

History of AIPRA

The history of allotment, and the attitudes underpinning this policy, began with the first contact between Europeans and Indians on this continent. Those first settlers from various European nations realized the Indian societies they encountered were vastly different from their own, and being different, were seen as inferior and “uncivilized.” Thus, the Indians were considered people to be dominated and subdued, part of the conquerable wilderness of this vast continent that settlers tamed through the western expansion of this country. The history of Indian land allotment, and its long-lasting and devastating effects, illustrate this attitude, as manifested in treaties, case law, and legislation.

I. The Beginnings of Land Allotment

The theoretical groundwork for Indian land allotment was laid in the case of *Johnson v. M'Intosh* by Chief Justice John Marshall.¹ This case involved a situation in which settler's were trying to buy land directly from the Indians, who did not understand the European's idea of private property.² This resulted in massive confusion regarding who held title to the lands. The decision by Marshall stated that the federal government had the exclusive sovereign power to acquire Indian land by right of purchase or conquest.³ This restricted the Indian's power to alienate their land to anyone but the federal government.⁴ Marshall invoked the Discovery

¹ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

² *Id.*

³ *Id.*

⁴ Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 433 (Summer 1998).

Doctrine that was handed down from England, Spain, and France to justify this decision.⁵ This decision and its justifications set the stage for future western expansion, that is, non-Indian settlement of the western lands, and lent validity to the idea of Manifest Destiny.

Western expansion was a considerable force in this country throughout the 19th century, and was increasing at an incredible rate.⁶ However, the treaties made by the government with the Indians, some of which required Indian consent for land acquisition by the government, threatened to stand in the way of this expansion.⁷ Therefore, in the Act of March 3, 1871, Congress repudiated future treaty-making with the Indians, prohibiting the President from negotiating or executing further treaties with the Indians.⁸ Thus, western expansion could progress unhindered by the will of the Indians who lived there.

The General Allotment Act, or Dawes Act, of 1887, initiated the policy of Indian land allotment in the name of “civilizing” the Indians and freeing western land for white settlement.⁹ This act authorized the President to allocate plots of reservation land, usually 80 or 160 acre plots, to individual Indians and Indian families.¹⁰ These allotments were held in trust by the government for the Indians, and therefore, they were inalienable and tax-exempt.¹¹ According to this act, the land of deceased allottees passed to their heirs according to the laws of the state where the land was located.¹² The results of this arrangement is discussed in the following section. There was, however, surplus land left over after the allotment to Indian individual and

⁵ *Id.* See also Cross, *supra* note 4.

⁶ See Cross, *supra* note 4.

⁷ *Id.* at 443-444.

⁸ *Id.*

⁹ General Allotment Act, ch. 119, 24 Stat. 388. See John C. Sledd, *Events Leading to the American Indian Probate Reform Act of 2004 (AIPRA)*, Univ. of Wisc. Land Tenure Symposium, 2 (May 18, 2005).

¹⁰ 25 U.S.C. § 331. See Sledd, *supra* note 9.

¹¹ 25 U.S.C. §§ 348, 349, 354. See Sledd, *supra* note 9.

¹² 25 U.S.C. § 348. See Sledd, *supra* note 9.

families. This land was given to non-Indians to settle and cultivate.¹³ The Indians thus lost about two-thirds of their tribal land through this process.¹⁴

The purpose of this legislation exhibited the dominating and paternalistic attitude towards the Indians held by the government and the American society. The act was meant to “force Indians to abandon their nomadic ways in order to speed the assimilation of the Indians into American society.”¹⁵ The idea was that, if the Indians were taught by the white settlers, whose lands were dispersed amongst the Indians’ allotment lands, how to farm and use the land as the white people used land, then the Indians would become more like white people and pose less of a threat to white society.¹⁶ White society, thus, could cure the Indians of their uncivilized ways in a way other than by killing them all. Additionally, allotment, which was “in part a result of pressure to free new lands for further white settlement,”¹⁷ would enable American society to spread further westward.

The case of *Lone Wolf v. Hitchcock*, challenging this policy in the court system and ending in the Supreme Court in 1903, further deteriorated the Indian tribes power of self-determination and further strengthened the government’s power to dictate the Indians’ fate.¹⁸ The issue in the case was whether Indian tribes could prevent the federal government from allotting their reservation lands and selling the surplus to non-Indian settlers in violation of a treaty requiring Indian consent.¹⁹ The Court held that Congress had plenary power over Indian lands and was under no legal obligation, but only a moral obligation, to respect Indian treaties.²⁰

¹³ See *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

¹⁴ Sledd, *supra* note 9 at 3.

