American Indian Law Review

Volume 22 | Number 1

1-1-1997

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Recommended Citation

Michelle M. Lindo, *Youpee v. Babbitt - The Indian Land Inheritance Problem Revisited*, 22 AM. INDIAN L. REV. 223 (1997),
<https://digitalcommons.law.ou.edu/ailr/vol22/iss1/6>

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YOUPEE v. BABBITT — THE INDIAN LAND INHERITANCE PROBLEM REVISITED

*Michelle M. Lindo**

There is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right.¹

Introduction

Case Studies

Imagine owning a tract of land with your brother and sister. You and your siblings do not own identifiable portions of the land. Although the tract may be composed of three acres, you do not own any acre by yourself. The terms of the ownership agreement require all three proprietors to concur on a course of action for the land before the owners can use the land.

Even if you and your siblings are the best of friends, this arrangement is bound to cause problems; it is just human nature to have differing opinions. When problems arise over how to use the tract, you and your siblings may wish to divide the land into smaller parcels and go your separate ways. Alas, the agreement forbids you from partitioning and selling the land or any portion of it.

Now add to the hypothetical your sister's three living children at her death. These children each take one third of her share in the tract. At this point, the original three owners have grown to five owners. If you thought coming to an agreement with your siblings was difficult, imagine trying to come to a consensus with your pesky niece and nephews about the wisest use for the land.

Fast forward about ten years. You and your brother have followed your sister to the pearly gates. You leave two living children. Your son who predeceased you leaves three children. Your brother's four children survive your brother. By this time, the original three owners have mushroomed to a dozen, each with varying amounts of interests in the tract. The owners still may not alienate or partition the land. Trouble is beginning to brew, and it will only get worse.

If the above scenario has not persuaded you that this is a nightmare situation, imagine owning interests in a tract of three hundred twenty acres.

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1. *Hodel v. Irving*, 481 U.S. 704, 715 (1987).

Originally, the tract belonged to your great grandmother alone. She took the land under an agreement similar to that in the above hypothetical scenario.²

In the seventy years since she received the land, your great grandmother has died. In fact, nearly one hundred subsequent owners of the land have died.³ Today, you are one of one hundred eighty-three people with ownership interests in that tract. Some of these owners hold interests of up to fifteen percent of the total acreage in the tract.⁴ You hold a minute fraction of one percent of the land. Are you enjoying the privilege of owning property yet? Finally, imagine this situation repeating itself throughout six million acres of land.⁵

A parcel of land known as Tract 1305 presents an even worse example of fractionation.⁶ In the early 1980s, the forty acres of land known as Tract 1305 were worth eight thousand dollars total and reaped just over one thousand dollars in rent annually. Four hundred thirty-nine people held ownership interests in this parcel at that time.⁷ No owner received over eighty-five dollars in rent per year.⁸ The owner of the smallest interest in the tract received one penny every one hundred seventy-seven years!⁹ The federal government spent more than twice the value of the land computing the rent due each year.¹⁰

Overview

For centuries, Americans have dearly treasured the right to transfer one's property, especially real property, to one's descendants.¹¹ Although this right is by no means absolute, courts closely scrutinize restrictions on transferring land by testamentary means. Government has always had the authority to regulate all types of land, but when it comes to Indian land, the government seems to have special authority to regulate its use.¹² Due to decades of land

2. KIRKE KICKINGBIRD & KAREN DUCHENEAUX, ONE HUNDRED MILLION ACRES 26 (1973).

3. *Id.*

4. *Id.* at 26-30.

5. *Id.* at 31. The tract just described is real. It is part of the Standing Rock Sioux Reservation in South Dakota. The original allottee's name was Mahpiya, or Nancy Cloud. *Id.* at 26. The subsequent owners belonged to various bands and tribes. The number of owners of this allotment and the sizes of their interests cited in this paper were current in 1959. *Id.* at 30. Undoubtedly, the number of owners has increased since that time. Likewise, the size of each interest has probably decreased. Even in 1959, the owners of some of the interests in the tract were unknown. *Id.* The fractionation problem continues even today.

6. *Hodel*, 481 U.S. at 713 (citing M. LAWSON, HEIRSHIP: THE INDIAN AMOEBA (1982), reprinted in *Hearing on S. 2480 and S. 2663 Before the Senate Select Committee on Indian Affairs*, 98th Cong. 85 (1984)).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 715.

12. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW vii (Rennard Strickland et al. eds.,

use restrictions, transferring Indian trust land presents a real problem for all parties involved: the donors, the donees, the tribes, and the federal government.¹³

Over the past one hundred years, tracking the ownership of these trust lands has turned into a logistical nightmare. As each generation of owners dies and leaves portions of trust parcels to his or her descendants, the number of concurrent owners grows exponentially.¹⁴ To further complicate the situation, the system of landholding is composed of undivided interests in the land. Rather than each descendant individually owning a small part of each tract of Indian trust land, every owner holds an undivided share of the whole land tract. No owner possesses an identifiable part of the land.¹⁵

This means that *all* owners must agree when a different use for the land is sought by one owner.¹⁶ Due to the problems created by multiple ownership of undivided interests in Indian trust land, such land has sometimes been all but abandoned. Today, much of this land is rented out, creating the further problem for the federal government of computing the amount of rent due each owner of the fractional interests.¹⁷ Sometimes, the cost of computing the rent checks exceeds the amount of rent owed to the owners. In fact, the annual administration costs for such fractionated parcels sometimes exceed the value of the property itself!¹⁸

Obviously, this complicated situation requires a solution. During the past sixty years, Congress has often attempted to solve the problem of too many owners of land with little income-producing value. Twice since 1987, the federal courts have told Congress that these efforts at reforming the Indian trust land system of inheritance are inadequate and unconstitutional.¹⁹

This article first reviews the historical and legal contexts within which the Indian trust land inheritance issue arises. Next, it examines one of the federal court system's latest rulings on this issue through *Youpee v. Babbitt*, which held unconstitutional the current law dealing with the inheritance issue.²⁰ This article focuses on possible solutions to the Indian trust land fractionation problem which pass constitutional scrutiny. Some solutions concentrate on enhancing the productivity of trust land and reducing the administrative costs associated with fractionated Indian land, while others emphasize methods for preserving the rights of Indian trust land owners to pass land to their

1982) [hereinafter COHEN].

13. *Hodel*, 481 U.S. at 715.

14. *Id.* at 712.

15. *Irving v. Clark*, 758 F.2d 1260, 1261 (8th Cir. 1984), *aff'd*, *Hodel v. Irving*, 481 U.S. 704 (1987).

