment of the ILCA amendments, President Reagan had signed legislation approving a new inheritance code for the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse reservation in North and South Dakota. This statute was remarkable, not only because of its restrictive provisions, but also because it established the precedent that tribes might ignore the general provisions of the ILCA and continue to seek specific legislation for their heirship problems. The new Lake Traverse code was much stricter than the ILCA, limiting inheritance to enrolled tribal members and providing for the escheat to the tribe of parcels of 2½ acres or less regardless of value. Yet, the BIA had opposed the legislation. Because the ILCA was enacted, in part, to eliminate the necessity of individual tribes having to obtain congressional approval for their land consolidation and tribal inheritance programs, the bureau felt strongly that the tribe should adopt its code through the ILCA provisions. However, the Sisseton-Wahpeton Tribe deserved credit for taking the initiative in attempting to solve the heirship problem on what has historically been one of the worst fractionated reservations. It also merited praise for managing to convince its membership that strict measures were necessary. Tribal attorney Bertram Hirsch and former tribal chairman Jerry Flute credited this success to strong tribal leadership and to a series of public forums that the tribal government held to discuss proposals.[88]

87. Ibid.

88. Ibid., vol. 98, p. 2411, Act of 19 October 1984; Statement of Sidney L. Mills, Director, Office of Trust Responsibilities, Bureau of Indian Affairs, 21 June 1984, in U.S., Congress, Senate, Select Committee on Indian Affairs, *Pertaining to the Inheritance of Trust or Restricted Land on the Lake Traverse Indian Reservation, North and South Dakota, and for Other Purposes*, S. Rept. 98-607, 98th Cong., 2d sess., 18 Sept. 1984, pp. 6-7; Lawson, "Indian Heirship Lands," pp. 213-31; Miller, "Tribal Responses to Federal Land Consolidation Policy," p. 27.

Within a few days of the enactment of the ILCA amendments, the plaintiffs in the Irving case appealed the district court's decision to the Eighth Circuit Court of Appeals in Saint Louis. The appellants did not assert that their own property rights had been taken unconstitutionally, but rather that their decedent's right to pass the property at death had been taken. Almost six months later, on 29 March 1985, Circuit Judge John R. Gibson rendered his decision in the case of *Irving* v. *Clark* (Secretary of the Interior William Clark). In common with Judge Bogue, Judge Gibson also held that the plaintiffs had only an expectancy of heirship and not a vested property right at the time that the ILCA was enacted and that Congress had the power to alter and condition rights that had not been vested in individual tribal members. However, he concluded that since Section 207 did not provide for compensation to the estates of the decedents for the interests that were subject to the escheat provision, it was in violation of the Fifth Amendment. Without explanation, Judge Gibson went on to declare that not only was the original version of Section 207 unconstitutional, but the 1984 version was also, even though the amended provisions were not an issue before the court in this case.[89]

The federal government, in the name of Secretary of the Interior Donald P. Hodel, then proceeded to appeal the circuit court's decision to the United States Supreme Court. On 8 May 1987, Justice Sandra Day O'Connor delivered the opinion of the court in the case of *Hodel* v. *Irving*, in which all of the other justices concurred in three separate written opinions. The court ruled that the original version of Section 207 amounted to a taking of the property of the decedents without just compensation. Although it held that the collective economic impact of the escheat provision could be substantial, even though the income generated by any single estate might be minimal, the court found dubious the argument that the original plaintiffs had any "investment-backed expectations" in the estates of the decedents.[90]

The court found further that the character of the government's regulation in this case was "extraordinary" because it amounted to "virtually the abrogation of the right to pass on property to one's heirs, which right has been part of the Anglo-American legal system since feudal times." Even the government as defendant conceded that the total abrogation of the right to pass property was unprecedented and probably unconstitutional. In his concurring opinion, Justice John Paul Stevens chided Congress for the "abruptness

89. *Irving* v. *Clark*, pp. 1260-69.
90. *Hodel* v. *Irving*, pp. 2076-77.

and lack of explanation" with which it enacted Section 207 without adequate hearings or floor debate. He stated further that because the escheat provision was effective immediately upon enactment of the ILCA, the government deprived the decedents in this case of the due process of law required under the Fifth Amendment by failing to provide for an adequate "grace period" in which they would have had fair opportunity to arrange for a consolidation of their interests or otherwise avoid the consequences of escheat.[91]