¹⁵ *Hodel*, 481 U.S. at 706 (quoting, in part, *Solem v. Barlett*, 465 U.S. 463, 466 (1984) (internal quotes omitted)).

¹⁶ This goal did not work perfectly, however, because the Indians started to lease the land to white settlers and live off the meager rents, rather than learning how to farm it and cultivate it themselves. See *Hodel*, 481 U.S. at 707.

¹⁷ *Hodel*, 481 U.S. at 706.

¹⁸ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

¹⁹ Cross, *supra* note 4 at 444.

²⁰ *Id.*

This decision thus alleviated the legal impediments to the allotment process and the sale of the surplus land, which was already underway, and which was necessary to maintain the ever-increasing western expansion.

In 1910, Congress passed a law that allowed Indians to devise their land interests by will.²¹ This privilege, however, was accompanied by the requirement to follow regulations made by the Secretary of the Interior. Despite this allowance, most Indians, for various reasons, did not have wills and thus died intestate.²² This compounded the emerging, burgeoning problem of fragmentation that was a threatening to engulf the sanctity of the Indians' land interests.

II. Results: The Fragmentation Problem

The intestacy that ran rampant amongst the Indians who held allotment interests resulted in a serious fractionation problem that still plagues Indian land interests to this day. According to the General Allotment Act, heirs (those who inherit by intestate succession) took land as tenants in common, holding undivided shares that got smaller and smaller with each generation dying intestate.²³ Because the lands were held in trust and could therefore not be alienated or partitioned, this fractionation not only increased with each generation, but also could not easily be remedied by the land interest holders. The land became effectively useless to the interest holders because, in order to do anything with the land, the individual owner had to get the consent of every other owner of that allotment parcel.²⁴ This becomes an intimidating and prohibitive requirement when there are hundreds of other owners of the parcel who do not know

²¹ 25 U.S.C. § 373 (1910). See Chris Schwab, *Constitutional Law—Fifth Amendment Just Compensation Clause—Escheat of Indian Trust Lands*, 65 TENN. L. REV. 805, 808 (Spring 1998).

²² See Sledd, *supra* note 9 at 3.

²³ *Id.*

²⁴ *Id.*

each other and do not share the same goals and interests.²⁵ Fractionation also resulted, and continues to result, in tremendous administrative costs. In fact, the costs of bookkeeping and distributing the proceeds often exceeds the total income from the land.²⁶ An example of this problem is occurring in one tract on the Sioux reservation that has 439 owners, a third of whom receive less than \$0.05 in annual income and two-thirds of whom receive less than \$1 in annual income.²⁷ Finally, fractionation is resulting in the disassociation and alienation of Indians from their tribal lands and heritage, which threatens to undermine and eradicate the Indians' sense of self-identity and even their very being.

III. The Fragmentation "Solution"

Congress eventually realized and acknowledged the failure of the allotment policy and has spend the last 72 years making attempts to rectify the fractionation situation. These attempts, however, have largely failed to bring about significant improvement in the situation that faces many Indian allotment interest holders. The most recent attempt, the American Indian Probate Reform Act of 2004 (AIPRA), has yet to be implemented and its potential effect has yet to be seen.

The first of these attempts to rectify the fractionation problem was the Indian Reorganization Act of 1934 (IRA).²⁸ In this act Congress officially recognized the failure of the allotment policy and prohibited further allotment.²⁹ It did nothing, however, to alleviate existing fractionation. This act also extended indefinitely the trust period for remaining allotments and

²⁵ For some uses of the land, such as leasing, logging, grazing, or mining, the approval of the federal government is necessary along with the consent of at least a majority of the parcel owners. See Sledd, *supra* note 9 at 3.

²⁶ *Hodel*, 481 U.S. at 708.

²⁷ See Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian land Tenure Problem*, 2003 Wis. L. Rev. 729, 746 (2003).

²⁸ 25 U.S.C. § 461, *et seq.*

²⁹ *Id.* See *Hodel*, 481 U.S. at 708.

authorized the acquisition by the government of new land in trust for tribes and individuals.³⁰ It also gave tribes the right to adopt constitutions, subject to federal approval.³¹ Though this was a first step toward preventing further fractionation, it ultimately did little to alleviate the problematic fractionation situation.