16. *Kickingbird & Ducheneaux*, *supra* note 2, at 31.

17. *Hodel*, 481 U.S. at 715.

18. *Id.* at 713.

19. *Hodel*, 481 U.S. at 716-18; *Youpee v. Babbitt*, 117 S. Ct. 727, 734 (1997).

20. *Youpee*, 117 S. Ct. at 723-24.

descendants. As this article will demonstrate, given the diverse actors involved in the trust land situation, the fractionation problem is likely intractable.

Historical and Legal Framework Behind Youpee

Provisions of the United States Constitution

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving individuals of property without due process of law.²¹ The government's obligation to provide the process that is due to individuals includes such measures as holding hearings before taking property. Simply giving prior notice of the government's planned actions may constitute another means of affording due process to individuals. Additionally, the Fifth Amendment requires the government to pay the owners "just compensation" when private property is taken for public use.²² Attempts by Congress to remedy this problem have violated the Fifth Amendment by failing to compensate the owners of the land escheating to the tribes.²³

General Allotment Act of 1887

The General Allotment Act of 1887 (GAA)²⁴ was the first piece of comprehensive legislation in a long line of statutes dealing with Indian trust land. The GAA divided Indian reservations into individual parcels.²⁵ To protect against white settlers taking advantage of Indian land owners unfamiliar with Anglo-American landholding schemes,²⁶ the GAA provided for the federal government to hold these lands in trust for the Indians.²⁷ If the owner of a parcel of land died before the trust period ended, the federal government held the land in trust for the deceased owner's heirs at law. These heirs all held undivided interests in the land.²⁸ To this day, the government holds millions of acres of land in trust for individual Indians.²⁹

21. U.S. CONST. amend. V. The pertinent phrases of the amendment read: "No person shall . . . be deprived of life, liberty, or property, without due process of law" and "nor shall private property be taken for public use, without just compensation." *Id.*

22. *Id.*

23. *Hodel*, 481 U.S. at 716-18; *Youpee*, 117 S. Ct. at 734.

24. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341, 342, 348, 349, 354, 381 (1994)). This legislation is also known as the Dawes Act.

25. COHEN, *supra* note 12, at 131-32.

26. *Id.* at 131.

27. *Id.* at 472.

28. Kickingbird & Ducheneaux, *supra* note 2, at 24.

29. COHEN, *supra* note 12, at 471 (stating that the government holds over fifty million acres of Indian land in trust).

Indian Reorganization Act of 1934

Forty years after the implementation of the GAA provisions, undivided interests in allotted land were held by many people.³⁰ This increase in the number of interest owners led to an increase in the government's administration costs in dealing with the allotted lands. In response to this growing problem, Congress enacted the Indian Reorganization Act of 1934 (IRA)³¹ to prevent the further allotment of Indian reservation lands to individual tribal members. This act did nothing to combat the problem of the many parcels of trust land already subject to fractionation.³² Any preexisting allotment of land remained subject to multiple divisions upon the deaths of the succeeding owners.

Indian Land Consolidation Act of 1983

Nearly half a century after passing the IRA, Congress directly addressed the problem of multiple owners inheriting small undivided interests in such land. In the Indian Land Consolidation Act of 1983 (ILCA),³³ Congress tried to do just what the act proclaimed, halt the further fractionation of Indian trust land parcels by regulating the terms under which heirs of such owners received property. As the rationales behind this move, Congress cited reducing administrative costs and making the land more economically useful. Another goal was to preserve the Indian land base.³⁴

The ILCA provided for the escheat³⁵ of certain trust land to tribes when an owner of Indian trust land died. The Act set out a number of qualifications for determining whether the act applied to the trust land involved in a specific case. First, the land must have been within the jurisdiction of a tribe.³⁶ Second, the Act took effect whether the deceased owner left a will or died intestate. Third, the Act only applied to those owners who held two percent

30. Kickingbird & Ducheneaux, *supra* note 2, at 26.

31. Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1994)).

32. 25 U.S.C. § 461 (1994).

33. Indian Land Consolidation Act of 1983, 25 U.S.C. § 2206 (Supp. I 1983) (codified as amended at 25 U.S.C. § 2206 (1994)). The original act provided that

No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.

Id.

34. 25 U.S.C. § 2206 (1994).

35. Escheat is defined as "[a] reversion of property to the state in consequence of a want of any individual competent to inherit." BLACK'S LAW DICTIONARY 545 (6th ed. 1990).

36. 25 U.S.C. § 2206 (1994).

or less of the total acreage of the tract at issue.³⁷ Fourth, the land must have yielded the deceased owner less than one hundred dollars in the year prior to his or her death. If all these conditions were met, the decedent's trust land escheated to the decedent's tribe, rather than to the decedent's heirs or devisees. In addition to having the land taken from them, neither the heirs nor the decedent's estate received any compensation from the tribe or the federal government.³⁸ Naturally, potential heirs of small trust interest owners did not welcome these provisions.

Hodel v. Irving (1987)

Potential heirs affected by the original ILCA challenged the act's constitutionality in *Hodel v. Irving*.³⁹ In *Hodel*, relatives of deceased Oglala Sioux tribal members sued Secretary of Interior Donald Hodel, the federal government's representative. The deceased tribal members⁴⁰ owned small interests in a number of tracts of trust land.⁴¹ Chester Irving held two undivided interests. Edgar Pumpkin Seed and Charles Leroy Pumpkin Seed owned thirteen trust land interests. Mary Poor Bear-Little Hoop Cross held twice as many escheatable interests as did the Pumpkin Seeds.⁴²

In *Hodel*, the decedents lost interests in land of varying worth.⁴³ Chester Irving's escheated interests were worth about one hundred dollars. The Pumpkin Seeds and Mary Poor Bear-Little Hoop Cross lost interests worth more substantial sums. Their trust interests were valued at approximately eighteen hundred and twenty-seven hundred dollars, respectively.⁴⁴

The relatives of the deceased members claimed that the interests in the land belonged to them, as the deceased owners' intended heirs or devisees.⁴⁵ The relatives of the deceased land owners claimed the federal government unconstitutionally seized property that had belonged to the deceased tribal members.⁴⁶ The government had taken private property without providing any compensation, much less "just" compensation, to the individual owners.

The Department of Interior claimed, to the contrary, that the relatives of the previous owners did not own the land. Rather, the government asserted

37. *Id.*

38. *Id.*

39. *Hodel v. Irving*, 481 U.S. 704, 710 (1987).

40. The deceased tribal members included Chester Irving, Edgar Pumpkin Seed, Charles Leroy Pumpkin Seed, and Mary Poor Bear-Little Hoop Cross. *Id.* at 709.

