

The ILCA Amendments
and the BIA's Proposed
Conveyancing Regulations

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Pre-ILCA Statutes and Regulations

- Early 20th Century statutes giving the Secretary broad authority to sell allotted land have always been viewed as having been made inapplicable to IRA Lands in 1934; while those statutes are generally thought to still be applicable to non-IRA allotments, their use has long been limited as a matter of policy.
- Section 4 of the IRA permitted the conveyance of allotted land only to tribes, and authorized exchanges of tribal land only where land of equal value was received in return; fee patents and conveyances of IRA allotments to Individual Indians and non-Indians were authorized in 1948, but “Secretarial Transfers” of entire tracts made under that 1948 Act – without the consent of all of the owners - were later found to be invalid.
- Departmental policies and conveyancing regulations (now found at 25 CFR Part 152, and last amended in 1973) imposed new restrictions, including restrictions on gifts and below-market sales, and conveyances to non-Indians; additional restrictions on conveyances to non-member Indians and conveyances of fractional interests to non-owners were incorporated in what is now Part 151, when it was first promulgated in 1980.

A & D Provisions in Original ILCA

- Section 203 - Section 5 of the IRA was extended to non-IRA lands, clearly authorizing fee-to-trust acquisitions, and presumably also broadening the conveyancing authority of individual Indian owners of non-IRA lands and the exchange authority of non-IRA tribes.
- Section 204 – All tribes were given more flexibility in the transfer/exchange of tribal land (for any combination of cash and land equal to 90% of FMV), with the proceeds earmarked for the acquisition of other land identified in an approved Land Consolidation Plan.
- Section 205 – All tribes (IRA and non-IRA alike) were given a limited Forced Sale authority, through the authorization of Tribal Tract Purchases at no less than FMV, with majority (now 50%, as amended) consent or ownership.

A & D Provisions in ILCA 2000

- Standard title transactions authorized by pre-existing statutes had key CFR rules explicitly and implicitly modified by Section 217 of ILCA 2000; The standard title transactions covered by Section 217 include fee-to-trust (fractional interests only), trust-to-trust, and trust-to-fee applications.
- Buyback purchases were authorized by Section 213 of ILCA 2000, relying on pre-existing conveyancing authority, and other ILCA provisions in Section 205 (waiving the Part 151 co-owner consent requirement for purchases of fractional interests by non-owner tribes) and Section 215 (expressly recognizing mass appraisal methods as alternatives to site-specific appraisals) intended to streamline the trust-to-trust process.
- Cf. ILCA title transactions which are authorized by the Section 204-205 provisions in the Original ILCA and the 2004 Amendments, and have not yet had any implementing regulations; to date, Buyback funds have only been used to support standard (trust-to-trust) title transactions, but AIPRA also authorizes the use of such funds to support certain ILCA title transactions.

A & D Provisions in AIPRA

- Section 205(c), as re-designated - Sales of “Highly Fractionated Land” (defined to include any tract with 100 or more owners, and any tract with 50 or more owners if none owns more than 10%) were authorized upon the application of any one owner, with limited consent requirements; this new Forced Sale authority complements but does not supersede the pre-existing Tribal Tract Purchase authority in Sections 205(a)-(b) of the Original ILCA, which is non-competitive (in that it benefits only tribes) and applies to all tracts, including those that are not “highly fractionated.”
- Section 217(f) – A general Tribal Right of First Refusal rule for all trust-to-fee applications (e.g., fee patents, advertised sales, and negotiated sales to non-Indians) was established, subject to a new “Family Farm Exception” (which arguably applies only to conveyances and not fee patents); other more severe/specific trust-to-fee restrictions in ILCA 2000 remain unchanged, including a five-year prohibition that attaches to any land/interest acquired under Section 217(b), including: (1) land conveyed to a grantee who takes from a relative who waives his/her right to appraisal information; and (2) land conveyed by gift to a grantee who does not have a special relationship with the grantor.
- Though not technically A & D provisions, Sections 206 and 207 establish various purchase options and authorize other purchase offer rights as part of the probate process, and provide new authorities for directional disclaimers and consolidation agreements which might be used to avoid certain inheritance restrictions.

