

CREATION AND ADMINISTRATION
OF LIFE ESTATES

BUREAU OF INDIAN AFFAIRS
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The New Framework

- AIPRA, through provisions enacted in 2004 and made applicable to estates of individual Indians who died after June 20, 2006, provides for the creation of Life Estates without Regard to Waste, with different rules for allocation of payments than those generally applicable to life estates created by instrument.
- 25 CFR Part 179, as originally adopted in 1988 to provide standard rules for allocations of payments between life tenants and remaindermen, was revised in 2008 to implement AIPRA, incorporating its terms (verbatim) but providing no guidance with respect to the management of interests that are subject to Life Estates without Regard to Waste.
- The new TAAMS system provides separate ID Number Class Codes for non-Indian and Indian life tenants, as well as separate Interest Type Codes for life estates created by instrument and those created by operation of law (including Life Estates without Regard to Waste), and includes a Redirection feature to be implemented where income is to be paid to someone other than the beneficial owner (including a life tenant).

Life Tenant and Remainderman

- A life estate is an estate in real property measured by the life of one or more persons, which does not terminate at any fixed or determinable time; a life estate per autre vie is an estate measured by the life of someone other than the life tenant.
- Life estates are typically created by instrument (i.e., by grant or reservation in a deed, or by devise); other life estates have been historically created by operation of state law (e.g., dower and curtesy) prior to the effective date of AIPRA.
- A remainder interest is created at the same time as the life estate, but vesting may be made subject to some later event (including the identification of a contingent remainderman).

Rights and Obligations

- The owner of a “full” life estate (covering all of the interests in a tract, and not just a fractional interest) is entitled to exclusive possession and the right to all income (i.e., rents and profits), but may not permanently deplete the land’s mineral resources (i.e., commit waste) without the remainderman’s consent.
- A remainderman may not use/lease land without a “full” life tenant’s consent, and any lease entered into only by the life tenant (without the remainderman’s consent) will terminate when the life estate ends.
- The owner of a “fractional” life estate will not have the power to lease or encumber the land without the consent of his/her remainderman (as well as the co-owners, in most cases); in the past, WRO policy would have allowed the remainderman and co-owners to lease or encumber the land without the “fractional” life tenant’s consent, so long as the life tenant received a proper allocation of the income or proceeds derived therefrom (see the IBIA’s Enemy Hunter and Adakai decisions from 2010 and 2013, respectively), but recent changes in 25 CFR Parts 162 and 169 should be read to require the consent of both life tenant and remainderman in order for the interest to be committed.

Transferability and Termination

- A life estate and vested remainder are separately transferable, in the absence of any restraint on alienation in the instrument which created the life estate; conveyances of life estates in trust lands are not subject to BIA approval (even where the life tenant is an Indian), but recording at LTRO is required for accounting purposes.
- Where a life estate terminates by death or upon voluntary relinquishment, a death certificate or relinquishment document must be recorded at LTRO; A life estate may also terminate by merger, where it is conveyed to the remainderman, or where both life estate and remainder are acquired by a third party.
- Where a remainder interest in trust lands is conveyed, the deed must be approved and recorded, and the approval will be subject to standard rules on FMV and appraisal waiver; FMV for the remainder will be determined through the application of the IRS tables cross-referenced in 25 CFR Part 179.

25 CFR Part 179 – The 1988 Rule

- The 1988 Rule established a uniform method for allocating payments derived from mineral leases (rents payable to the life tenant, bonus split, and royalties (principal) invested, with interest payable to the life tenant), where life tenant and remainderman have not provided for a different allocation (e.g., by entering into a “6A Agreement”); a well or mine that is in production/operation when the life estate vests is subject to the “Open Mine Doctrine” exception, whereby the life tenant may receive all of the royalties.
- The 1988 Rule was also intended to establish a uniform method for allocating other types of principal payments (and establishing FMV for life estate and remainder), based on the life expectancy of the life tenant; two gender-specific tables (derived from the Tables A then found in the IRS regulations) were directly incorporated in the 1988 version of Part 179, applying a 6% discount rate to the invested principal and showing percentage “factors” for both life estate and remainder.
- The 1988 Rule did not directly address whether/when right-of-way compensation would be treated as principal, but the historical record suggests that the drafters of the Rule intended those payments to be viewed as principal in most cases (to be allocated in accordance with the tables in Part 179).