41. *Id.* at 709-10.

42. *Id.*

43. *Id.* The amounts cited here are the values of the land interests themselves, not the rental income of the property. *Id.*

44. *Id.*

45. *Id.* at 711. Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed died intestate. Mary Poor Bear-Little Hoop Cross died testate. *Id.*

46. *Id.* at 704.

that the fractional interests in dispute were governed by the original ILCA. Under the provisions of the act, the government claimed that the land interests at issue in *Hodel* met the qualifications necessary for the land to escheat to the Oglala Sioux Tribe.⁴⁷ First, the interests had not produced over one hundred dollars in rent for their owners in the last year of the owners' lives. Second, the interests did not amount to more than two percent of the total acreage of the tracts of land in which the interests were situated.⁴⁸ As far as the Department of Interior was concerned, this was exactly the situation the ILCA was intended to remedy. Underlying the Secretary of Interior's argument was the philosophy that small interests in unprofitable land were to be put to more practical and profitable use, such as having the land escheat to the tribe.⁴⁹

District Court Decision

The saga began in federal district court in South Dakota.⁵⁰ The district court sided with the government, proclaiming the ILCA constitutional. The district court deferred to Congress on the inheritance question, stating that the Indian land inheritance issue was within Congress' authority. Congress had complete power to abrogate the ability of Indian land owners to pass their land to others upon their deaths.⁵¹ In addition, the court concluded that the relatives lacked vested interests in the escheated lands during the decedents' lifetimes.⁵²

Appellate Court Decision

The Eighth Circuit Court of Appeals disagreed with the district court and reversed the lower court's decision.⁵³ The court of appeals found that the ILCA violated the rights of the decedents. While the court held that the plaintiffs had no vested rights in the trust land,⁵⁴ the decedents did have such interests. The plaintiffs could pursue these rights for their dead relatives. The right to testamentary disposition of the decedents' property came from the old Sioux allotment statute, the appeals court noted.⁵⁵ This controversy eventually found its way to the United States Supreme Court.

47. *Id.* at 714. .

48. *Id.* at 710.

49. *Id.* at 712.

50. *Id.* at 710. At the time of the filing of the original suit, the Secretary of Interior was William P. Clark. By the time the case reached the United States Supreme Court, Donald Hodel had replaced Clark as Secretary of Interior.

51. *Hodel*, 481 U.S. at 710.

52. *Id.*

53. *Irving v. Clark*, 758 F.2d 1260, 1261 (8th Cir. 1984), *aff'd*, 481 U.S. 704 (1987).

54. *Id.* at 1263.

55. *Id.* at 1268-69.

Supreme Court Decision

In an opinion that sparked no dissent,⁵⁶ the Court agreed with the substantive arguments of the Indian trust land owners' relatives⁵⁷ and held the original version of section 207 of the ILCA unconstitutional.⁵⁸ While acknowledging Congress' wide-ranging powers in the area of land regulation, the Court held that section 207 of the ILCA went too far. The Court borrowed from its takings analysis in *Penn Central Transportation Co. v. New York City*,⁵⁹ which distinguished mere regulation of property from a taking of property. Mere regulation requires no compensation to the landowner, while a taking requires "just compensation" to the landowner.⁶⁰

The takings inquiry asks several questions. First, what is the economic impact of the regulation?⁶¹ Second, what is the character of the government's action?⁶² Third, to what extent does the statute interfere with the owners' reasonable investment-backed expectations?⁶³

In applying these questions to *Hodel*, the Court found strong evidence in favor of the plaintiffs' rights in the first two prongs of the takings analysis. Justice O'Connor noted that "[t]here is no question that the relative economic impact of Section 207 upon the owners of these property rights can be

56. Justices Brennan, Scalia, and Stevens wrote concurrences. *Hodel*, 481 U.S. at 718-34.

57. *Id.* at 711-12. Before making their substantive argument, the relatives successfully persuaded the United States Supreme Court that the potential heirs did, indeed, have standing to bring their suit. First, the Court held that an actual case or controversy existed, thus satisfying the jurisdictional requirement. *Id.* Second, the plaintiffs suffered adequate injury-in-fact because the Indian Land Consolidation Act divested the plaintiffs of land they would have inherited but for the act's application. The prerequisite that plaintiffs assert their own rights proved another hurdle for the plaintiffs to clear. *Id.* Eileen Bissonette, Mary Irving, and Patrick Pumpkin Seed argued not for their right to inherit but for the right of their deceased relatives to transfer property at death. The Supreme Court agreed with the plaintiffs on this point, also. *Id.*

A unique situation presented itself here. The Court held that a party's representative may pursue the party's claim after the party's death. *Id.* Generally, the Secretary of Interior serves as the deceased party's representative in cases involving Indian trust land, but, in the *Hodel* situation, the Secretary of Interior also had the duty to enforce the statute the plaintiffs challenged. Obviously, serving in both capacities would have been a blatant conflict of interest for Donald Hodel. Therefore, the Court allowed the relatives of the deceased trust land owners to bring suit in this controversy. *Id.*

58. *Id.* at 717-18.

59. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 125-27 (1978).

60. *Hodel*, 481 U.S. at 714-15.

61. *Id.*

62. *Id.*

63. *Penn Central*, 438 U.S. at 124; see, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979).

substantial."⁶⁴ The Court criticized section 207 for conditioning the escheat provision on the amount of rent the fractional interests had yielded, rather than the value of the land itself. Under the terms of the original ILCA, property worth thousands of dollars would escheat to the tribe of the deceased owner if the property did not produce rent exceeding one hundred dollars a year.⁶⁵ Indeed, the income provision seems somewhat strange when one realizes that the owner who put the land to personal use most likely would not have received any money for the land in the preceding year. The Court noted that the land held value not only for its current life estate⁶⁶ owners but also for the holders of the remainder interests in the land.⁶⁷ If the owner of a life estate in a parcel was elderly, the remaindermen⁶⁸ owned quite a valuable stake in the parcel.⁶⁹

In *Hodel*, the decedents held the life estate interests in the property, and the plaintiffs held the remainder interests in the land. As originally enacted, section 207 of the ILCA,⁷⁰ in effect, cut off the interests of the remaindermen without providing any compensation for the seized interests. Therefore, the Court deemed the escheat of these valuable interests as having a significant economic impact on the owners, a sign of a taking.⁷¹

The character of the government action involved in *Hodel* also indicated that a taking of the Indian trust land had occurred. Justice O'Connor described the regulation as "extraordinary."⁷² She wrote

[t]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property — the small undivided interest — to one's heirs. In one form or another, the right to pass on property — to one's family in particular — has been part of the Anglo-American legal system since feudal times.⁷³

64. *Hodel*, 481 U.S. at 714.

