Too Little Land, Too Many Heirs—The Indian Heirship Land Problem

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INTRODUCTION

The poverty of the American Indian is magnified by the vagaries of long-established federal land policies controlling reservation ter-
ritory. Prompted by a desire to "civilize" the Indian, the Government began, in 1887, to grant fee title to individual tribesmembers. Some 5½ million acres of reservation land were allotted to individual Indians in the first 15 years of the program.¹ To prevent Indians unskilled in landowning from being defrauded of their tracts, titles were disabled by a total restraint against alienation, except by special permission of the Government.² When an owner died, the land was divided among the heirs according to federal statutes, which provided for distributing the land according to state rules of intestate succession if no will had been made, and setting aside a will if all the decedent's family was not included.³ The practical effect of these policies was progressive fractionation of ownership of the land, so that now over half the reservation allotments are held by so many owners in common that the Indians are helpless to make effective use of their

¹ The General Allotment Act, or Dawes Act 25 U.S.C. §§ 331-32, 348 (1964), authorized the President to allocate tribal land to individual members in tracts of 40, 80, or 160 acres, called allotments. Surplus land remaining after all eligible Indians had received their shares was to be sold by the Secretary of the Interior and the proceeds were to be devoted to the education and civilization of the tribe. The General Allotment Act did not include the Five Civilized Tribes, the New York Senecas, and certain other tribes. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207-11 (1945) [hereinafter cited as COHEN].

The agricultural allotments could not exceed 80 acres; the grazing land, 160 acres; and the irrigable land (capable of irrigation without great expense) 40 acres. Indians not residing on reservations could receive an allotment of unappropriated public lands. An Indian could not be a member of more than one tribe for this purpose and accordingly could not have allotments on two reservations. The Indians themselves made their own allotment selection. The heads of families could select for their minor children and the Indian agent for orphan children. Indians were given a preferred right to make a selection of the land which they occupied and on which they had made improvements prior to the General Allotment Act. If an Indian failed to make a selection within four years after he was authorized to do so, the allotting agent of his tribe could be directed to make a selection for him. 2 T. HAAS, THE INDIAN & THE LAW 15-16 (U.S. Dep't of Interior Tribal Relations Pamphlet No. 3 1949).

² Restrictions on alienation run with the land, and hence even though a restriction is removed on one allotment, the other allotments of the individual Indian will still be subject to the restriction. . . .

An allottee ordinarily acquires, by virtue of his allotment, full possessory rights with respect to the improvements and the timber upon his allotment, as well as the minerals beneath it. . . . Until he is granted a fee patent, or the restrictions are removed, allotted lands while held in trust by the United States cannot be sold by an Indian without the consent of a Federal official. . . .

² T. HAAS, supra, note 1, at 16 (1949). Indian allotments included both lands subject to a restriction on alienation and trust lands. There is only a technical distinction between the two types of title and the author has not differentiated them for the purposes of this comment.

Indian Heirship property. Unless this pattern can be reversed, all Indian allotments inevitably will have an astronomical number of owners.

Clearly no solution will be acceptable to most Indians if it results in sale of reservation land to non-Indians and eventual termination of the reservations. Commentary and solutions presented in this comment are based on the premise that the concept of the reservation should be preserved. The resurgence of Indian pride in recent years renders any other philosophical basepoint inappropriate.

The purpose of this comment is to review the Indian heirship land problem and to analyze potential solutions. The policies which led to land fractionation and the regulations which perpetuate it will be discussed to provide a perspective to evaluate the alternatives open to Congress.

I. THE HEIRSHIP LAND PROBLEM

A. Dimensions of the Problem

At present over 400,000 Indians live on the reservations their ancestors received in exchange for the vast territories they had previously occupied and defended. The economic situation of the reservation Indian is alarming by any standard. Indians have about

4. For instance, the Colville Reservation of Washington contained about 2,900 allotments in 1964, of which 785 had between 2 and 5 owners, 301 had 6 to 10 owners, 155 tracts had 11 to 15 owners, and 77 had 16 to 20. Ten tracts had 51 to 100 owners and one had over 100 owners in common. On the Quinault Reservation of Washington, 39 tracts had between 51 and 100 owners in 1965, while 5 tracts had over 100 owners.


6. Indian poverty is aggravated when welfare assistance is withheld because an applicant has an interest in several parcels of land, which may occur even though the applicant cannot use the land because other heirs have not approved. The rules limiting real estate possession for welfare eligibility vary from state to state. In Nebraska, for instance, the Department of Public Welfare confesses its reluctance to make public assistance payments to Indians who are the actual owners of thousands of dollars worth of farmland, even though they cannot farm the land. 1963 Hearings, supra note 4, at 475. Washington State does not withhold welfare grants where restricted land ownership is involved. Telephone interview with Mrs. Lee Piper, Director of Indian and Alaskan Native Services, April 1970.
two-thirds the life expectancy, receive about half as much education, and earn between one-third and one-fourth as much income as other citizens.\textsuperscript{7} The present ownership patterns of tribal land minimize the hope of alleviating this economic situation through effective land management.

The reservations, in addition to undivided tribal lands and non-Indian parcels, contain about 12 million acres of allotted trust land, most of which is in multiple ownership.\textsuperscript{8} About half the allotted land in heirship status is owned by six or more heirs.\textsuperscript{9} In 1960 one-half of the heirship land was being used by non-Indians and about three percent was not being used at all,\textsuperscript{10} presumably because of the complicated heirship problem. When the number of heirs becomes so large that the return to each heir is minimal, all are disinterested in managing their land.\textsuperscript{11} For example, one young Sioux who received a check for 7 cents as his share of a lease fee found that it would cost him 10 cents to cash the check.\textsuperscript{12} Even in managing standing mature timber, it was found that the usefulness of the land tends to decrease and the benefits derived to diminish in proportion to the number of heirs involved.\textsuperscript{13}

Sometimes the pattern of ownership and the size of the tract is such that it is not administratively feasible to consolidate the land into units large enough to use efficiently.\textsuperscript{14} Over half of the heirship land is now used by non-Indians because individual Indians cannot


\textsuperscript{8} 1966 Hearings, supra note 4, at 13.

\textsuperscript{9} Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., Indian Heirship Land Survey Pt. 2, at 868 (Comm. Print 1960) [hereinafter cited as 1960 LAND SURVEY].

\textsuperscript{10} Id. at 870.

\textsuperscript{11} Hearings on S. 1392 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 60 (1961) [hereinafter cited as 1961 Hearings]. When the Army Engineers took Indian land for Fort Randall Reservoir in South Dakota, Francis Hairy Chin was determined to have a .000534 interest, worth exactly 60 cents. 1961 Hearings at 50.

\textsuperscript{12} Id. at 51.

\textsuperscript{13} 1960 LAND SURVEY, supra note 9 at 927. See also 1961 Hearings, supra note 11, at 7, 20, 126.

\textsuperscript{14} 1961 Hearings, supra note 11, at 62, 156. A study of the Blackfeet Reservation reported that if a ranch or farm were to pay off its debts, it must be considerably above the minimum in size and have better than average farm management. The author of the study estimated these minimums to be 2400 acres for a cattle ranch, 640 acres for a wheat ranch, and 320 acres for irrigated farmland. See 1960 LAND SURVEY, supra note 9, at 1115-35. Contrast the acreage originally allotted to the Indians, note 1, supra.
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assemble sufficient acreage or credit to make farming profitable and because it is simpler for the Bureau of Indian Affairs\textsuperscript{15} to deal with operators who control large tracts.\textsuperscript{16}

Decisions concerning allotments are often frustrated because heirs who have moved off the reservation can’t be located. Even within the reservation, communication is difficult. When land value is very low there is little incentive for an heir to incur any expense in establishing his interest or to reply to letters asking him to join in a plan to use, lease or sell the land.\textsuperscript{17}

Most Indians enmeshed in the heirship problem are anxious to resolve it.\textsuperscript{18} The government has been aware of the problem since at least as long ago as 1926, when the Merriam Report was requested by the Secretary of the Interior.\textsuperscript{19} The Merriam Report described the increasing fractionation of land and the inefficiency of small units, and advised the government to purchase the heirship land with a revolving fund and resell it to the Indians in economically workable units.\textsuperscript{20} Since the Merriam Report, there have been at least a dozen bills introduced in Congress to enable the Indians to halt the fractionation process, but none has been enacted.\textsuperscript{21}

\textsuperscript{15} The Bureau of Indian Affairs is the governmental agency which handles many of the services for the Indian which are administered for non-Indians by states, counties and municipalities. Functions of the BIA are to carry out federal programs authorized by Congress for Indians, to act as trustee for Indian lands and resources, and to assist the Indians in self-government. The BIA was established in 1834, when settlements near Indian country were usually army outposts, and in consequence the Bureau was made a part of the War Department. In 1849 it was permanently transferred to the Department of the Interior. The Commissioner of Indian Affairs is appointed by the President and confirmed by the Senate. W. Brophy & S. Aberle, The Indian: America's Unfinished Business 16-17 (1966).

\textsuperscript{16} 1961 Hearings, supra note 11, at 154.

\textsuperscript{17} Id. at 100.