Implementation Status

- All of the A & D provisions in ILCA were effective immediately upon enactment (from the Original ILCA going forward), except for those authorizing Forced Sales of “Highly Fractionated Land,” and the “Purchase at Probate” provisions, which went into effect on June 20, 2006.
- Following several consultation sessions (and circulation of a Consultation Draft), a complete overhaul of 25 CFR Part 152 was among the Proposed Rules published in the Federal Register on August 8, 2006, as part of the ILCA/AIPRA phase of a multi-phase, DOI-wide Rulemaking Initiative; the comment period, as extended, closed in the spring of 2007, but a Final Rule was not published in 2008 with all of the companion “ILCA” rules, in part because of concern that new rules might constrain the Buyback Program (which, soon thereafter, was greatly expanded following the enactment of the Cobell Settlement legislation, and has since operated without any formal rulemaking).
- The Proposed Rule for Part 152, as published, included nine “lettered” subparts (whereas the current rule includes four subheadings); the Proposed Rule covered all trust-to-trust and trust-to-fee issues (including those now covered by Part 151), and separately addressed the various types of standard and ILCA transactions (including Tribal Tract Purchases and Sales of “Highly Fractionated Tracts”), with references to the Land Buyback Program integrated therein.

Subpart B: Sales and Exchanges of Tribal Land

- Subpart B of the Proposed Rule includes “old” provisions that allow tribal land to be exchanged for land of equal value, as well as “new” provisions which allow tribes that have approved Land Consolidation Plans to sell and (more freely) exchange tribal land.
- Under Section 204 of ILCA and Subpart B, if a tribe has an approved Land Consolidation Plan, tribal land/interests can be sold or exchanged for any combination of cash and land not less than 90% of FMV (unless prohibited by a tribe’s constitution), but all of the proceeds must be used for land acquisition purposes.
- Under the Proposed Rule, the proceeds of tribal dispositions can be used to finance either fee-to-trust or trust-to-trust acquisitions, if the lands/interests to be acquired are generally described in an approved Land Consolidation Plan; any acquisition made with those proceeds will remain subject to the same standards and processes that would otherwise apply, whether the land is located on-reservation or off-reservation, and will not be considered to be “mandatory.”

Subpart C: Trust-to-Trust Transactions

- Subpart C of the Proposed Rule covers negotiated sales, gifts, and exchanges, and includes provisions intended to implement the trust-to-trust provisions in Sections 217(a)-(b) of ILCA, the trust-to-fee restrictions in Section 217(f), and the Buyback provisions in Sections 213-214.
- The Proposed Rule includes ILCA-based provisions which: (1) “define” eligible grantees to include any “Indian” (as defined in Subpart A to incorporate the AIPRA Definition, which is much broader than the IRA definition that formerly limited the efforts of many trust owners to consolidate by deed), or any other trust co-owner at the time of application; (2) allow grantees to take by gift, or at less than FMV, even where there is no special relationship between the grantor and grantee, with a five-year trust-to-fee restriction being imposed on the land and required in the deed; and (3) allow grantors to waive their rights to appraisal information where they wish to convey to Indian family members (and, in cases involving small Interests, tribes and trust co-owners), with a five-year trust-to-fee restriction being imposed on the land and required in the deed.
- The Proposed Rule included Buyback provisions which would define how and when: (1) a “Buyback” lien would attach to an interest purchased on behalf of a tribe; (2) the BIA might remove such a lien; and (3) an Indian co-owner might purchase an interest that has been purchased for the tribe but is still subject to a lien (an exception to the law generally prohibiting conveyances of tribal land/interests); however, the Buyback Program (as expanded to implement the Cobell settlement) chose not to impose any new liens and recently waived the liens imposed by its predecessor Indian Land Consolidation Program, transferring all “recouped” funds to the Acquisition Fund for each participating tribe.

Subpart C: Trust-to-Trust Transactions Contd.

- The Proposed Rule also includes provisions which would effectively eliminate the current (Part 151) rule that generally requires (majority) co-owner consent for non-owner acquisitions of fractional interests, based in part on the tribal exception to that consent rule found in Section 205 of the Original ILCA; a new (100%) co-owner consent rule is needed, however, in cases where the owner of a fractional interest in a tract wishes to convey his interest in only a portion of the tract (thus creating a new ownership tract).
- The Proposed Rule would also: (1) not allow a grantor to “fractionate by deed” (i.e., convey to multiple grantees or convey less than his/her full Interest in a tract), consistent with the overall purposes of ILCA; and (2) eliminate the general provisions on advertised sales now found in Part 152, along with the rule that generally requires advertisement prior to a sale to a non-Indian (advertised sales still being provided for in Subpart E, where the tract being sold is “highly fractionated.”)
- The Proposed Rule eliminated a provision in the Consultation Draft that would have imposed additional conditions on trust-to-trust conveyances of Public Domain Allotments to tribes, where those conveyances would convert the land to “Indian Country” without notice to other affected jurisdictions, but that provision will likely be restored in any Final Rule; any Final Rule will likely also modify the Proposed Rule to effectively negate the tribal consent requirement for conveyances to non-member Indians (now found in Part 151) altogether, pending a possible amendment to Section 217 that would extend the Right of First Refusal rule for trust-to-fee applications to at least some of these trust-to-trust transactions (e.g., where the proposed grantee is not already a trust owner, or where the proposed grantee is seeking to acquire full trust ownership of the tract).