65. *Id.*

66. A life estate is a property term defined as "an estate whose duration is limited to the life of the party holding it, or some other person." BLACK'S LAW DICTIONARY 924 (6th ed. 1990).

67. *Hodel*, 481 U.S. at 715.

68. A remainderman is defined as "[o]ne who is entitled to the remainder of the estate after a particular estate carved out of it has expired." BLACK'S LAW DICTIONARY 1293 (6th ed. 1990). A remainderman holds a present right to use the property in the future.

69. *Hodel*, 481 U.S. at 715 (citing 26 C.F.R. § 20.2031-7(f) (Table A) (1986)). For example, holding a remainder interest in a piece of property currently held by an eighty year old life tenant would be much more valuable than a remainder interest in property held by a twenty year old life tenant. In the latter scenario, the remainderman will likely have to wait decades before he or she will have access to the property. The remainderman in the former scenario is in a better position to have access to the property after the passage of only a few years.

70. 25 U.S.C § 2206 (1994).

71. *Hodel*, 481 U.S. at 717.

72. *Id.* at 716.

73. *Id.* It is ironic that so many times the Anglo-American methods has worked against the Indians, and yet, here, the Anglo-American system worked in the Indians' favor.

The statute's effect was so pervasive the Court noted that "[e]ven the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional."⁷⁴ In examining the escheat of these valuable parcels of land, the Court found no viable alternative to transferring the interests through devise or descent. The application of the act in all instances, regardless of whether a will had been made, deeply troubled the Court.⁷⁵ The Court characterized section 207 as overbroad, possibly even defeating inheritance plans which consolidated interests.⁷⁶

Not all aspects of the statute weighed against its constitutionality, however. The Court summarily dismissed the possibility that the ILCA interfered with the trust land owners' investment-backed expectations.⁷⁷ Justice O'Connor noted that the deceased owners did not buy the land at issue. The trust land usually changed owners by gift at death. Successive owners received trust land by operation of wills or intestacy statutes.⁷⁸ Moreover, most of the owners did not actually put the land to personal use; they rented the land out to others. The government had held the land in trust for their use for a century, so the trust terms were not new to the owners.⁷⁹

One other factor favored the government's position in *Hodel*. The court cited an "average reciprocity of advantage."⁸⁰ Justice O'Connor noted that many owners of trust land subject to escheat belonged to the tribes to which the land would escheat. The court explained that the benefits the owners would derive from the escheat of many small interests would exceed the hardship of continuing to hold the land in unproductive, fractionated parcels.⁸¹

Hodel has not been universally accepted. Some commentators have written off *Hodel* as an aberration in the course of land regulation policy.⁸² Others have warned that *Hodel* bodes ill for future takings cases unrelated to the Indian inheritance issue.⁸³ A recent federal court case suggests that the

74. *Hodel*, 481 U.S. at 716.

75. *Id.* at 716-18.

76. *Id.* at 718. The court was concerned that the original Indian Land Consolidation Act would defeat the wishes of a decedent whose devisees already owned other interests in the tract of land in which the decedent had held interests. If the decedent's intent was followed, the tract would end up with fewer total owners. *Id.*

77. *Id.* at 715.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 715-16.

82. See Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected? — The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195 (1995); Suzanne S. Schmid, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. MIAMI L. REV. 739, 756-59 (1989).

83. See John H. Leayitt, Note, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis — A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL L. 597 (1988); Schmid,

Indian trust land inheritance issue is not yet dead, and *Hodel* may not be so easily dismissed by future commentators and courts.⁸⁴

Amended Indian Land Consolidation Act

In *Hodel*, the Supreme Court and the lower courts examined the original version of section 207 of the ILCA.⁸⁵ While the *Hodel* case was moving through the federal court system, Congress modified the conditions under which Indian trust land would escheat to the tribes having authority over the land. Congress amended section 207 of the ILCA.⁸⁶ In hindsight, as the following discussion will highlight, Congress probably should have waited until *Hodel* was decided before attempting to correct the deficiencies of the act.

Under the amended section 207 of the ILCA, some provisions did not change between the original and the amended versions. Small undivided interests in Indian trust land could still escheat to the tribes. The escheat provision applied to both descent and devise of the interests.⁸⁷ The size requirement for the provision to apply remained two percent or less of the

supra note 82, at 752.

84. *Klauser v. Babbitt*, 918 F. Supp. 274, 280-81 (W.D. Wis. 1996).

85. *Hodel*, 481 U.S. at 710-18; *Irving*, 758 F.2d at 1269. In dicta, the *Irving* court also declared the amended version of the Indian Land Consolidation Act unconstitutional. *Irving*, 758 F.2d at 1269.

86. 25 U.S.C. § 2206 (1994) [hereinafter Amended Indian Land Consolidation Act]. The amended statute read:

(a) No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning \$100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than \$100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning \$100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

Id.

87. *Id.* § 2206(a).

total acreage of the tract under scrutiny. No compensation of any kind was provided to owners who lost interests in land under the application of the statute.⁸⁸

Instead of looking back only one year in determining whether the land was profitable, the amended section of the ILCA looked back through five years of records to see whether the land yielded one hundred dollars or more in rent in any of those years.⁸⁹ This change in the statute came partially as a result of evidence that some trust land produced income only once every few years, due to crop rotation or infrequent extraction of minerals from the land.⁹⁰

The new statute encouraged consolidation of land by exempting certain interests from the danger of escheat.⁹¹ The original act did not provide such safeguards. Under the amended statute, if the intended recipient of an undivided interest in trust land already owned other undivided interests in the same tract, the intended recipient could take the land. This escape hatch opened only if the intended new owner received the property through a will. If no will existed, the intended owner did not take the property through intestacy even if he already owned other interests in the same tract.⁹² However, this well-intentioned addition to the statute was unlikely to apply in many situations.⁹³

A final innovation in the amended section 207 of the ILCA allowed the individual tribes to bypass the act by instituting their own methods of controlling the further fractionation of allotted trust land.⁹⁴ The Secretary of Interior had to approve all such tribal land plans. Of course, any escheat scheme did not please many trust land owners,⁹⁵ so the updated version of the ILCA had not been received with overwhelming enthusiasm.

Case Examination: Youpee v. Babbitt

The most recent case to deal with the Indian trust land escheat problem was *Youpee v. Babbitt*. This case came from Montana in the Ninth Circuit. The plaintiffs in this case were similarly situated to the plaintiffs in *Hodel v. Irving*.⁹⁶ In *Youpee*, the amended version of section 207 of the ILCA was at issue.