\textsuperscript{18} See 1961 Hearings, supra note 11, at 22. Of those Indians answering a congressional questionnaire, 55 percent wanted to sell all their heirship lands and 13 percent wanted to sell some of their interests. Fifty thousand questionnaires were mailed out and 9000 usable returns were received. The majority of heirs answering the question wished to sell all their heirship land, but a third of the heirs did not answer this question.

\textsuperscript{19} L. Merriam, The Problem of Indian Administration (1928), discussed in D. McNickle, The Indian Tribes of the United States 56-57, 70 (1966).

\textsuperscript{20} See 1961 Hearings, supra note 11, at 179 and 1966 Hearings, supra note 4, at 11.

\textsuperscript{21} See 1966 Hearings, supra note 4, at 11. A Senate committee complained: In 1963, the Senate passed a workable bill, supported by a majority of tribes. It lacked wholehearted Bureau enthusiasm and was not acted upon in the House. The Bureau has given lip service to correcting this very serious administrative problem, but has made no discernible progress toward solving it.

B. Restrictions on Disposition of Indian Allotments

By present law, sale of allotments requires the unanimous consent of the owners, some of whom may be minors, recalcitrant, *non compos mentis*, or unavailable. Frictions arise because Indians cannot understand how land in which they have an equity can pass intestate to persons not immediately related to them or only related by marriage, and this misunderstanding compounds the difficulty in management of their land. At best, heirs will not act without time-consuming consultations with other heirs. Some of the owners holding minor interests will not reply to inquiries, while others, realizing that their signature is needed to achieve unanimity, will demand a bonus before they sign. Trouble can develop even after tentative agreement has been reached.

22. 25 U.S.C. § 379 (1964) reads as follows:
The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court . . . but all conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser. . . .

25 U.S.C. § 404 (1964) reads, in part:
The lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma and the States of Minnesota and South Dakota, may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe. . . .

25 U.S.C. § 483 (1964) reads, in part:
The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians. . . .

23. One Colville Indian complained:
My sister's allotment was 80 acres. She died and my dad, a white man, was willed the land. He died and all his children fell heir. His share was 13440/20160. We had that probated in court—four children share is 960/20160, and cousins one share 270/20160, one share 305/20160, five shares 128/20160, one share 320/20160, one share 140/20160, seven shares 35/20160 and these last seven are no relation only that this man was once a brother-in-law and they are the ones that won't sign so that we can have a hundred percent signers.

HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86th CONG., 2d SESS., INDIAN HEIRSHIP LAND STUDY PT. 1, at 463 (Comm. Print 1960) [hereinafter cited as 1960 LAND STUDY].

24. 1960 LAND SURVEY, supra note 9, at 897.

25. For example, on the Warm Springs Reservation of Oregon, 7 of the 8 heirs to an allotment wanted to sell their land to the tribe but the one heir who withheld her signature wanted a larger share than the one-ninth she was entitled to. In a second case, involving a total of 21 heirs, one heir demanded that the best land be partitioned to him, to which the rest could not agree. 1960 LAND SURVEY, supra note 9, at 908. See also Id. at 988; S. LAIDLAW, FEDERAL INDIAN POLICY AND THE FORT HALL INDIANS 51 (1960); 1960 LAND STUDY, supra note 23, at 19.

26. One Colville Indian reported:
About 3 years ago we asked the heirs if we could buy their shares in the heirship
Nor is partition of the allotments feasible in most cases, since farmers cannot make economical use of a farm as small as 80 acres.27 The cost of partition is prohibitive—unless the land is valuable and all the owners solvent—a combination of circumstances seldom found on an Indian reservation.28

Allotted land can seldom be sold, even when the owners unanimously agree. In order to reduce sales to non-Indians—sales which erode the land base of the reservation—the present policy of the Secretary of Interior is to withhold his required permission for sales unless the sale is in the best interests of the selling Indians and the land is sold either to other Indians or to the tribe.29 Unfortunately, few tribes or individual Indians are wealthy enough to buy land. Relatively rich tribes like the Yakimas of Washington, who have land-acquisition programs, have far more applications for purchase than they are able to satisfy.30

we now live on. All were agreeable and signed papers to that effect, so we went ahead and built a modern 7-room home and proceeded to build up the land which was in a very rundown condition. Now that the land is producing and fenced, one of the heirs has changed her mind and retracted her name which according to the present law and regulations she was able to do. Now as we own the biggest share in these allotments and the rest of the heirs are anxious to sell, we don't think it's fair she can hold up the sale and purchase of this land. She holds about 10 acres out of 160 acres.

1960 LAND SURVEY, supra note 9, at 466.
27. 1963 Hearings, supra note 4, at 429; 1960 LAND SURVEY, supra note 9, at 897. See note 14, supra.
28. For instance, when the Tulalip Indians of Washington partitioned some of their fractionated allotments in 1957, the court and attorney costs varied from $500 to $1000 for each allotment. 1960 LAND SURVEY, supra note 9, at xiv.
29. Statement of Mr. Richard Neely, Asst. Regional Solicitor, the Dept. of the Interior, Portland, Oregon, Office, to the Indian Legal Problems Seminar, University of Washington, Nov. 12, 1969. See also 25 C.F.R. § 121.11 (1970) which reads as follows:

Petitions for the sale of trust or restricted land shall be filed on approved forms with the Superintendent or other officer in charge of the Indian Agency or other local facility having administrative jurisdiction over the land. Sales will be authorized only if, after careful examination of the circumstances in each case, a sale appears to be clearly justified in the light of the long-range best interests of the owner(s). Written notice of the approval of petitions for sale of land shall be given to the tribe, occupying the reservation where the land is located, a sufficient time in advance of public advertising to reasonably enable the tribal authorities to consider the possibility of tribal interest in the land being sold. Such notice need not be given where a tribe has, by appropriate resolution, expressed a lack of interest in acquiring land on the reservation.
30. See 1963 Hearings, supra note 4, at 428. In a statement to the Indian Legal Problems Seminar, at the University of Washington, Chairman Robert Jim of the Yakima Tribal Council said on Dec. 3, 1969:

The Yakima tribe gives first priority to buying land owned by Indians on the reservation who have received governmental permission to sell, and which thus might be sold to non-Indians and go out of Indian control. Second priority is accorded the purchase of land interests inherited by members of the Colville Indian tribe on the Yakima reservation. The Colvilles are considering the termination of
Loan funds needed to create a market among other Indians for heirship interests or to generate purchasing power at a tribal level are also sorely lacking. The Bureau of Indian Affairs administers a small revolving loan fund which is available to tribal Indians or to those of one-quarter or more Indian blood, and to Indian organizations, but the funds available for land acquisition are insufficient.31

While the BIA encourages Indians to borrow from commercial sources, that policy has not been a success. Indians have been reluctant to approach banks, and the credit business has assumed that adequate financing was available to Indians through governmental agencies. Indians can offer little security for a loan. Often without permanent work, they have been unable to establish a credit rating

their reservation and such termination might affect restrictions on lands owned by the Colvilles in other reservations. Third priority must go to purchase of key tracts which contain easements to other reservation lands or which have needed water rights. Only after all land with higher priorities has been purchased can the Yakimas consider buying fractionated land merely to relieve the economic needs of its owners.

The Yakimas at present have $1 million set aside to buy land, but heirs owning land appraised at $3.7 million are waiting anxiously for their land to be purchased. The tribal income has many demands upon it, and unless loan funds are available to the tribe above the amount needed for more pressing needs, the amounts allocated to land purchase must be apportioned.

The Makah tribe of Washington strives to purchase interests in Makah Reservation land which have been inherited by non-Indians or Canadian Indians. The Makabs had purchased 28 percent of all reservation allotments by 1960, but had not been able to allocate more funds to buy other Makah interests which owners wished to sell. 1960 LAND SURVEY, supra note 9, at 916. 31. From 1934 until 1952, 77 percent of all loans from this fund were under $1000 and were largely for emergency subsistence. In 1965 applications for Bureau loans exceeded the available funds by $42 million. W. BROWDY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 109 (1966).

25 U.S.C. § 470 (1964) reads:
There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

25 U.S.C. § 479 (1964) reads in part:
The term "Indian"... shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood....