Finally, the court expressed the view that the circuit court's ruling that the 1984 amended version of Section 207 was also unconstitutional was "at best, dicta," since none of the property scheduled to escheat in this case would have done so pursuant to the amended statute. While the court offered no opinion as to the constitutionality of the amended Section 207, it did discuss appropriate methods for resolving the heirship problem. It suggested that the further compounding of interests could be minimized by establishing regulations that would abolish the descent of such minimal interests by rule of intestacy, thereby compelling owners to designate an heir by will in order to prevent an escheat.[92]

Fourteen months after the Irving case was decided, the amended Section 207 escheat provisions were also challenged in federal court. On 26 July 1988, Sonya Curley, a member of the Navajo Nation, filed suit in United States District Court in New Mexico against Secretary of the Interior Hodel. As an heir whose potential inherited interests in five allotments were found to be subject to escheat to the Navajo Nation, Curley claimed that the escheat provisions of the amended ILCA also violated the due process clause of the Fifth Amendment by not allowing an adequate grace period in which to arrange for the consolidation of fractionated interests. She also claimed that escheat violated the taking clause by depriving decedents of their property without payment of just compensation. The federal government agreed eventually to an out-of-court settlement of this case, largely because it surmised that it could not receive a favorable decision on the issue of a grace period, which in this case amounted to the five months between the enactment of the 1984 amendments and the death of Curley's father.[93]

Although the amended Section 207 would appear to be ripe for further legal challenges, and a BIA memorandum of 16 June 1988 even anticipated such litigation, no further suits have been filed.

91. Ibid., pp. 2078, 2083, 2085-86, 2092.
92. Ibid., pp. 2080n, 2084.
93. U.S., District Court, District of New Mexico, *Curley* v. *Hodel*, Civil No. 88-0886 JC, 26 July 1988; interviews with Piepenbrink.

Factors of money and time may now inhibit additional court action. No economic incentive exists for potential heirs of minuscule property interests to pursue such litigation, and as more time passes, the issue of a grace period becomes less subject to challenge. However, as more escheats take place under the law and reluctant tribes are more often placed in the position of becoming involuntary owners of an increased number of fractional interests, the tribes may question whether the United States as a sovereign has the authority to dictate to other sovereign entities (the tribes) regarding the kinds of property to which they must accept ownership.[94]

The BIA held the escheat provisions in abeyance between October 1985 and June 1988 pending the outcome of the Irving case and a ruling by the Justice Department regarding the constitutionality of the amended statute.[95] In a memorandum of 4 March 1988, John O. McGinnis, the deputy assistant attorney general, opined that the new Section 207 would survive a constitutional challenge under both the taking and due process clauses as long as owners of inherited interests "had an adequate opportunity to adjust their affairs to avoid forfeiture of their interests."[96]

Since June of 1988, more than twenty-one thousand inherited interests have escheated under the provisions of the amended Section 207. It is estimated that through this number of escheats the BIA has avoided the addition of between thirty-five and fifty thousand new heirs. Thus, the ILCA appears to be making an incremental dent in the heirship problem. As is evident from the previous example of Yankton Allotment No. 10326-A, all but 8 of the 1,075 interests in that tract in 1983 would now be subject to escheat. Yet, BIA agency realty personnel have indicated that the escheat provisions have served to increase their administrative workload. They must now provide additional data to the administrative law judges before estates can be probated, including the amount, in both the fractional and decimal form, of the decedent's ownership in each tract in which an inherited interest was held. For each tract in which the decedent held a 2 percent or less interest, they must also determine the amount of income that might have accrued to that interest during the five years preceding death.[97] While the escheat provisions should eventually reduce the workload of agency staff (since the interests that escheat and the new heirs that are avoided both mean that there will less division of estates on paper in the future), for the time being they represent an increased burden on personnel who are already overworked.

94. Interviews with Piepenbrink.

95. Ibid.

96. John O. McGinnis to Ralph W. Tarr, Solicitor, Department of the Interior, 4 Mar. 1988, Files of the Branch of Titles and Research, Bureau of Indian Affairs, Washington, D.C.

97. Interviews with Piepenbrink; interview with Alice Harwood, Realty Specialist, Bureau of Indian Affairs, Washington, D.C. (formerly at Fort Berthold Indian Agency, North Dakota), 11 Oct. 1990; John W. Fritz to All Area Directors, p. 14.