The next attempt at solving the fractionation problem was the Indian Land Consolidation Act (ILCA) in 1983.³² Through several comprehensive studies by the House and the Senate in the 1960's, Congress was made aware of the full extent of the fragmentation problem and finally took action to ameliorate the problem in ILCA in 1983.³³ The act authorized tribes to adopt plans for consolidation of tribal lands through purchase, sale or exchange, subject to the approval of the Secretary of the Interior.³⁴ This was evidence of the nascent policy of tribal self-determination that was reflected in the provisions of ILCA.³⁵ The most contentious of the provisions, however, was the escheat provision in section 207. This provision required that restricted land escheat to the tribe if the interest represented 2% or less of the total acreage in the parcel, and if the interest had earned the owner less than \$100 in the year preceding the decedent's death.³⁶ This section prohibited the descent both by intestacy and by devise of land that fell into this category, and made no provision for the payment of compensation to the owners of such land interests.³⁷

Because of this extreme limitation of the ability of the owner to pass on property at death, this escheat provision was soon challenged in the courts, ending in the Supreme Court in *Hodel*

³⁰ See Sledd, *supra* note 9 at 4.

³¹ *Id.*

³² 25 U.S.C. §§ 2201-2210 (1982).

³³ See *Hodel*, 481 U.S. at 708-709.

³⁴ Sledd, *supra* note 9 at 6. Though ILCA granted the tribes the ability to adopt such plans, few were actually ever adopted. *Id.*

³⁵ *Id.*

³⁶ ILCA § 207, 96 Stat. 2519.

³⁷ See *Hodel*, 481 U.S. at 710, 717.

v. Irving.³⁸ This suit brought a claim under ILCA that the escheat provision constituted a government taking without just compensation.³⁹ The plaintiffs owned several fractional interests in land, which had little value individually, and which therefore escheated to the tribe under section 207 of ILCA. These interests taken together, however, had significant value. The Court, therefore, held that this provision of ILCA did effect a taking of the plaintiff's property without just compensation.⁴⁰ The Court also established the right to pass on valuable property to one's heirs.⁴¹ Thus, because the law prohibited passing on property both by intestacy and by devise and so constituted a total abrogation of the right to pass on property, the Court found it was too extreme a restriction and could not be upheld.⁴²

Even as this case was being decided, Congress passed an amended version of section 207 of ILCA.⁴³ This amended version adjusted the definition of a fractional land interest that was subject to escheat. It stated that an interest is fractional if it constitutes 2% or less of the total acreage of the parcel, and if it is incapable of earning \$100 in any one of the five years following the decedent's death. However, there was a rebuttable presumption stating that if the land interest earned less than \$100 in any one of the five years prior to the decedent's death, such an interest would be considered incapable of earning \$100 in any one of the five years following the death of the decedent.⁴⁴ The amended version also permitted devise of an otherwise escheatable interest "to any other owner of an undivided fractional interest in such parcel."⁴⁵ Finally, the amended version authorized the tribes to override the provisions by adopting their own codes

³⁸ *Hodel v. Irving*, 481 U.S. 704 (1987).

³⁹ *Id.* at 706.

⁴⁰ *Id.* at 717-718.

⁴¹ *Id.* at 717.

⁴² *Id.*

⁴³ ILCA (1984), 98 Stat. 3172. The Court in *Hodel* made it clear, however, that it was deciding the case under the pre-amended version, since that was the law that was applied to the plaintiff's property. *Hodel*, 481 U.S. at 710.

⁴⁴ See *Babbitt v. Youpee*, 519 U.S. 234, 241 (1997).

⁴⁵ *Babbitt*, 519 U.S. at 241.

close Indian relatives, more distant relatives who were co-owners, or the tribe.”⁵⁴ However, the ILCA 2000 amendments ultimately failed once again to contribute to the solution of the fractionation problem.