The Secretary of the Interior, or his designated representative, is authorized, under such regulations as the Secretary may prescribe, to make loans from the revolving fund... to tribes, bands, groups, and individual Indians, not otherwise eligible
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or to acquire collateral,\textsuperscript{32} although legislation passed in 1956 enabled restricted Indian land to be mortgaged.\textsuperscript{33}

Unless the loan funds are readily available to the tribe or individual Indians, the theoretical right to buy heirship land is meaningless, and even if funds were available, the requirement of unanimous consent of the owners for sale remains an imposing obstacle. As a result, one-half of the heirship land was being leased to non-Indians in 1960.\textsuperscript{34}

Present regulations allow the Secretary of the Interior to act in the interest of persons \textit{non componis mentis}, orphaned minors, and undetermined heirs when a satisfactory lease is proposed to the Bureau of Indian Affairs or when a majority of the other interests negotiated a satisfactory lease.\textsuperscript{35} The Secretary may also grant a lease on behalf of those heirs or devisees who are not able to agree upon a satisfactory lease during a three-month period after a lease becomes available.\textsuperscript{36}

\begin{itemize}
\item for loans \ldots \textit{Provided,} That no portion of these funds shall be loaned to Indians of less than one-quarter Indian blood.
\item 32. W. BROPHY \& S. ABEKLE, \textit{The Indian: America's Unfinished Business} 109-11 (1966). The Indian revolving loan default record from 1934 to 1965 was only .5\% \cite{32. W. BROPHY \& S. ABEKLE, \textit{The Indian: America's Unfinished Business} 109-11 (1966).} Indians are not even able to qualify for F.H.A. mortgages in Washington. Telephone interview with Mrs. Lee Piper, Director of Indian and Alaskan Native Services, April 1970.
\item 33. 25 U.S.C. § 483a (1964) reads in part:
\textit{The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed or trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land.\ldots}
\item However, the power to mortgage land on the reservation is the power to terminate that part of the reservation, if for some reason the mortgage cannot be satisfied. \textit{"It's the main proposal in the bill,"} said Vine Deloria, Jr., referring to the Indian Omnibus Bill of 1967, \textit{"ostensibly it would be so we could raise capital, but many tribes think it's just another scheme to get their land."} S. STEINER, \textit{The New Indians} 171 (1969).
\item 34. \textit{See 1960 LAND SURVEY, supra note 9, at 985; COHEN, supra note 1, at 229; 1963 Hearings, supra note 4, at 417, 424, 480; 1951 Hearings, supra note 11, at 101.}
\item 35. 25 C.F.R. § 131.2 (1970).
\item 36. 25 U.S.C. § 380 (1964) reads:
\textit{Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined and (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe.\ldots}
\end{itemize}
Relaxation of the unanimity previously required in leasing reduced the amount of heirship land not being used at all from about 7.6 percent in 1960 to the present level of approximately 3 percent.\textsuperscript{37} Although leasing of heirship land assures some income to the owners, it is an unsatisfactory substitute for sale to an individual Indian or the tribe. The income which comes to an owner who operates his own business is greater and the experience gained in taking responsibility for decisions is invaluable.\textsuperscript{38} When the Rosebud Sioux took over the management of their land, for example, their annual tribal income rose from $40,000 to $220,000 within six years.\textsuperscript{38}

Where the fractionation of land has resulted in a large number of owners, and sale or group management has not been possible, it has been necessary for the BIA to act as agent. The central BIA offices have conducted schools for real estate officers to improve leasing results and have attempted to make leasing practices uniform.\textsuperscript{40} With a limited staff, however, the Bureau tends to spend most of its time on those properties which require the least time and effort—those which have the fewest owners.\textsuperscript{41} With the government assuming the role of overworked real estate agent\textsuperscript{42} and the Indians forced into a role of helpless absentee landlord,\textsuperscript{43} an atmosphere of dependence,

\textsuperscript{37} See 1960 \textit{LAND SURVEY}, supra note 9, at x, and 1966 \textit{Hearings}, supra note 4, at 29.
\textsuperscript{38} Statement of Mr. Richard Neely, Asst. Regional Solicitor for the Dept. of the Interior to the Indian Legal Problems Seminar, University of Washington, Nov. 12, 1969.
\textsuperscript{39} The Sioux successfully demanded the same rental value for tribal grazing land that owners were receiving outside the reservation, whereas the non-Indian ranch owners had been leasing grazing land from the BIA at fixed minimum prices. See 1966 \textit{Hearings}, supra note 4, at 41, 45, 46; 1961 \textit{Hearings}, supra note 11, at 108, 130, 139.
\textsuperscript{40} See 1966 \textit{Hearings}, supra note 4, at 47.
\textsuperscript{41} See 1960 \textit{LAND SURVEY}, supra note 9, at 919-20.
\textsuperscript{42} Over forty percent of the realty work in many offices consists of heirship matters. 1960 \textit{LAND SURVEY}, supra note 9, at xii. After each probate there are new heirs for whom new records must be made and kept. Costs of accounting sometimes exceed the returns to the Indians. Each fractional interest is recorded separately in complicated computations of large common fractions in determining ownership. Common denominators have reached 54 trillion; billions are not uncommon; and millions are commonplace. \textit{Id.} at xi. In a Sisseton Sioux register from two columns, a page long, the largest interest was $6.04, and most of the interests ranged from 5 cents to 51 cents. The costs of mailing and cashing the checks involved were greater than the checks sent. 1961 \textit{Hearings}, supra note 11, at 47-49.
\textsuperscript{43} A Western Washington Indian complains:
\begin{quote}
There are many things being done on Indian land which the owners know nothing about, for instance logging companies cutting cedar timber on land that the owners know nothing, [sic] and are not being paid for. This has been going on for quite some time. Also timber being sold to logging companies by the Indian Bureau for
\end{quote}
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bitterness, and suspicion is created. All of these factors combine to restrict the disposition and consolidation of fractionalized allotments.

C. Origin of the Heirship Land Problem

The Indian heirship land problem had its origins in the last century. When the Federal Government negotiated treaties, the Indian land belonged to the tribe as a whole. However, it was thought that with land of his own the Indian would become accustomed to the non-Indian's concept of private land ownership and become "civilized." Training and suitability for farming were ignored. For example, an attempt was even made to make the whalers of Neah Bay, Washington, into farmers.

Failure to appreciate the religious and cultural association of the Indian with the tribal land has prevented understanding of the depth of his resistance to further reduction of the reservation land base. Uniformly, Indians have a tradition of naturalistic religion, often rooted in particular tracts of land. Part of the conflict in value systems between some of the non-farming tribes and the encroaching whites lay in the Indian's belief that individual land ownership was a sacrilege and that tilling of the soil was a desecration of the beauty of the earth. Thus, the detrimental effects of land loss are not only economic, but include a profound loss of identity on a tribal level. Consequently, most Indians feel that the burdens associated with restriction on sale, including the problem of multiple ownership, must be solved without further destroying the reservations.

practically nothing, timber on outside land selling for $70 per thousand, on Indian land $18.50, to me something looks mighty crooked. 1960 LAND STUDY, supra note 23, at 497.

Another remarked, "[T] would like the market price of timber to be paid us the same as is being received outside the reservation. Logging costs shouldn't be any greater inside the reservation." Id. Whether or not the complaints are true, the system of leasing heirship land in default of any other disposition permits this kind of doubt to arise.

44. See COHEN, supra note 1, at 183-87, 206-09.
In 1887, however, the General Allotment Act was passed providing that tribal land would be divided into tracts and given to individual Indians with the "surplus" available for white purchase.48 Title to the allotments was to be held in trust by the government for a period of 25 years.49 Alienation was prevented to protect the Indian until he could assume full responsibility for his land, learn to farm it, and learn its value on the market. Although the trust period was extended each time it expired, provisions which allowed individuals to remove the restrictions in order to sell their land caused the original reservation area of 138 million acres in 1887 to shrink to its present 55 million acres.50 Much of the land left is desert or semi-desert land which was not subjected to the same pressure for sale as the more valuable land.51

Although termination of the reservations was the acknowledged

48. See sources cited in note 1, supra.
50. See COHEN, supra note 1, at 216; E. CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 69, 73 (1969) gives as the reason for shrinkage that Indian land is cheaper, easier and less politically dangerous to take. Construction engineers, road builders and dam erectors have an uncanny knack for discovering that the only feasible and economical way to do what must be done will, unfortunately, necessitate taking the Indian's land. Indian land is often taken to create national monuments and parks, and the BIA grants rights-of-way across Indian land with little or no compensation to the Indian owner for roads, pipelines, cattle, and reservoirs. Professor Deloria attributes the land loss quite simply to white greed:

[O]ne day the white man discovered that the Indian tribes still owned some 135 million acres of land. To his horror he learned that much of it was very valuable. Some was good grazing land, some was farm land, some mining land, and some covered with timber. . . .

Therefore it took no time at all to discover that Indians were really people and should have the right to sell their lands. . . . It was the method whereby land could be stolen legally and not blatantly.

51. See COHEN, supra note 1, at 216; D. McNICKLE, THE INDIAN TRIBES OF THE UNITED STATES, ETHNIC AND CULTURAL SURVIVAL 49-50 (1966) states in part:

Most efficient in reducing Indian holdings was the provision permitting the Government to purchase so-called surplus lands. Sales could also be made by individuals after the initial trust expired, or, as later provided, the Secretary of the Interior could issue a "certificate of competency" indicating that the individual was qualified to manage his own affairs. The Indians' creditors, or anxious land buyers, could be counted on to assist an Indian in submitting an application . . . testifying to the applicant's competency.

The lands that went first were the most valuable: agricultural lands in river valleys, rich grasslands on the high plains, virgin forests in the Great Lakes region.

What remained was desert or semi-desert.

S. STEINER, THE NEW INDIANS 163 (1969) states:

The Branch of Soil Conservation of the Bureau of Indian Affairs has estimated that the reservation lands consist of 14 million acres that are "critically eroded," and 17 million acres that are "severely eroded," and 25 million acres that are "slightly eroded." Of the 56 million acres left them, the Indians are the proud owners of 56 million acres of erosion.
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federal policy during the 1950's, the present administration avows its opposition to termination. President Nixon insists that Indians should neither be forced to terminate their reservations nor continue their excessive dependence on the federal government. Officials of the BIA and the Indian tribes agree that termination is an unacceptable alternative, and that only a clear and voluntary application from an Indian tribe to be terminated would be considered.