For their part, tribal leaders have been reluctant to implement the voluntary provisions of the ILCA. No tribe has yet adopted an inheritance code under the act, and only two tribes, the Cherokee Nation of Oklahoma and the Pueblo of Nambe in New Mexico, have had land consolidation programs approved under the law. In neither case, however, did the desire or necessity to reduce heirship interests motivate the tribes, for neither has serious problems in this regard.[98]

In 1988, Margo S. Miller, a graduate student at Harvard University's Kennedy School of Government, conducted an analysis of tribal responses to the ILCA. She found that tribal leaders were generally confused or uninformed about the law, largely because the BIA had been slow to disseminate information and guidelines pertaining to the statute. Miller also discovered that the tribal leadership, for a variety of reasons, had chosen not to take any action. Some tribes had no need for the law, since they either had no allotments or had already adopted inheritance codes and/or consolidation programs. Others had chosen to focus on other priorities, such as the development of natural resources or the purchase of land within their reservation. While several tribal leaders felt that land consolidation programs and tribal laws limiting inheritance would serve to stir up conflict and alienate their members, others stated that their tribes did not have sufficient means to purchase fractionated interests, especially since the legislation did not provide funds for that purpose. Several leaders expressed both their continued frustration with the magnitude of the heirship problem and its seeming insolubility and their skepticism of the incremental solution offered by the ILCA.[99]

The BIA has yet to publish regulations implementing the ILCA, but it currently has four task forces working on various aspects of heirship and probate problems. Among the goals of these task forces is the development of a program that would allow the BIA, for the first time in its history, to provide estate planning and administration as part of its technical assistance to tribes and tribal members. Another goal is to develop a model code of inheritance that would allow tribes to conform with the movement of the states in recent

98. Interview with Lee Maytubby, Realty Specialist, Division of Real Estate Services, Bureau of Indian Affairs, Washington, D.C., 11 Oct. 1990; Miller, "Tribal Responses to Federal Land Consolidation Policy," p. 14.

99. Miller, "Tribal Responses to Federal Land Consolidation Policy," pp. 14-27.

years toward the development of uniform inheritance codes. The BIA also hopes eventually to provide improved guidance regarding such matters as life estates, gift conveyances, and alternatives to escheat.[100]

The Indian Land Consolidation Act falls short of the ideal solution to the heirship problem postulated by Ethel Williams in 1971. Although it gives tribes a greater opportunity to retain control and make more productive use of trust lands, it neither protects the equities of all owners of heirship land interests nor offers a short-range reduction of federal costs. The potential for further legal challenges and the reluctance of tribal leaders to implement the statute now casts a cloud over the future of both this solution to the historic heirship problem and the tribal land consolidation efforts it was designed to encourage.

100. Interviews with Piepenbrink; Deputy to the Assistant Secretary, Indian Affairs (Trust and Economic Development) to All Area Directors, 31 July 1986 and 28 Jan. 1988, to Aberdeen, Anadarko, Billings, and Portland Area Directors, Field Solicitor, Twin Cities, Minnesota, and Director, Office of Hearings and Appeals, 17 May 1990, and Howard Piepenbrink, Chief, Branch of Titles and Research, to Deputy Assistant Secretary, Indian Affairs (Trust and Economic Development) 6 Oct. 1987, 16 Aug. 1989, and 1 June 1990, all in Files of the Branch of Titles and Research, Bureau of Indian Affairs, Washington, D.C.

Allotment and the Sissetons: Experiments in Cultural Change, 1866-1905

JOHN D. MCDERMOTT, JR.

Although practiced on a limited basis since the early decades of the nineteenth century, the allotment of American Indian reservations did not become the basis for federal Indian policy until the passage of the Dawes General Allotment Act in 1887. Before that time, the concept of allotment, that is, the practice of issuing a quarter section of land to each eligible individual on a reservation, rested on the belief that Indian peoples could adopt an agricultural lifestyle if given land of their own, education, and, most importantly, time to change their traditional cultures. Under these assumptions, the Sisseton and Wahpeton Sioux signed the Treaty of 1867, which established a reservation for them in eastern Dakota Territory. Over the next twenty years, they made remarkable gains toward their own self-sufficiency under a unique set of clauses in the treaty that encouraged them to work for their own subsistence on an economically sheltered reservation.

In contrast to earlier allotment policies, the Dawes Act of 1887 made different assumptions. The key ingredient, formerly present but now missing, was time: the Dawes Act legislated that the Indians immediately convert to an agricultural lifestyle and that unallotted land be opened for white settlement. Despite their steady progress over two decades, the Sioux at Sisseton were unable to function effectively in white society after the allotment act took effect because it changed the basic structure of their reservation's economy too quickly, introducing white competition and removing governmental protection. The motivating forces in the treaty that