The most recent attempt by Congress to solve the fractionation problem, the American Indian Probate Reform Act of 2004 (AIPRA), draws upon elements of the ILCA 2000 amendments and represents an effort to change the way trust estates are administered.⁵⁵ First, this act creates a new federal probate code applicable to all estates that do not fall under an approved tribal probate code.⁵⁶ It also revises, and restricts, the definition of “Indian” and “eligible heirs” for purposes of inheriting trust lands.⁵⁷ Furthermore, in the attempt to alleviate the fractionation problem, the act includes provisions regarding intestate succession that promote the consolidation of fragmented interests. One of these provisions states that if the ownership interest is less than 5% of the total, then inheritance is limited to the oldest eligible child.⁵⁸ Another of these provisions permits for highly fractionated land parcels an involuntary sale upon the request of a tribe or Indian wanting to buy the interest.⁵⁹ This means that the government may sell, and purchase, the fractionated interests without the consent of the heirs.⁶⁰ Another such provision relates to unclaimed property interests, in order to deal with the many interests for which the DOI has no valid owner’s address.⁶¹ It allows the DOI, if the owner is not located, to seize the land and give it to the tribe, after fulfilling requirements of notice and efforts to locate

⁵⁴ *Id.*

⁵⁵ AIPRA, P.L. 108-374.

⁵⁶ *Id.* at § 2.

⁵⁷ *Id.* at § 6(b)(1), (3).

⁵⁸ *Id.* at § 3(a).

⁵⁹ *Id.* at § 6(a)(2). *See also* Sledd, *supra* note 9 at 15.

⁶⁰ *See* Understanding the American Probate Reform Act of 2004, <http://www.tribal-institute.org/lists/understanding.htm>.

⁶¹ AIPRA at § 4. *See* Sledd, *supra* note 9 at 15.

the owner.⁶² This act, despite the new restrictions on intestate disposition, preserves most options for testate disposition, and therefore is hoped to be able to pass constitutional scrutiny.⁶³

IV. Possible Constitutional Challenges

There are, however, several provisions within AIPRA that may provoke challenges to its constitutionality. One of these potential challenges could be aimed at the provision regarding forced sale at probate. This provision could be vulnerable to a takings challenge.⁶⁴ Because these fractional interests have not only a monetary value, but also retain a symbolic value, their forced sale, though reimbursing the owner of the monetary, fair-market value, may deprive the owners of the symbolic value of the land. This symbolic value, because it is an intrinsic value that ensures a connection with the individual Indian's tribal heritage, is difficult, if not impossible, to reimburse. Thus the government is liable to be charged with taking that value without just compensation.

Another possible constitutional challenge could be aimed at the narrow definition of "Indian."⁶⁵ This restrictive definition, which emphasizes tribal membership, is vulnerable to an equal protection and due process challenge. Because the individual Indian tribe defines who is eligible to become a member of their tribe, it would be possible to exclude lineal heirs who may be only partially Indian, and thus not eligible for membership in some tribes; whereas another person who is of a similar degree of descent, but because he is of a different tribal heritage with a different definition of who is eligible to be a member, may be considered an "Indian." This

⁶² *Id.*

⁶³ Sledd, *supra* note 9 at 17.

⁶⁴ *Id.*

⁶⁵ *Id.*

outcome would constitute the government treating similarly situated people differently, and thus a possible equal protection violation.

Finally, there could possibly be a due process claim brought based on the infringement of fundamental rights. The Supreme Court in *Hodel* and *Babbitt* has already held that there is a right to pass property to one's heirs. If this right is deemed to be a fundamental right, then the provision in AIPRA allowing forced sale at probate of fractionated interests could be determined to unconstitutionally infringe upon that right. The possibility that this right would be found to be fundamental is fairly substantial, given its roots in this nation's history, and the protection given to land ownership stated in the Constitution.⁶⁶ A further consideration that could be presented as an issue is whether one has a right to one's heritage. The restrictive definition of "Indian" in the statute will conceivably allow non-member Indians to be treated as non-Indians. This could be seen as depriving those non-member Indians of their Indian heritage, particularly when it prevents them from inheriting tribal lands. Whether this concept is considered to be substantial enough to be deemed a fundamental right is debatable, but it is an intriguing issue to ponder.

Thus, the land allotment policy and the resulting fragmentation problem has a long history and a lingering effect. The numerous attempts by Congress to rectify the increasingly compounding problem have all failed, either in effectiveness or in constitutionality. The latest attempt, AIPRA, though complex in its provisions, is hoped to be successful in reducing the extent of the fractionation problem. Though there are several provision that might prove vulnerable to constitutional challenges, it is yet to be seen whether AIPRA will be able to withstand these challenges and make a real contribution toward the solution of the fractionation problem.

⁶⁶ See *Hodel*, 481 U.S. at 717. Though the right, as such, to pass valuable property to one's heirs has not been acknowledged before *Hodel*, the practice of passing property at death has been well established and highly valued by our society throughout its history.