II. STATE OF THE LAW ON INDIAN RESTRICTED LAND DEVOLUTION

Multiple ownership of restricted Indian land is the result of an inflexible adherence to statutory provisions for the probate of Indian estates. The heirs of Indians who die intestate are determined by examiners of inheritance, employed by the Bureau of Indian Affairs, who also approve or disapprove the wills which dispose of trust lands or restricted property and allow or disallow claims against estates. Examiners of inheritance handle probate within administrative guide-

52. Proponents of termination argued that the reservations were a ghetto, a sentimentalized effort to maintain the Indians as museum pieces, or a crutch which hindered self-realization. Other proponents were non-Indians eager to buy the Indian land. W. DANIELS, AMERICAN INDIANS 130-33, 144-47 (1957).

The faction opposing termination was convinced that a long history of sharp dealing with the Indians was culminating in a plan to cheat them of the invaluable remnants of treaty promises. Indians maintain that the consideration for which the treaty-signers bargained was security for their descendants forever. Id. at 45, 55-63, 76-82, 111, 133-40; S. LARZAW, FEDERAL INDIAN LAND POLICY AND THE FORT HALL INDIANS 14-15 (1960); W. BAGBEY & S. ABEKEE, supra note 46, at 26, 28, V. DELORIA, JR., supra note 46, at 61, 136.

The actual examples of termination have been catastrophic. The Menominees of Wisconsin were reduced to financial desperation after they had been one of the most self-sufficient tribes in the United States. The vast timber holdings of the Klamaths of Oregon, terminated in 1961, were dissipated in a boom-city set up specifically to absorb the Indians' termination checks. The Klamaths suffered a sudden rise in crime, drunkenness and suicides. Time, Feb. 9, 1970, at 18-19.

A House Concurrent Resolution, H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 Cong. Rec. 10,815 (1953) was a declaration of the intent to free Indians from federal control, supervision, and wardship, and make them subject to the same laws and entitled to the same privileges as other citizens. Though not a statute, it was considered and interpreted as an administrative directive by the BIA. It has never been repealed. Note, Indians: Better Dead Than Red?, 42 S. CAL. L. REV. 101, 108-09 (1968).


lines and are not required to be attorneys. The decision of the examiner of inheritance is final unless an appeal is taken to the Secretary of the Interior. Such an appeal is handled by the United States Solicitor’s Office and an appeal will usually be heard within a year.

The probate hearings are informal, but provide a fair opportunity for the parties to be heard. Notices of hearings are mailed to probable heirs, devisees, witnesses and creditors and are posted in at least five established public posting places in each case.

A. Intestate Disposition

The examiner of inheritance is required to apply the custom of the tribe on inheritance if such custom is proved. Otherwise he is to apply state law in deciding what relations of the decedent are entitled to be his heirs. Few tribes have codified their customs into rules, however, and the intestate succession laws of each state are usually followed.

The examiner is also required to follow tribal council rules if they govern Indian-custom marriage, divorce, or adoption. Until the tribal council determines a formal rule, whenever any male and female Indian cohabit together according to the custom of the tribe, a marriage must be recognized. Any separation regarded by the tribe as a divorce must be similarly viewed by the examiner of inheritance. The issue of any Indian-custom cohabitation must be adjudged legitimate for the purpose of inheritance. There is some authority that a polygamous marriage must be recognized if Indian custom is appealed to.

55. 1960 LAND SURVEY, supra note 9, at 937-39. "[E]xaminer of inheritance' means any employee upon whom authority has been conferred by the Secretary or the Commissioner to conduct hearings in accordance with the regulations . . . ." 25 C.F.R. § 15.0 (1970).
56. See 1960 LAND SURVEY, supra note 9, at 934, 939-43. See note 75, infra.
58. The Yakimas of Washington, for example, have established rules which govern both intestate succession and testamentary disposition. Only enrolled members of one-fourth or more blood of the Yakima tribe may take an interest in any restricted allotment of land located within the Yakima Reservation. A Yakima who owns no restricted or trust land on the Yakima Reservation and fails to have a residence in the area for five consecutive years may be removed from the membership rolls and thereafter cannot inherit. Thus the tribe seeks to reduce the number of absentee landholders and holdings by non-Yakima Indians and near-whites. See 25 U.S.C. § 601 (1964), and 25 U.S.C. § 607 (1964).
62. Ortley v. Ross, 78 Neb. 339, 341, 110 N.W. 982, 983 (1907) (a polygamous mar-
B. Testamentary Disposition

An Indian who is over 21 years old may dispose of trust property by will. The will must be executed in accordance with regulations prescribed by the Secretary of the Interior and each will must be approved either before or after the testator's death.

The substantive provisions of the regulations prescribed by the Secretary, however, are vague; the only mandatory provision in regard to the execution of wills is that they may not be oral. Though provision is made for attesting witnesses, they are not essential. No definition is given for mental competency or undue influence, and there is no settled policy for dealing with the omission of children or the death of a devisee. Each will is apparently considered on its own merits.

The procedural regulations of the Secretary, by contrast, are very complete. The examiners must conduct a hearing to approve or disapprove a will, giving prior notice to all interested persons, including the presumptive legal heirs. Testimony showing the circumstances surrounding the execution of the will must be taken, and the heirs must be given an opportunity to object to the will. Indians often do not know which hearings are important, however, and may let land go by default rather than travel long distances to the hearings.

The authority of the examiner is limited to approval or disapproval of an Indian will, and he may not change the will by making a different provision than that provided by the testator. Approval of a will is dependent upon a finding that the testator was mentally competent and not unduly influenced. State statutes regarding devisees of property have no effect upon Indian wills, except when Congress has given the

riage valid by the law governing both parties when made must be treated as valid everywhere and the offspring thereof must be regarded as legitimate); Earl v. Godley, 42 Minn. 361, 362, 44 N.W. 254, 255 (1890) (the general rule is that marriages valid by laws of the country where they are entered into are binding and the same rule must be adopted in relation to Indian marriages where the tribal relation still exists).


64. 25 C.F.R. § 15.28 (1970).

65. Id.


68. In re Wah-Shah-Shie-Me-Tsa-He's Estate, 111 Okla. 177, 239 P. 177, 179 (1925) (so long as the will stands, the disposition of the property made by its terms must also stand).


70. Tiger v. Western Inv. Co., 221 U.S. 286, 299, 316 (1911) (a conveyance of land
states specific power to intervene.\textsuperscript{71} An Indian’s real property and shares in a tribal corporation may be devised only to his heirs,\textsuperscript{72} to members of the tribe having jurisdiction over the property, or to the tribe itself.

The multiplicity and vagueness of the requirements for a satisfactory will\textsuperscript{73} are a constant source of uncertainty to the testator. The uncertainty is compounded by the power of the examiner to revoke his own approval or disapproval if he later finds that he has mistakenly approved a will or if the hearing was not conducted according to statute or regulations.\textsuperscript{74} About 90 percent of Indian wills are approved.\textsuperscript{76} If a will is disapproved after an Indian’s death, however, the allotment descends according to the law of intestate succession of the state of residence.\textsuperscript{78}

\section*{III. SOLUTIONS TO PROBLEM OF INDIAN HEIRSHIP LAND}

The problem of multiple ownership of Indian restricted land may be attacked either (1) through the probate statutes, by severely limiting the number of persons allowed to inherit, or (2) by legislation affording the heirs practical ways to sell their interests to other Indians or to the tribe. The criteria for an ideal solution should include realization of a fair value for the interests of the landholders, retention of control of the land within the tribe, reduction of the

\textsuperscript{71} See, e.g., Act of April 28, 1904, ch. 1824, § 2, 33 Stat. 573, applying the laws of Arkansas to Indians’ estates, and Act of May 10, 1928, ch. 517, 45 Stat. 495, requiring that Oklahoma intestate laws apply to a tribesmember of half or more Indian blood of the Five Civilized Tribes who leaves no issue and no will.

\textsuperscript{72} 25 U.S.C. § 464 (1964). Heirs include all those persons who by marriage, descent, or adoption, have acquired a relationship to the testator sufficient to constitute them heirs at law, whether or not they are non-Indian. See \textit{Cohen}, supra note 1, at 233.

\textsuperscript{73} See text accompanying notes 65-66, supra, and 25 C.F.R. § 15.28 (1970).

\textsuperscript{74} During intermittent periods, the examiner has followed a policy of disapproving wills if he deemed them unwise or improvident, when, for example, insufficient property was devised to a dependent member of the decedent’s family. See E. \textit{Cahn}, supra note 50, at 74; \textit{Brown, The Indian Problem and the Law,} 39 \textit{Yale L.J.} 307, 326-27 (1930).

\textsuperscript{75} \textit{See 1960 LAND SURVEY,} supra note 9, at 939. An aggrieved party may appeal a decision to the Secretary of the Interior. 25 C.F.R. § 15.19 (1970). Prior disagreement in the circuits as to the scope of permissible appeal from the decision of the Secretary has been resolved by Toohnippah v. Hickel, 397 U.S. 598, 606 (1970) (decision of the Secretary disapproving the will of a Comanche Indian was subject to judicial review).

taxpayers' cost in trust management of the land, and return of land to its most productive use. No perfect solution is possible, of course, for many interests are in conflict. For example, protection of the tribal land base by avoiding sale to non-Indians while preserving tribal integrity will limit the market so that the landholder will be less apt to receive a fair price. Nevertheless, compromises are possible which are far superior to the present frustrating paralysis.