Life Estates without Regard to Waste

- Under AIPRA, a surviving (Indian or non-Indian) spouse will receive (only) a Life Estate without Regard to Waste in all lands which pass by intestacy, unless the interest being inherited is < 5% and “Single Heir Rule” applies (in which case the surviving spouse will receive a Life Estate without Regard to Waste only if he/she is residing on the tract)
- Under AIPRA, a surviving non-Indian spouse named as a devisee (with respect to an interest in an IRA allotment) will be deemed to have received just a Life Estate without Regard to Waste, with the remainder generally passing to the testator’s eligible heirs.
- Full interests in non-IRA allotments (including most Public Domain Allotments) may pass to a non-Indian spouse (or any other non-Indian individual) by devise, but where a non-IRA tribe has jurisdiction it may exercise an option to purchase (which will be subject to the devisee’s right to reserve a Life Estate without Regard to Waste); a tribe which has made non-member Indians ineligible to inherit (via an approved Tribal Probate Code) will have a similar option to purchase a devised interest, in which case a spouse or lineal descendant devisee would again have the right to reserve a Life Estate without Regard to Waste.

25 CFR Part 179 – The 2008 Revision

- The 2008 Revision did not alter the standard rules established in 1988 for allocation of mineral and other principal payments, but it did stipulate that the owner of a Life Estate without Regard to Waste would receive “all income, including bonuses and royalties”
- While the 2008 Revision again failed to directly address whether/when right-of-way compensation would be treated as principal, it seems clear that Congress intended for the owner of a Life Estate without Regard to Waste to receive all land use payments (notwithstanding the use of the term “income” in both AIPRA and the Rule), in the absence of an agreement between life tenant and remainderman.
- The 2008 Revision replaced the (long-obsolete) Tables A found in the 1988 Rule with a cross-reference to a new series of IRS tables (collectively, Table S, updated every ten years) showing only remainder factors for interests subject to life estates held by either male or female life tenants, at variable discount rates.

Applying the IRS Tables

- The 2008 Revision did not adopt the previous uniform discount rate of 6%, indicating instead that BIA would periodically establish a uniform discount rate via publication in the Federal Register, but no such rate has yet been established.
- Pending further guidance, valuations and allocations of principal should be based on the monthly-published “Section 7520 Rate” referenced in the IRS regulations (with allocations which pre-dated the 2008 Revision still being subject to the tables printed in the 1988 Rule); In all cases where the IRS tables are used, the age of the life tenant must also be determinable, meaning that birth date information should be entered in TAAMS when the life estate is created.
- The 2008 Revision’s cross-reference to Table S may be used for land sales and long-term or perpetual easements, but – pending further guidance - another IRS Table (Table H) may be better suited for allocations of lump sum payments derived from shorter-term easements (e.g., pipelines) or timber sales.

Consent and Collection Requirements

- All rents derived from all types of surface leases are payable to life tenants (regardless of the “type” of life estate), even though the consent power rests with both the life tenant and remainderman; Notice should thus be given to both life tenant and remainderman, with specific information as to how much each would receive (or not receive, in the case of the remainderman) in the absence of an allocation agreement, in order to provide for an informed consent (as needed) and possibly an agreement.
- Principal payments derived from mineral leases, rights-of-way, and timber sales are payable to the owner of a Life Estate without Regard to Waste, or allocated between life tenant and remainderman in most cases where a life estate was created by instrument; Notice should thus be given to both life tenant and remainderman, with specific information as to how much each would receive in the absence of an allocation agreement, in order to provide for an informed consent (as needed) and possibly an agreement.
- Given that we have no accounting-based obligation to collect on behalf of life tenants, and may not do so even to protect the interests of the remaindermen, it is important that we avoid advance payments or lengthy payment periods, and that we also take steps to quickly ascertain dates of death in order to document the termination of life estates for record title purposes.