88. *Id.*

89. *Id.*

90. *Youpee v. Babbitt*, 857 F. Supp. 760, 762 (D. Mont. 1994), *aff'd*, 67 F.3d 194 (9th Cir. 1995), *aff'd*, 117 S. Ct. 727 (1997).

91. 25 U.S.C. § 2206(b) (1994).

92. *Id.*

93. *Youpee v. Babbitt*, 67 F.3d at 194, 198 (9th Cir. 1995), *aff'd*, 117 S. Ct. 727 (1997).

94. 25 U.S.C. § 2206(c) (1994).

95. Not all Indians oppose Congress' efforts to consolidate fractionated trust land. In fact, the Sisseton-Wahpeton Sioux Tribe appeared as amicus curiae on behalf of the government in *Hodel v. Irving*, 481 U.S. 704, 712 (1987).

96. *Id.* at 709-10.

Allen Youpee, Cary Youpee, Darlan Youpee, Marvin Youpee, Sr., Helen Youpee-Ricker, and Williamette Bussard were the devisees of William Youpee, a Sioux and Assiniboine tribal member who owned Indian trust land interests before his death in 1990. These undivided interests in the Devil's Lake, Fort Peck, and Standing Rock Sioux reservations fell within the scope of the amended version of the ILCA, according to the administrative law judge assigned to the estate.⁹⁷ The controversy reached the federal court system after the Department of Interior Board of Indian Appeals rejected the claims of William Youpee's devisees. This board found the constitutional question beyond the scope of its jurisdiction, leaving the devisees without an administrative remedy.⁹⁸

The plaintiffs claimed that the escheat method set forth in the amended act fell short of constitutional standards and, therefore, constituted an unlawful taking of the allotted trust land of William Youpee. As the decedent's relatives, the plaintiffs sought to represent the decedent's interests in court. The land at issue in *Youpee* was similar to the land seized in the *Hodel* situation, the plaintiffs claimed. The testamentary transfer of Indian trust land remained completely abrogated under the amended ILCA.⁹⁹ The plaintiffs argued that the Interior Department took the land without providing any compensation, a violation of the United States Constitution. In addition, the lack of notice to William Youpee of the impending escheat of his land especially troubled his heirs.¹⁰⁰

In defense of its position, the government pointed to the *Hodel* court's concerns about the original statute defeating testamentary transfers of allotted fractional interests that actually consolidated the land into fewer hands.¹⁰¹ The government asserted that the deficiency had been rectified in the amended version of the act. Devise of fractional interests in property was no longer completely abrogated. Only the qualifications of the new owners were restricted by the amended act, the Department of Interior claimed.¹⁰² The land involved in the instant case was subject to escheat for several reasons.¹⁰³ The interests totaled a small fraction of the tracts on which they were located, they had not produced sufficient rent in the previous five years, and the devisees did not already own other interests in the tracts at issue.¹⁰⁴

97. *Youpee v. Babbitt*, 857 F. Supp. 760, 763-64 (D. Mont. 1994), *aff'd* 67 F.3d 194 (9th Cir. 1995), *aff'd*, 117 S. Ct. 727 (1997).

98. *Id.*

99. *Id.* at 762.

100. *Id.* at 763-64.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

District Court Decision

In reaching its decision, the United States District Court¹⁰⁵ in Montana relied on the United States Supreme Court's analysis in *Hodel v. Irving*. Based on the same grounds cited in *Hodel*, the federal court found the descendants of William Youpee had standing to challenge the validity of the statute. The court held that the GAA gave trust land owners the vested right to dispose of their undivided interests in land upon their deaths.¹⁰⁶ The plaintiffs, as third-party claimants, could pursue the claim of their relative, William Youpee. In addition, as in *Hodel*, the plaintiffs in *Youpee* would have received the land if the statute did not apply, satisfying the injury-in-fact requirement to bring a claim.¹⁰⁷ For the above reasons, the district court not only upheld the claims of William Youpee's devisees, but also granted the devisees summary judgment in the case.¹⁰⁸

The district court found little substantive difference between the original and amended versions of the ILCA. The court discounted the government's claims that the ability to devise fractional trust interests was restored in the amended statute.¹⁰⁹ People who make wills tend to leave their property to lineal descendants, if they have any. The plaintiffs successfully argued that few, if any, lineal descendants of trust land owners were likely to hold other interests in the same tract of land. Therefore, the district court found the applicability of this exception to the escheat provision to be limited.¹¹⁰

This limited exception to the escheat provision weighed heavily in the district court's decision in *Youpee*. The court held that

for those property owners who are not legally capable of devising property, or for those like William Youpee, who do not have an heir who possesses an undivided interest in the escheatable property, the statute, as amended, continues to allow the total abolition of both descent and devise of such property.¹¹¹

The court held that the bar on transferring fractional undivided interests required compensation to the owners. Since such compensation did not appear in the ILCA, the district court relegated the amended version of the act to the same fate as the original version — unconstitutional.¹¹²

105. The Hon. Jack Shanstrom presided.

106. *Youpee*, 857 F. Supp. at 762.

107. *Id.* at 764.

108. *Id.* at 766.

109. *Id.* at 765.

110. *Id.*

111. *Id.*

112. *Id.* at 766.

Appellate Court Decision

The Court of Appeals for the Ninth Circuit decided the constitutional claim in *Youpee*. The Ninth Circuit¹¹³ agreed with the holding of the trial court in *Youpee* and held that the amended section 207 of the ILCA fell short of the constitutional requirements spelled out in *Hodel*.¹¹⁴

After briefly reviewing the history of Indian trust land policies, the court outlined the provisions of amended section 207 of the ILCA. The appeals court noted that the new version of the statute at issue in *Youpee* provided more flexibility than the original version. Tribes were allowed to craft their own solutions to the fractionation problem under the amended statute.¹¹⁵ Also, the statute only applied to land that had been consistently unproductive. More importantly, the amended measure affected a more limited class of landowners.¹¹⁶

As in *Hodel*, the Ninth Circuit examined the amended provision in light of the regulation/takings analysis. The court found close parallels between *Hodel* and *Youpee* on the economic impact prong of the test.¹¹⁷ The Ninth Circuit followed the Supreme Court's reasoning in declaring the value of the land at issue, rather than solely the land's rental income, as the important factor here. The respective values of the interests subject to escheat in *Hodel* and *Youpee* were comparable, the court noted. Given the Supreme Court's finding that the values of the interests in *Hodel* were not minimal, it is not surprising that the Ninth Circuit found the interests in *Youpee* to be substantial, as well.¹¹⁸ Thus, the court held that the loss of such interests would have a significant economic impact on the owner.