A. Obstacles to a Solution

Among the obstacles to a solution of the multiple ownership problem are the inertia and opposition of some of the Indians themselves. Under the General Allotment Act, administration costs of land held in trust are borne by the federal government, a situation particularly attractive to persons with small interests who are content to receive small returns with little effort.77

Also, much opposition can be expected to a plan which would disinherit some of the prospective heirs of a family. Even if the amount to be received is paltry, the emotional resentment would be great.78

A final obstacle underlying most bills presented in Congress is the necessity of appropriating a substantial loan fund79 or otherwise stimulating private loans to enable individual Indians or their tribes to finance the transfer of interests. Although some stronger tribes would prefer to have a separate plan worked out with each reservation,80 a good bill, providing for revolving loan funds to facilitate sales and

77. COHEN, supra note 1, at 230.

78. One Yakima said, "My children are unable, under present laws, to inherit my land, which I purchased and have worked up to be very valuable. ... My children do not meet enrollment requirements of the Yakima Tribe." Another adds, "I'm one-eighth Yakima and have an allotment but my children nor wife could not inherit the land if I died, so why should I spend 5 or 10 years to improve it." 1960 LAND SURVEY, supra note 9, at 506, 508.

Yakima tribal law restricts the class of potential heirs to tribesmen who are residents of the reservation or closely affiliated with it and who have at least one-fourth Yakima blood. See note 58, supra. Even though the rule was self-imposed, much objection was voiced, leading to the adoption of an amendment to 25 U.S.C. § 607 requiring the Yakima Tribes to pay the appraised fair market value of an interest that a person of insufficient Yakima blood is precluded from taking. Pub. L. No. 91-627 (Dec. 31, 1970).

79. See notes 109-111 and accompanying text, infra.

80. Strong tribes like the Crow, Kiowa, Apache, Comanche and Devils Lake Sioux opposed Senate Bill 1049, introduced in 1963 by Senator Frank Church, because they felt it was inferior to bills they themselves had introduced or had envisioned. 1963 HEARINGS, supra note 4, at 405, 418-19, 457-60, 485. See also S. LAIDLOW, supra note 52, at 46. Cohen, The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy, 62 YALE L.J. 348, 367 (1953); and V. DELORIA, JR., supra note 46 at 140-41.
protecting property interests of owners and the tribe, might win the support of the large, politically effective tribes. Approval by these tribes of national legislation\textsuperscript{81} is needed to extend help to the small, politically weak tribes who could never hope to have legislation written particularly for their heirship needs. Since a revolving loan fund is needed rather than an outright grant, the approach does not seem to be an unreasonable way to meet a serious problem of the most underprivileged sector of our population.

B. Solution by Change in Probate Statutes

Solution of the multiple ownership problem through change in the probate statutes has the advantage of not requiring a loan fund. Such an approach presents no constitutional problem since persons not permitted to inherit are not unconstitutionally deprived of a property right.\textsuperscript{82}

A bill presented by Congressman Wayne Aspinall\textsuperscript{83} provided that Indian property passing intestate should devolve to only one person, the order of priority being (1) the spouse of the decedent; (2) the eldest descendant of the decedent living on the allotment at the time of the decedent’s death or, if no descendant was then living on the allotment, the eldest descendant of the decedent who was then living on the reservation on which the allotment is located; (3) the eldest descendant of the decedent not living on the reservation. Upon failure to find any heirs within these categories, other relatives were named, with priority always given persons closest in blood to the decedent, relatives living on the allotment, and relatives living on the reservation. The bill provided escheat of the intestate property to the tribe if no person in a named class existed.

The proposal for single descent would serve to halt further fractionating of the lands and slowly reduce the interests as escheats occurred. The primary disadvantages of the plan, in addition to the gradualism of the approach, are the unfairness of disinheriting a child in favor of a recently-wed spouse and the lack of provision for the support of minor children disinherited in favor of older children. The


\textsuperscript{83} H.R. 11113, 89th Cong., 2d Sess. (1966).
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priority given to the person who is living on the allotment, or on the reservation, might cause some Indians to refuse the challenge and opportunity of gainful off-reservation employment. Finally, unless Indians were forbidden to pass property to more than one person by will, more wills would be written to circumvent the statute.

Other inheritance plans have been suggested by BIA field offices: the Cheyenne River Agency suggests that estates descend to not more than five heirs and the Pawnee office proposed that not more than four heirs be allowed except in hardship cases. Still, arbitrary limitation of heirs, at whatever number, involves discrimination within a family, misunderstanding and resentment. Only if some logical limitation fostered by the Indians themselves were adopted, such as the Yakima requirement of substantial Indian blood and reservation affiliation, could such a plan succeed.

Another proposal is to allow minor fractional interests or interests of little monetary value to escheat to the tribe or be purchased by the government upon the death of the owner. Aspinall's bill suggested that interests below a certain value, determined by appraisal or average net income during the five years immediately preceding death, be purchased by the Secretary of the Interior on behalf of the United States. Purchase would be either upon request or at the election of the Secretary. Unless the Secretary could join with the other owners of a fractional interest to sell the property, however, the purchase would freeze the trust status of the land and prevent the other owners from selling. Suggested levels at which escheat or purchase would occur were set at 1/16th of an interest by the Assistant Secretary of the Interior. The Billings office proposed escheat at a valuation of $100, while the Gallup area suggested the point of 1/32 fractionation.

A high value or a low fractionation point set for escheat would be most effective in reducing the problem of multiple ownership and recordkeeping. Tribesmembers would justifiably object strongly, however, if escheat were applied to shares having more than minimal value.

84. 1966 Hearings, supra note 4, at 6, 35; 1960 Land Survey, supra note 9, at 917-18.
85. See note 78, supra.
87. See 1966 Hearings, supra note 4, at 6, 35.
88. See 1960 Land Survey, supra note 9, at 921, 942.
The compromise figure would determine the effectiveness of the program for the purposes of either Indians or taxpayers.89 Whether degree of interest or value of the land is chosen for escheat purposes, a complex problem of fairness arises. Few of the tracts have been appraised, and the present appraisal staff of the BIA would have to be enlarged greatly to meet such an increased need.90 Only appraisal by a qualified expert trusted by the Indian community (a formidable requirement) would insure equal protection to all heirs. While a low cutoff point for escheat would win widespread Indian acceptance, the cost of appraisal might often outweigh the value of the land. Further, the gradual decrease in the number of fractionated interests and slow increase in tribal control of the land suggest that an escheat statute would be most useful as a supplement to a program in which major fractional interests could be sold, while the small interests not worth the cost of sale would escheat.

C. Partition and Sale

Partition and sale of interests to other Indians or the tribe has the important advantage of enabling the Indian to realize a fair value for his interest while control of the land is retained within the tribe. Small holdings might be exchanged for a single, usable piece of land by conveyance and reconveyance. Alternatively, shares given according to the amount of acreage represented by a fractional interest could be exchanged or purchased until holdings sufficient to support a household could be concentrated in one location. A voluntary exchange is already possible through the medium of sales approved by the Secretary of the Interior.91

89. An alternative proposal that value should be defined as 25 times the annual income in the absence of an appraisal is grossly unfair, because income from Indian property is often a poor measure of the value of the property. Allotments may not produce income when a member of the family lives on the land by permission, when a recalcitrant resident refuses to move, or when the value is in some natural resource like timber, which must be harvested. Sometimes lands which are located near suburban areas and have a much higher subdivision value, are leased for agricultural purposes. Furthermore, even a low fractional interest value might be extremely important to a family if minerals were present.

Statement of Chairman Robert Jim of the Yakima Tribal Council to the Indian Legal Problems Seminar, University of Washington, Dec. 3, 1969; see also S. LAIDLAW, supra note 52, at 51.

90. See 1966 Hearings, supra note 4, at 4, 54, 55. In 1966, the staff was able to appraise only 2% of the real estate transactions which should have been supported by appraisal. Id. at 4.

91. 25 U.S.C. § 464 (1964) reads in part:
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The sale or exchange of fractional interests has been made ineffective, however, by the cost and difficulty of partitioning allotments. In most cases, even if the land were worth the cost of partitioning and funds were available, missing, minor, incompetent, or recalcitrant heirs would often prevent partition under present law, which requires unanimous agreement for sale.

On a small scale, locally organized partition and sale can solve reservation problems. The Tulalips of Washington, with the assistance of Union Oil Company and Boeing Company who were anxious to use part of the reservation land, persuaded Congress to enact special legislation enabling a single heir in the Tulalip tribe to bring an action of partition and to allow the tribe to sell reservation land.

Thirteen multiple ownership allotments aggregating 1,635 acres were sold to the tribe for $166,500. The sales were negotiated through the BIA real estate agency, except where the owners could not agree or a complicated heirship pattern existed, in which case the tribe purchased the land through the state court. There has been no wholesale dismemberment of the reservation as a result of the permission for sale given to the tribe, and the tribe's action brought needed job opportunities to the rural reservation.

The average Indian on an impoverished reservation has no industry waiting to bear the expenses of partition and sale, or to bring his problem before Congress. One lesson of the special legislation, however, is that it is essential that a group of less than 100 percent of the owners be empowered to agree to sell the land. Even a requirement of a
majority agreement may be unworkable inasmuch as many owners have infinitesimal shares and live away from the reservation.

Among non-Indians, it is customary to allow partition on the request of one owner of an undivided interest.\textsuperscript{96} Justification for requiring agreement by a substantial fraction of the land interests lies in an analogy to principles of trust law. In addition, there must be some consultation and harmony among persons who will continue to live within a small community.\textsuperscript{97}

An Indian heirship bill introduced by Senator Henry Jackson\textsuperscript{98} seems to be an intelligent compromise. The bill provides that the owners of not less than a 50 percent interest in restricted land may partition or sell where ten or fewer persons own undivided interests, whereas the owners of 25 percent interests may partition or sell where eleven or more own undivided interests.

\textbf{D. Incorporation}

A medium for exchange of fractional allotments is also presently possible through use of the 1934 Indian Reorganization Act provision enabling tribes to incorporate.\textsuperscript{99} Many plans of incorporation are possible, depending upon the wishes and resources of the group. Upon agreement of the tribe, fractional land interests may be exchanged for shares in the corporation, the whole group can work as a unit to make the land productive, and acquired income can be distributed as dividends to stockholders. Such a plan might be particularly effective where stock is grazed or timber cut on Indian land. Another possibility is allocating a block of land according to the number of shares possessed by a tribesmember.\textsuperscript{100} Alternatively, the tribe might use tribal savings as a revolving fund to buy fractional interests and replace the fund by money earned by leasing the land. Though a share in a corporation might seem an incomprehensible abstraction to some Indians, a deed to an undivided and often infinitesimal land share must seem no less abstract. A possible advantage is a return to the model of com-

\textsuperscript{96} See 2 H. Tiffany, Real Property § 475 (1939).
\textsuperscript{97} See 1961 Hearings, supra note 11 at 64, 70-71; 1960 Land Study, supra note 23, at 451; 1960 Land Survey, supra note 9, at 919.
\textsuperscript{98} S. 522, 91st Cong., 1st Sess. § 2(a) (1969).
\textsuperscript{100} See 1966 Hearings, supra note 4, at 6, 20; 1961 Hearings, supra note 11, at 116; 1960 Land Survey, supra note 9, at 901, 917, 923.
munal ownership and to a right of occupancy by use and tribal agreement.

One of the most successful examples of incorporation is the Tribal Land Enterprises formed by the Rosebud Sioux of South Dakota in 1943. Fractional owners exchange their interests for Enterprise stock certificates of equivalent value on which they receive dividends. Accumulated certificates may be transferred for an allocation of an integrated block of land. The tribe hopes to purchase outstanding certificates as money becomes available, thereby compensating the original owners and returning the allotted land to tribal ownership.

The principal problems the Rosebud Sioux have experienced are the cost of clearing title to the heirship tract by obtaining transfers to the corporation from all the fractional owners, and lack of funds to purchase certificates. In 1959 the tribe had only been able to buy 35 percent of the fractional interests. In order to consolidate blocks of land, the tribe buys all the interests in fewer blocks of estates rather than buying partial interests in many estates. In 1968 the corporation was leasing most of its land to whites in order to recover its investment quickly and buy more land. Similar attempts by various other tribes have been less successful.

A statute granting Indian tribes the power of eminent domain

101. For instance, among the Hopi, land allotments from clan lands are made by the senior women of the clan. Enough unoccupied lands at the edges of the community exist to facilitate shifts in case members of the clan need more or less land. Possession is affirmed by the use of the land and descent is by custom, in the lineage of the female line. See Shepardson & Hammond, Navajo Inheritance Patterns: Random or Regular? 5 Ethnology at 87-96 (1966); Beaglehole, Ownership and Inheritance in an American Indian Tribe, 20 Iowa L. Rev. 304, 311-16 (1934). See Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 302 (1893), aff'd, 155 U.S. 196 (1894) (Every member of the community is the owner of the communal property. He does not take as an heir and if he dies his right of property does not descend. He has nothing which he can convey, yet he has a right in the land as perfect as that of any other person, a right which his children after him will enjoy to the same extent).


103. 81 Harv. L. Rev. at 1833.

104. Id.

105. Id.

106. See 3 J. Sackman, Nichols' The Law of Eminent Domain § 9.1[1] (3d ed. rev. 1970) (The condemnor obtains title good against the world, extinguishing pre-existing interests.); 2 Id. § 5.1[5] (The land itself is taken, not the rights of persons. All previous estates are extinguished, giving a new title.); 2 Id. § 5.2[2] (Condemnation
over heirship lands would provide a useful tool for a tribal corporation to acquire land and clear title inexpensively. The power of condemnation, accompanied by funds to compensate for the taking at a fair appraised price and provision for consent or petition by a majority of the land interests, would provide simplicity and economy in dealing with land that is usually worth very little. So long as the individual owner is protected, the tribe ought to be able to remove the burden of fractionation from the land by the simplest method.

Though the option of incorporation is useful to some well-led, well-integrated tribes, it cannot solve the heirship problem unless funds are made available for land purchase. Allocation of land by a corporation, unless done with scrupulous impartiality, would often be more divisive than helpful to a reservation, since many reservations are composed of many tribes forced together for the convenience of the white treaty-maker. Besides rivalry among tribes, divisions exist along religious and family lines. Unless a tribe has had traditional and satisfactory experience of communal land ownership, joint ownership and allocation of land to individuals may be a difficult leap backwards. Ancient tribal patterns are often shattered by generations of acculturation to individual land ownership.

E. Sale to Tribe with Revolving Loan Funds

The most promising solutions to the heirship problem assume that Congress will vote a substantial increase to the revolving loan fund presently available to the tribes, with which they could purchase fractionated interests. With an appropriate loan fund, owners' consent, representation of interests which cannot represent themselves, fair compensation, and low cost administration, the worst aspects of the fractionated land problem could be solved with equity to the owners, tribe and taxpayer.

can proceed even when the title is in dispute or owners cannot be ascertained. If doubt as to ownership exists, the condemnor can pay a lump sum into court and the claimants may litigate among themselves the question of ownership or apportionment.)

107. The Yakima Reservation of Washington, for example, is actually an amalgamation of 14 tribes. See Treaty with the Yakima, 1855, reproduced in C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 698 (1904).

1. The Revolving Loan Fund

Senator Jackson’s bill suggests increasing the appropriation for a revolving loan fund, presently $20 million, to $55 million. The loan fund would be available for any purpose which would promote the economic development of an organized tribe or of individual Indians of one-quarter or more Indian blood who are not members of a tribe. Jackson’s bill provides that loans shall be made only when in the judgment of the Secretary of the Interior there is a reasonable prospect of repayment, the applicants are without sufficient funds, and they are unable to obtain financing from other sources on reasonable terms. Though these provisions are subject to variable interpretation and possible abuse, the provisions preserve the limited loan funds for cases of greatest need. The requirement that a tribe must use its own funds if available should not be construed to mean that a tribe must be penniless before it has access to the revolving fund, and this point should be made explicit.

Title to property purchased with revolving loan funds would be pledged or mortgaged to the lender as security for the unpaid indebtedness, unless the Secretary determines that the payment of the loan is otherwise reasonably assured. Foreclosure of mortgaged land obviously presents a problem of loss of reservation land base, whoever the lender may be. If the federal government forecloses, however, the land is less apt to move irrevocably out of Indian hands. A new proposal has been made to allow the Secretary of the Interior to guarantee up to 90 percent of a loan made to an Indian tribe to a limit of $1 million and to an individual Indian to a limit of $60,000. The guaranteed loans would be conditioned on reasonable assurance of repayment and unavailability of other financing. This device would be a useful supplement to a revolving loan fund. Private lending institutions will continue to be wary of making loans to Indians until they have had an opportunity to prove themselves good risks.

2. Owner’s Consent

In 1961 John Carver, Assistant Secretary of the Interior, proposed that whenever the Secretary determined that any trust lands located

within the boundaries of an Indian reservation were idle or economically unproductive because of fractionation of ownership interest, the Secretary be authorized to sell the beneficial interest in the land to the tribe occupying the reservation. Sale was to be made at the appraised fair market value as determined by the Secretary. Such a solution represents outrageous paternalism. While it is true that the United States, as guardian of the Indian tribes and as trustee of their trust property, possesses a plenary power to manage Indian affairs, the power is subject to constitutional restraints. The private property rights of an Indian are constitutionally secured and enforced to the same extent and in the same way as those of other citizens of the United States.

In addition to constitutional limitations, the Department, as trustee, has a responsibility to prevent the interest of the tribe from taking precedence over the interest of the tribesmembers. An individual Indian who is in disfavor with the tribal government must have a fair opportunity to protect a sale or an appraisal. A workable proposal should provide that partition or sale be initiated by one or more of the owners. Both the Jackson bill and a bill introduced in 1969 by Senator George McGovern provide for request by owners of a substantial proportion of the land in order to partition or sell all or part of the land. The bills require agreement by the owners of at least 50 percent of the interests where ten or fewer persons own undivided interests, and agreement by the owners of at least 25 percent of the interests where eleven or more persons own undivided interests. If any of the undivided interests in a tract of land are in an unrestricted status (usually, owned by non-Indians), only the owners of the remaining restricted land may request partition or sale in the same

112. See 1961 Hearings, supra note 11, at 9-10.
114. See Choate v. Trapp, 224 U.S. 665 (1912) (the private property rights of an Indian are constitutionally secured and enforced to the same extent and in the same way as those of other citizens, even though the Indian may be subject to the guardianship of the United States); Cherokee Nation v. Southern Kansas R.R., 135 U.S. 641, (1890) (the guaranty of just compensation in the fifth amendment for property taken for public use entitles the owner to certain and adequate provision for obtaining compensation before his occupancy is disturbed).
115. See 1961 Hearings, supra note 11, at 9-10, 13, 19, 121.
117. Id. § 2(a); see note 98 and accompanying text, supra.
proportion as if all the land were restricted. Since the land-planning of non-Indians is often at variance with that of Indians, the proviso that only Indians shall initiate change in the status of their land is a wise discharge of the government's trust relationship.