The appeals court deemed the nature of the government's regulation of the land to be the most important factor in deciding whether a taking had resulted. The court appreciated the looming problem of Indian trust land inheritance and Congress' ongoing efforts to control this situation.¹¹⁹ Despite this, the court criticized the amended section 207 for severely limiting the choices of trust land owners. The new act allowed only a select group of people to inherit fractionated trust land. As the plaintiffs in *Youpee* pointed out, the designated beneficiaries are unlikely to be lineal descendants of the owner. Rather than limiting the number of or means by which descendants could take land, the statute went too far in prescribing requirements for who could take the land.¹²⁰ The court found the limited applicability of the exception

113. Circuit Judge Beezer presided.

114. *Youpee v. Babbitt*, 67 F.3d 194, 200 (9th Cir. 1995), *aff'd*, 117 S. Ct. 727 (1997).

115. *Id.* at 197.

116. *Id.*

117. *Id.* at 199.

118. *Id.*

119. *Id.*

120. *Id.*

amounted to a total abrogation of the rights of owners to transfer their land by descent and devise. Due to this deficiency, the court held the amended provision of the ILCA violated the United States Constitution by taking land without providing compensation to the owners.¹²¹

As in *Hodel*, the court also found William Youpee's investment-backed expectations lacking. Due to the use of the land for lease purposes, the court held that the decedent did not have investment-backed interests in the property.¹²² However, it is not necessary that a statute satisfy all the prongs of the test for a taking to occur.¹²³ Therefore, the Ninth Circuit held the amended ILCA unconstitutional, and William Youpee's land did not escheat to the Sioux and Assiniboiné Tribes.¹²⁴

Supreme Court Decision

While the United States Supreme Court ruling in *Hodel* binds all the nation's courts, only courts in the Ninth Circuit had to follow the appellate decision in *Youpee*. In March 1996, *Youpee* was cited in the Wisconsin federal district court case of *Klauser v. Babbitt*.¹²⁵ In *Klauser*, a case with facts similar to both *Hodel* and *Youpee*, the district court declined to follow the Ninth Circuit's rationale in *Youpee*.¹²⁶

The United States Supreme Court resolved this disparity by reviewing the *Youpee* case.¹²⁷ The Court noted that William Youpee had devised each of his interests to an individual descendant, rather than further splitting each interest by giving them to all descendants together.¹²⁸ Relying on *Hodel* and the Ninth Circuit analysis of *Youpee*, the Court held the amended ILCA did not correct the problems in the original ILCA. In an 8-1 decision,¹²⁹ the Court struck down the amended § 207 of the ILCA.¹³⁰

121. *Id.* at 200.

122. *Id.* at 199.

123. *Id.* at 199-200.

124. *Id.* at 200.

125. *Klauser v. Babbitt*, 918 F. Supp. 274 (W.D. Wis. 1996).

126. The *Klauser* court disagreed with the Ninth Circuit's finding that the amended Section 207 of the Indian Land Consolidation Act totally abrogated the right to transfer fractionated Indian trust land upon the owner's death. The Wisconsin court cited the amended statute's provision allowing the devise of fractionated interests to an individual who already owned interests in the same tract of land as one example which negated the "total abrogation" argument. The longer review period required before land would escheat was another factor favoring the constitutionality of the amended statute. *Id.* at 280-81.

The *Klauser* court criticized the *Hodel* decision, also. In *Klauser*, the court deemed the *Hodel* holding "a departure from its approach in earlier cases that heirs are not injured by changes in the laws of descent and devise that take effect before the death of the property owner." *Id.* at 277.

127. *Babbitt v. Youpee*, 117 S. Ct. 727 (1997).

128. *Id.* at 732.

129. *Id.* at 729. Justice Stevens dissented.

130. *Youpee*, 117 S. Ct. at 734.

The Court based its decision on five factors. First, the amended section still ignored the value of the property itself and focused solely on the income derived from the property.¹³¹ Second, the right to give one's property away at death was strictly limited by the narrow class of persons who could receive the property under the statute.¹³² Third, the statute continued to restrict the right to devise property even when property interests would be consolidated as a result of the transfer.¹³³ Fourth, the Court rejected the Interior Department's arguments that the amended ILCA did not interfere with William Youpee's right to use the property and that other means of transferring the property were available.¹³⁴ Finally, the provision of the amended section allowing tribal codes to deal with the escheatable interests did not affect the case because no such codes had been enacted at the time *Youpee* reached the high court.¹³⁵

Analysis: Where Should Congress Go from Here?

Despite the courts striking down congressional attempts to resolve the trust land fractionation problem, the courts in both *Hodel* and *Youpee* acknowledged that finding a viable solution to the problem was a laudable goal.¹³⁶ At first glance, the possible solutions to the Indian trust land inheritance problem appear endless. However, after a more critical examination of the possibilities, some solutions appear unlikely to ease the tension of this problem. Fortunately, other possible cures for the fractionated Indian trust land ailment appear more promising.

Government Condemnation

The first method by which the government might try to remedy the fractionation problem would be to condemn the trust land. The government could strip the fractionated interest owners of their small stakes in various trust land tracts and take title to all interests in the land through the government's eminent domain powers. The Fifth Amendment of the United States Constitution allows the government to take private property for public use.¹³⁷ The plaintiffs in *Youpee* would receive money instead of interests in the land of their relative under a condemnation scheme. Any time the

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 733-34.

136. *Hodel v. Irving*, 481 U.S. 704, 712 (1987); *Youpee v. Babbitt*, 67 F.3d 194, 199 (9th Cir. 1995), *aff'd*, 117 S. Ct. 727 (1997).

137. Fortunately for the federal government, the United States Supreme Court has interpreted "public use" quite expansively. See generally *Hawaii Housing Authority v. Midkiff*, 465 U.S. 1097 (1984) (upholding government taking of landlords' property for the benefit of tenants because entire state owned by a limited number of people).

government condemns private land in order to further the public good, the Constitution requires the government to compensate the land owner for his or her loss.¹³⁸ The government might prefer to pay for the land once, rather than spending more than the value of the land each year on administration costs.