3. **Representation of Owners Who Cannot Represent Themselves**

The sale of heirship land, even where funds are available and where there is substantial consent to sale, is blocked unless owners who cannot represent themselves can participate in a sale through the agency of the Secretary, since present statutes require participation by each owner.\(^{118}\) Even costly guardianship proceedings and adjudication of death would not clear many titles.\(^ {119}\) Those restricted lands which have the greatest number of owners and which consequently most need to be removed from heirship status will inevitably have a few owners who are incompetent.

A bill introduced in 1961 by Senator Frank Church\(^ {120}\) provided that the Secretary of the Interior could represent any Indian owner who was a minor, who was *non compos mentis*, or who could not be located after reasonable notice by publication of the proposed sale is given.\(^ {121}\)

The Jackson and McGovern bills authorize the Secretary, in an action for partition or sale, to represent any Indian owner who is a minor, who has been adjudicated *non compos mentis*, whose ownership interest in a decedent's estate has not been determined, or who cannot be located by the Secretary after reasonable and diligent search and the giving of notice by publication. These bills incorporate important safeguards. First, it is particularly important to specify that an Indian must be adjudicated *non compos mentis* before he can be disqualified from participation. Second, notice to a missing owner by publication is, despite convention to the contrary, not likely to reach the missing person. A reasonable and diligent search by inquiries and by inspection of the BIA's own files would not be an excessive burden.\(^ {122}\) Third, it is essential that potential owners be represented even though their interest in a decedent's estate has not been determined. Some allot-
ments have over one hundred owners. At any given time resolution of some of the interests in such a plot will be pending in probate or on appeal from probate. The death of any owner would similarly halt an attempt to sell. The power of the Secretary to represent those interests which cannot represent themselves is essential to effective sale or partition.

4. Limitation of Potential Purchasers

Experience has shown that when sale of Indian land was encouraged from 1887 to 1934 and again during the 1950's, the reservation land was decimated.¹²³ Potential purchasers of fractionated land must be limited to tribesmembers or the tribe if the reservations are to be preserved.

In the past, the class of possible buyers of Indian land has varied. The Secretary perpetually faced the dilemma of either permitting the land to be sold, or exerting his influence to retain the land in the ownership of the heirs and leasing it. So long as the allotment was held intact, it was subject to progressive subdivision by the death of heirs and the resulting fragmentation. When the estate was put up for sale, the Indians rarely had the money to buy it, and the allotment almost always passed to white ownership.¹²⁴

Furthermore, the allotment of tribal land, despite its lauded purpose of "civilizing" the tribesmembers, has not implanted a farmer's instinct in every Indian breast. Faced with perennial want, the Indian

¹²³. COHEN, supra note 1, at 216. In 1934 sales other than to Indian tribes or corporations were prohibited under a new BIA policy designed to preserve and consolidate the reservations. During the 1950's, sale to non-Indians was again encouraged and losses of land to the reservations from 1948 to 1957 were 2,500,000 acres. The largest losses occurred on reservations containing the most allotments. See W. BROPHY & S. ABERLE, THE INDIAN: supra note 46 at 72, 219. See also S. STEINER, THE NEW INDIANS, 170-71 (1969), who quotes from The American Indian, the publication of the San Francisco Indian Center:

"The ultimate aim [of the white man] is to bring about the breakup of the Indian tribes throughout the country by doing away with the reservations" . . . Society sought to accomplish this by forcing the tribal Indian into [its] big melting pot, which they so fondly refer to. This is to quit being Indians, give up your customs, and act like a white man."

Professor Deloria gives a history of the termination policy of the 50's and says, "[T]his policy was not conceived as a policy of murder. Rather it was thought that it would provide that elusive 'answer' to the Indian problem. And when it proved to be no answer at all, Congress continued its policy, having found a new weapon in the ancient battle for Indian land." V. DELORIA, JR., supra note 46, at 55.

¹²⁴. COHEN, supra note 1, at 209, 216; W. BROPHY & S. ABERLE, supra note 46, at 72.
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has been tempted to look upon his land as an asset to be disposed of to meet everyday needs rather than to be worked for an income. Between 1907 and 1934, sales of allotment lands totaled 90 million acres and most of the proceeds were dissipated rather than reinvested in land.125

If land is to be sold, the sale should not only be in the best interests of the Indian owner, but also not detrimental to the Indian tribe. The sale of an individual key tract with a water supply might destroy the value of thousands of acres of grazing land. In other instances, communities of Indians live upon property by informal agreement, and the tribe would be gravely injured if that property were sold to a non-Indian.126 Any sale to a non-Indian reduces the land base and strength of the tribe. Consequently, the Jackson and McGovern bills provide that no partition or sale shall be authorized unless the Secretary of the Interior finds it to be in the best interests of the Indian owner and not detrimental to the Indian tribe.127 The owners of un-divided Indian interests or the tribe would have a preferential right to purchase, but upon the request of an owner who is seeking a higher price than any owner or the tribe offers, the land could be sold publicly so that a non-Indian could bid. If the tribe or an Indian owner did not meet the high bid, the land could, upon approval of the Secretary, go to a non-Indian. Indians other than the owners of fractional interests in the land sold stand on the same footing as non-Indians in bidding, but they might well be accorded preference in gaining the approval of the Secretary.

Any plan which allowed the Secretary flexibility to approve a highly desirable non-Indian sale will also risk sales that will unnecessarily erode the reservation land base. Discretion must be tempered by a strong policy to preserve the reservations. That policy should give owners first preference to buy. Next in order should be the tribe, the tribesmembers, and only by a strong showing of Indian consensus should non-Indians be eligible.

125. Cohen, supra note 1, at 216.
126. See 1963 Hearings, supra note 4, at 397, 449; 1961 Hearings, supra note 11, at 130.
5. Fair Compensation

Fulfillment of the government's trust duties toward the Indian owners of land requires that the Indians receive the best value upon sale. The owners should have the option of obtaining both an appraisal and open competitive bids to arrive at a fair price. At best, owners are at a disadvantage when selling in a restricted market, a disadvantage accentuated by the poverty of potential Indian buyers. The appraisal itself will be adversely affected by the lack of examples of similar land on a truly open competitive market.

A Department of Interior substitute draft for Senate Bill 1392, introduced in 1961, provided that prior to a competitive sale the tribe shall have a preferred right to purchase at the appraised value any lands.128 If the appraisal were low, the heirs would have preference to buy at the low value. If some of the heirs decided to accept the appraised value and force sale, the remainder could not protest the fairness of the appraisal without going into court to claim that their property was taken without adequate compensation. Provision should be made, however, for an option for sale on bids made in an open competitive market, to the extent that the reservation constitutes an open market. Then a patently unfair appraisal would not embitter the owners, litigation would be avoided, and dissidents would not have grounds for disputing a fair appraisal.129 Opportunity for an appraisal gives all parties a professional's view of the value of the land and can provide a basis for judging the acceptability of bids. If any of the owners wishes a competitive sale, such an option is reasonable and may well result in more adequate compensation.130

129. Indians are distrustful of BIA appraisals. The process is frequently inefficient and inaccurate. An Indian from the Fallon Reservation in Nevada complained: The appraisers are inefficient and do not know the land of our area. They are known to have appraised lands by the fields next to the one in question. Because of the scattered alkali deposits in this area, this method is highly inaccurate. The appraisers do not use the soil samples and do not allow the owner to show his land . . . . Appraisals for timber and oil land have been similarly criticized. See E. CAHN, supra note 50, at 89. Even the most competent appraiser has extreme difficulty in appraising land unless nearby land has had recent offers or has been sold. Even if distrust is unwarranted however, grounds for distrust can be avoided by supplementing appraisals by competitive bidding. See generally 1961 HEARINGS, supra note 11, at 57, 71, 97, 113.
130. Nearly identical bills introduced by Senators Henry Jackson and George McGovern, S. 522, 91st Cong., 1st Sess. § 3(b) (1969) and S. 920, 91st Cong., 1st Sess. § 3(b) (1969) try to meet the need for adequate compensation by providing that the owners of undivided Indian interests or the tribe shall each have a right to purchase
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6. Low-cost Administration

Many parcels of heirship land have little value. When that value is divided among many heirs who have great need for whatever money they can recover from a sale, it is important that a sale be accomplished inexpensively. If revolving loan funds are used for purchase by either a tribesmember or tribe, the money ought to be expended for land rather than court costs. In addition to the burden of court costs, the potential court congestion must be considered in evaluating any proposed solution.

Both the Jackson and McGovern bills place the power of partition and the supervision of sale in the jurisdiction of the United States district court for the district in which the land involved is located. Unfortunately, judicial partition or supervision will require formal proceedings with attendant costs. Each of the owners is entitled to an attorney, and the court may appoint an attorney to represent the interests of minors, persons non compos mentis, and persons missing or with undetermined interests. Attorney's fees are payable from sale proceeds. An administrative proceeding to partition or supervise sale of fractionated land should be adequate except in the most complex cases. Commercial arbitration presents useful examples of the speed and economy with which an expert officer can resolve prob-

property being partitioned or sold, or a part of the property, at its appraised value unless one of the owners objects within a fixed time. In the event that two or more rights of preference are exercised for the same land, or if there is an objection by an owner, the land shall be sold at sealed bids or at public auction with the right in the tribe or any Indian owner who has previously exercised his right of preference to meet the high bid. If two or more eligible purchasers elect to meet the high bid, there shall be a further auction between them and the property sold to the highest bidder. All bids at the competitive sales which are less than 75 percent of the appraised value of the land would be rejected. An option is given to any owner to test the appraisal, yet the possible loss that could be incurred at a poorly attended sale is kept to an acceptable level.

131. For instance, a typical 320-acre allotment on Fort Belknap in Montana might have brought $5,000 in 1963. See 1963 Hearings, supra note 4, at 476.
134. See 1966 Hearings, supra note 4, at 53. Right of appeal to the district court should guard against gross inequity. The probate hearings conducted by the BIA examiner of inheritance seem to be a satisfactory model for such a proceeding. The laws of Oklahoma provide for an executor's fee of $4,400 to probate an estate of $172,000. An Indian in Oklahoma could have paid $75 for the same service from the Solicitor's office. 1960 LAND SURVEY, supra note 9, at 1010.
Certainly an option should exist to turn to informal administrative adjudication when the value of land cannot justify a court procedure.

7. Disposition of Mineral Interests

For the majority of Indians, solution of the heirship problem would implement an opportunity to consolidate fractionated land into usable units for surface cultivation or building, and make possible the realization of fair value for heirship interests while keeping control of the land in the tribe. For some tribes in oil or mineral regions, however, the unknown potential value of the subsurface may be the real heritage of the landowner. Preservation of mineral rights presents a new BIA recordkeeping problem which would hinder hopes of reducing the quantity of records now required by the heirship land problem. Nevertheless, the government's trust responsibility may require that mineral rights be reserved to the Indian seller unless he is properly compensated for them.136

In the past, Indian owners were frequently induced to sell valuable mineral rights when they thought they were selling only the land. Even honest negotiation is difficult, however, when the value of potential minerals is entirely speculative.137 It may not be a proper discharge of the government's trust obligation to allow any sale of mineral rights unless some investigation has been made of the mineral content of the area.138

A bill introduced in 1961 by Senator Frank Church139 gave the individual owner who was selling undivided Indian trust interests in land the option to reserve or to sell his interest in oil, gas, or other minerals. If he reserved his interest, it would be held in a nontrust and nonrestricted status. Removing mineral rights from restriction after sale of the owner's land would take the interests off the BIA's books and make them the responsibility of the owner. Senator Church recognized that, if land is sold and mineral rights are retained in trust, the accounting portion of the heirship problem would remain. Inter-

135. See F. KELLORE, ARBITRATION IN ACTION 4, 138, 363 (1941).
136. See 1961 Hearings, supra note 11, at 101; 1963 Hearings, supra note 4, at 397, 411.
137. 1963 Hearings, supra note 4, at 402, 471.
138. See 1960 LAND SURVEY, supra note 9, at 919.
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ests would still have to be computed and posted, and disbursements made if minerals were extracted.

Few Indians, however, would resist pressure to sell valuable rights. Even fewer would have the resources to keep complex titles in proper recorded form. Unless justified by more than convenience, a plan to abandon the government's trust control of mineral rights would encourage termination and should be resisted. The Jackson Bill properly gives the Indian owner the option to reserve his interest in oil, gas and other minerals in trust status.

CONCLUSION

The Indian heirship land problem has occupied the attention of Indians, their friends, and Congress for many years. The Indian people should not have to suffer ever-greater economic privation because increasing portions of their land are becoming tied up in fractionated interests as a direct result of the governmental allotment program. A plan should be adopted to prevent needless continuation of a technical property problem by providing a simple procedure by which interested Indian owners might sell their land shares to other tribe members or their tribe.

Every solution to the Indian heirship land problem requires congressional aid either in enabling legislation or in creation of a loan fund to make exchange of land financially feasible. Legislation which would guarantee commercial loans might have greater chance of passage by Congress and should be considered. Awareness of the shabby treatment afforded Indians has finally reached the national consciousness and can be converted into effective, comprehensive legislation which both eases the excessive restrictions on land sale and provides loan funds to permit purchase.

Any Legislative solution by change in the probate statutes would be harsh and incomplete. Over half of all allotted land already has so many owners that no one can control the allotment. Even if only one heir is allowed to inherit and wills are not permitted unless there is only one devisee, land with multitudes of interests will not be returned to manageable status within a tolerable period of time. The brutality of forced disinheritance should not be inflicted upon an already aggrieved population when so little benefit would result. If any of the
tribes wish to follow the Yakima example and restrict inheritance to tribesmembers of substantial Indian blood and tribal affiliation, Congress should facilitate the decision. But such a decision is directed to an entirely different problem—the problem of absentee ownership and tribal control—and should not be confused with reducing the heirship quandary.

Provision for escheat or purchase of minor fractions of land interests of little value would serve only as a holding action, and would not be worth its cost in money or irritation. Indians would quite understandably not tolerate a level of escheat which would make perceptible inroads into the present fractionation. In the meantime the rest of the allotments would become subdivided to the statutory limit of fractionation. Cost of appraisal to determine fairly which interests would escheat would doubtless exceed the value of the escheated land.

Partition and sale of interests to tribesmembers is increasingly more costly and difficult as the number of interests in allotments increases. If Congress gives no other help with the heirship problem, it is at least imperative that it provide that less than 100 percent of the owners be sufficient to effect a sale. Among non-Indians, partition of undivided interests is permitted on the application of one owner. No purpose is served by subjecting Indians to the exquisite frustration of having a land-acquisition program or consolidation plan which is nullified by the non-agreement of owners who are missing or recalcitrant. Since sale of land within a closely-knit, mutually dependent society like a reservation is a serious step, it is wise to require that a reasonable number of the owners agree. Consideration should be given to the Jackson and McGovern bills, which provide that the owners of 50 percent or more of the interests in restricted land may partition or sell where ten or fewer persons own undivided interests, but that the owners of 25 percent of the interests may act where eleven or more own undivided interests.\textsuperscript{140}

Incorporation is presently used as a land acquisition and control method by strong, relatively rich tribes. Incorporation can never be extended to the multitude of poor tribes, however, until loan funds are made available by Congress so that individual owners can get a tan-

\textsuperscript{140} Note 127, \textit{supra}.  

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gible return for their land instead of a nebulous promise. Present Indian corporations have been stymied in their land consolidation programs because they lack funds to buy land available.

Congress should give Indian tribes the power to condemn land for the benefit of the tribe upon application by the owners of a substantial proportion of an allotment. Condemnation provides a relatively simple and inexpensive technique to clear title. When land is of low value and the purchasers have little money, the tribe should be entitled to use any method of land transfer which is fair to the land's owners.

It is useless to pretend that the Indian tribes or tribesmembers, receiving on the average from one-fourth to one-half the income of other citizens, can make any inroad in their land problem without a source of capital. The fractionation of land will not be corrected soon even with a loan fund, but no amount of desperate planning or collective altruism is going to succeed without money to compensate the interest owners. The allotments obviously have value; unfortunately, there is no source of private capital which has shown any interest in making loans on Indian land in the past. Few can be expected in the future to risk money on the marginal land and long-range schemes that will be involved in tribal land consolidation. The imperative need for a revolving loan fund or guaranteed loans can only be met by new legislation. This course should be vigorously pursued by Indians and their friends.

Provision of purchase funds must, of course, be matched by legislation removing the present insurmountable barriers to sale. Removal of the requirement for unanimous request for sale should have first priority.

After purchase and sale are made feasible, a policy to insure that sales will not decimate the reservation must be clarified. Surely the experience of a century should be sufficient to prove that unrestricted sale of Indian land results in loss of that land to the Indian tribe. A sale should not only benefit the individual owner, but should not be detrimental to the tribe by reducing its land base and thus its strength. Until such time as the Indian tribe itself expresses a wish to terminate its reservation, the land within the reservation must remain within the control of the tribe. A policy which would accomplish this goal should first give preference to buy available land to the owners of
interests in the land, next to the tribe, and then to other tribesmembers. Only if the tribe is convinced that a sale to non-Indians would be beneficial should a sale to outsiders be permitted.

Encouraging progress has been made in the drafting of legislation to reduce fractionation of Indian land. The Jackson and McGovern bills incorporate many of the suggestions and avoid pitfalls discovered in numerous hearings and studies where the ideas of Indian land owners and administrators were solicited. The time has come to use those findings and to pass legislation which will alleviate a problem which has been long acknowledged and which is rapidly becoming intolerable.

_Ethel J. Williams_*