This method of eliminating minute interests in Indian trust land has some major drawbacks. First, the government is unlikely to jump at the opportunity to own more land. What use will the government have for thousands of acres of farmland? Will the land be allowed to lay dormant if the government takes the land? The prospect of spending thousands of dollars of taxpayer money for land the government does not need might not sit well with fiscally conservative members of Congress or the public.¹³⁹ Also, condemnation of the land would not protect the Indian land base.¹⁴⁰

In addition, the suspicion such government action might provoke from the Indian landowners themselves could stifle any condemnation program. The relationship between the individual Indian tribes and the federal government has been marked by a historical pattern of the government promising land to the Indians and later taking this land from them. This solution to the fractionation problem might leave a bitter taste in the mouths of Indians who have learned the lessons of history.

Restrict All Descent

Restricting all descent of fractionated land is another possible congressional remedy for the trust land inheritance problem.¹⁴¹ In both *Hodel* and *Youpee*, the courts repeatedly criticized the total abrogation of the right to transfer property upon death through will and by operation of intestacy statutes. The courts proclaimed that a statute which only restricted the intestate transfer of land might not be so objectionable.¹⁴² While the courts might frown on a statute that defeats a decedent's explicit intent, the courts are more likely to uphold a scheme that affects only individuals who never took any action to safeguard their interests. Therefore, a provision that prevented fractionated interests from passing to individual tribal members through intestacy and provided for the interests to escheat to the tribes would likely be constitutional.

138. U.S. CONST. amend. V.

139. Of course, in the long run, this might be better than spending more than the value of the property on administration each year.

140. Perhaps the federal government could return the condemned land to the tribes, but such a scheme has an effect similar to that of the amended Indian Land Consolidation Act, which heirs of individual landowners have so vigorously opposed.

141. "Descent" and "intestacy" refer to property that is transferred without the writing of a will.

142. *Hodel*, 481 U.S. at 718; *Youpee*, 67 F.3d at 199.

The constitutionality of a statute restricting all descent does not guarantee that such a solution would operate without problems. Many of the interests at stake in *Hodel* would still be lost to the tribe because the decedents neglected to write wills. Heirs would still view the statute as another justification for the government to take their land.

Tie Escheat to Land Value

Congress could remedy the defects of tying the escheat of tiny trust land interests to the amount of rent yielded from the parcel. While the courts in *Hodel* and *Youpee* agonized over the rent provision, they appeared to approve of a scheme that would allow the escheat of such land based on other criteria.¹⁴³ One such criterion might include tying the escheat provision to the value of the land itself, rather than the amount of money realized from the use of the land. Again, the courts might require some sort of compensation to the owners for their land. The escheat of land worth a negligible amount might not pose a problem for the courts.

The federal government should welcome such a plan. This solution would remedy the problem of too many owners of valueless parcels of land. Tying the escheat of land to its value might also encourage voluntary consolidation of fractionated land interests, thus satisfying an important goal of both versions of the ILCA. Owners of small interests in tracts might seek to increase their holdings in the tracts so that their interests do not escheat to their tribes.

On the contrary, the Indian landowners might not like the fact that their land, however unproductive it might be, is being forcefully taken from them. Land that holds little monetary worth might hold significant religious or personal value for the owners. Another deficiency of this scheme is the fact that the government would still be faced with figuring the rents for fractionated parcels of economically valuable land, such as the land involved in *Hodel* and *Youpee*.

Designate Single Beneficiary

Mandating that the owners of fractionated trust land designate a single beneficiary to take their land upon the owners' deaths would allow the land to stay in the hands of individuals.¹⁴⁴ These individual beneficiaries could be lineal descendants of the previous proprietors, a possibility all but ruled out under the current statute. In the case of intestacy, Congress could construct a system whereby the land goes to the decedent's spouse first, then to the eldest child, and so on, until a living relative is found.

This compromise solution to the trust land inheritance boondoggle offers something for both sides of this controversy. This would help the government

143. *Hodel*, 481 U.S. at 714-15; *Youpee*, 67 F.3d at 199.

144. *Youpee*, 67 F.3d at 199.

in its rent computing function. Restricting the transfer of land to a single beneficiary would not really further the consolidation purpose of the ILCA. While the number of trust interest holders would likely not decrease under such a scheme, the total number of trust interest holders would be guaranteed not to climb any higher.

Landowners would retain the freedom to choose to whom to give their land. Only the number of beneficiaries would be limited. William Youpee would be able to keep his land interests within the control of his family under such a scheme, rather than having his land escheat to the Sioux and Assiniboiné Tribes. However, allowing only one beneficiary to receive trust land might precipitate many family quarrels over the issue of which individual relative will take the land.

Swap Interests

Yet another possible resolution of the fractionation dilemma entails some complicated maneuvers. Many Indian trust land owners hold interests in land located in several different tracts. Some landowners even own interests in separate reservations. This contributes to the logistical headache of determining rents and control over the land. Swapping interests of similar sizes and values might aid the situation.

For example, suppose that Heir A owns two interests worth one hundred dollars each. These interests are located in two different tracts of trust land. We will label these tracts as Blackacre and Whitefield. Suppose further that Heir B owns four different interests worth fifty dollars each. Conveniently, these interests, two per tract, are located in the same two tracts as Heir A's interests.¹⁴⁵ In the land swap, Heir A's interest in Blackacre would be transferred to Heir B. In return, Heir A would receive Heir B's interests in

145. The hypothetical involves the following scenario:

Before the land exchange

	<u>Heir A</u>	<u>Heir B</u>
Blackacre	1 interest (\$100)	2 interests (\$50 each)
Whitefield	1 interest (\$100)	2 interests (\$50 each)

After the land exchange

	<u>Heir A</u>	<u>Heir B</u>
Blackacre		3 interests (1 at \$100, 2 at \$50)
Whitefield		3 interests (1 at \$100, 2 at \$50)

Whitefield. This land trade would result in Heir A and Heir B owning land of the same dollar value as before the swap.

The net benefit of the trade is the reduction in the total number of owners of Blackacre and Whitefield. This would achieve the government objective of consolidating ownership of the trust land parcels and avoid taking land away from the owners without compensation. This could also save the government thousands of dollars in administration expenses in the long run.

Obvious problems materialize with the suggestion of a land swap method of reform. First, real property is considered unique and irreplaceable in American society. Swapping interests of comparable value in two different tracts would not appeal to a person attached to the characteristics of his original piece of property. For example, Blackacre is fertile farmland with a lake in the middle. Whitefield is a barren desert wasteland. Granted, the uniqueness of the property might not pose a great concern for Indian trust interest owners who do not personally use the land.

The paperwork involved presents another difficulty with the land trade issue. This scheme requires evaluation of the land, finding owners of comparably valued interests in reciprocal parcels, changing the deeds to reflect the new ownership, and changing the rent computation percentages. Fortunately, most of the work involved in the land swap process comes at the beginning. After the land trade is completed, the paperwork is actually less than before the swap took place. The problem of finding owners of interests of comparable value may also be remedied by providing a cash supplement to the owner of the more valuable interests transferred.

Transfer Responsibility for Land

The federal government's transfer of responsibility for computing the rents due to owners of fractionated Indian land is one innovation which might accelerate the consolidation of fractionated Indian land. The government could simply stop spending scarce resources figuring out which interest holder is owed a few pennies of rent per year. The responsibility for determining who gets how much rent would fall to the tribes or the individual interest holders themselves. As long as the federal government continues to pay for the computation of rent for the fractionated land, owners of small interests in the land have no incentive to consolidate their interests.¹⁴⁶

Shifting responsibility for keeping records of the owners and rents for Indian trust land would appeal to the federal government. No longer would the government be faced with the task of figuring out who owned what percentage of a certain tract of trust land. The computing of rents on all those thousands of interests in fractionated trust land would fall on different shoulders. If the tribes were faced with the prospect of finding the money in

146. Leavitt, *supra* note 83, at 611 (citing FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 208-09 (Five Rings 1986) (reprint of Univ. of N.M. photo. reprint 1971) (1942)).

their limited budgets to compute the rents, the tribal members might be prompted to implement a land consolidation plan of their own. Consolidation would probably come sooner if the individual interest holders had the task of computing the rents. Owners of minute interests in land would likely realize that it does not make good economic sense to spend ten dollars per year to discover they are entitled to a dollar in rent.

The tribes and individual owners involved would probably not welcome the plan to relieve the federal government's responsibility for keeping the records for Indian trust land. The increased administrative costs would force some land owners to abandon or consolidate interests they otherwise would have retained under the current system. The result of such a transfer of responsibility might be a de facto taking of land, not a good solution.

Educate Owners

A possible addition to the present system of inheritance of fractional interests in Indian trust land would bypass Congress completely. It involves simple education of the landowners.¹⁴⁷ As evidenced by the landowners in *Youpee*, people who own land subject to escheat sometimes do not even know about the provisions of the ILCA.¹⁴⁸ In a concurring opinion in *Hodel*, Justice Stevens focused on this problem. He concentrated his analysis on the lack of notice to owners who held land interests subject to escheat. He also lamented the lack of any type of grace period before the land escheated to the tribes.¹⁴⁹

If owners of small trust land interests knew what would happen to their land upon their deaths, perhaps the owners would take steps during their lives to prevent the escheat of the land to the tribes.¹⁵⁰ If owners knew of the possibility that their land would escheat to their tribes and did not take steps to remedy this situation, at least they would have received the notice required by due process.

One probable result of better education about the consequences of the ILCA is the creation of inter vivos trusts.¹⁵¹ The act does not address the

147. *Statement of Rebecca Adamson, President, First Nations Development Institute Before the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations: The Management of Indian Trust Funds*, FED. NEWS SERV., Sept. 26, 1994, available in LEXIS, News Library, FNS File. Such education might come in the form of well-publicized meetings held at tribal councils or town halls. Community centers and schools might also provide a centralized place for land owners to learn of their rights to their property. Even direct mailings of information would provide at least minimal notice to trust land interest owners.

148. *Youpee*, 857 F. Supp. at 763.

149. *Hodel*, 481 U.S. at 717, 728 (Stevens, J., concurring).

150. Some tribal members might actually want their property to go to their tribe.

151. An inter vivos trust allows one person to hold legal title to property that must be used for the benefit of the person holding the equitable interest in the property. JESSE DUKEMINIER & STANLEY JOHANSON, *WILLS, TRUSTS, AND ESTATES* 568 (5th ed. 1995). For example, William

transfer of interests through the use of such trusts. In *Hodel* and *Youpee*, the courts noted the availability of inter vivos trusts to circumvent the statute's restrictions.¹⁵² Trusts would allow the interest owners to remain in control of the land during their lifetimes and transfer the land to the intended descendants or other beneficiaries upon the owners' deaths.

Of course, this method defeats Congress' intentions behind the enactment of the ILCA. A growing number of people would still own minute undivided interests in trust land. Other drawbacks to the inter vivos trust solution include the fact that trusts are not simple creations. They generally require an attorney to help set up the arrangement. Also, they are expensive to maintain, especially if the owner of an interest in trust land is fairly young when the trust is established.¹⁵³

Retain Status Quo

Congressional repeal of the ILCA, resulting in taking a "hands off" view of the situation, is the final alternative to the fractionated land problem. On the positive side, this is possibly the most favored solution for some trust interest owners. The owners would not have to worry about following the correct procedure to avoid the escheat of their land to their respective tribes. This reform also avoids governmental responsibility for determining whether land is valuable or productive.

For the Department of Interior, however, a laissez-faire attitude would signal that the fractionation problem will only get worse as succeeding generations take over the land of their ancestors. There would be no way to halt the further fractionation of land that already yields merely pennies per year to its owners. For the Indian owners themselves, the land would continue to yield little income if allowed to remain in its present fractionated state. William Youpee's devisees would continue to receive less than one hundred dollars per year from their interests in the land they inherited.

Conclusion

In summary, fractionated Indian trust land presents a great problem for society. The quagmire of small undivided interests in Indian land is a complex, multi-sided issue with no easy solutions. Congress has the delicate task of balancing the property rights of the trust land owners with the

Youpee could have set up an inter vivos trust which stated that William Youpee served as trustee (with legal title to the land) for the benefit of his children, with the land being distributed to his children upon William's death.

Other alternatives that might result from increased education are holding property through tenancy by the entirety (husband and wife own the property jointly) or through joint tenancy with the right of survivorship (when one owner dies, the other owner automatically takes the property).

152. *Hodel*, 481 U.S. at 717; *Youpee*, 857 F. Supp. at 763.

153. *DUKEMINIER & JOHANSON*, *supra* note 151, at 1006.

economic practicalities of efficient land use and a federal government deep in debt. Congress made some small improvements in the ILCA from its original version, but the amended statute has a long way to go before it passes constitutional muster. Whether Congress can deliver a constitutional statute on this issue remains to be seen. This article has attempted to highlight some of the possible roads Congress could explore in devising a solution to the fractionated land problem. All the potential solutions present good and bad alternatives for the government, the tribes, and the individuals involved. Shifting the burden of administering the land to the individual owners might be the best solution to the problem if the goal is to consolidate the land without depriving the Indian owners of their land base. This solution, too, has its share of drawbacks. One thing that is certain, though, is the fact that each succeeding generation of trust land owners will result in the further fractionation of the tracts of land if no viable solution surfaces soon.