Subpart C: Trust-to-Fee Transactions

- The Proposed Rule reflects that Section 217(f) of ILCA gives tribes a Right of First Refusal, whereby they can block trust-to-fee conveyances by offering FMV (in the case of a gift or patent) or matching a higher negotiated price (in the case of a sale); where the tribe makes such an offer, the applicant is not required to convey to the tribe, but the proposed conveyance out of trust status cannot be completed.
- The tribal Right of First Refusal is subject to a “Family Farm Exception,” under which conveyances out of trust status may be completed notwithstanding a qualifying tribal offer, but with the tribe retaining a Right of First Refusal if the new fee owner later attempts to convey to a non-family-member; the Proposed Rule indicates that the tribe will be given 30 days in which to respond to notice of a proposed trust-to-fee conveyance, and (if the tribe indicates that it wishes to exercise its Right of First Refusal by making a qualifying offer, and that offer is accepted by the applicant) another 30 Days in which to deposit the necessary funds with BIA.
- The Proposed Rule eliminated a provision in the Consultation Draft that would have allowed trust-to-fee conveyances only where all of the trust/restricted interests in the tract are being conveyed; this provision (which was consistent with long-standing BIA policy) will likely be reinstated in any Final Rule, in light of the overall purpose of ILCA to preserve trust status, land management problems associated with fractional fee interests, and the fact that tribes would be unlikely to exercise their Rights of First Refusal in cases involving fractional interests.

Compare “Purchase at Probate” under AIPRA

- The re-numbered Section 207(o) generally authorizes consensual purchase at no less than FMV of any/all interests in an estate, by the other heirs/devisees and Indian co-owners in the same tract(s), the tribe, or the BIA acting on behalf of the tribe (using Buyback funds); these consensual purchases need not be competitive, with the heir or devisee whose interest is being purchased having a right to select where more than one eligible purchaser makes a qualifying offer.
- The consent of the heir to whom an interest would pass in intestacy is not needed where the decedent’s interest is < 5% (unless the heir is residing on the land), with eligible purchasers now being only the BIA’s Land Buyback Program (which is not currently pursuing these types of purchases) or a tribe seeking to prevent a non-member from inheriting.
- Whether consensual or not, the “Purchase at Probate” transfer will be made by probate order (and made effective after the death of the decedent, on a date stated in the order); the appraisal requirement is statutory and cannot be waived (even where the purchase is consensual and a waiver would be allowed in a non-probate context), and the FMV determination (and “approval” of the purchase) may be made appealable before the order is issued.

Compare Other Probate “Conveyances” under AIPRA

- Other Purchase Options - Tribes have options to purchase at FMV where a devisee would otherwise take in fee status, subject to the devisee’s right to renounce in favor of an eligible heir/devisee, reserve a life estate, or invoke the “Family Farm Exception”; Indian co-owners have options to purchase (at no less than FMV) where there are no “Eligible Heirs” and the land would otherwise pass to the tribe without compensation via a true escheat.
- Consolidation Agreements – Heirs and devisees may enter into gifts and exchanges involving lands outside the estate, as well as those being inherited, with all transfers to be made by probate order (and made effective after the date of the decedent’s death, on a date stated in the order); FMV determinations can and should be waived by the parties entering into a Consolidation Agreement, and interests that have been included in a Consolidation Agreement will be exempt from any non-consensual “Purchase at Probate.”
- Renunciations and Disclaimers – AIPRA supersedes the standard rule on renunciations, to allow “directional” disclaimers to any “Eligible Heir” or anyone eligible to take in trust by devise, effective as of the date of death of the decedent (with no title “vesting” in the disclaiming party); such disclaimers may be made to tribes as well as individuals (and in intestate as well as “will” cases), and any disclaiming heir or devisee may reserve a life estate.

Subpart D: Tribal Tract Purchases

- Subpart D of the Proposed Rule would implement Sections 205(a)-(b) of ILCA, which allow tribes to acquire the on-reservation interests of non-consenting owners, with 50% ownership or the consent of the owners of at least a 50% aggregate interest; only tribes may initiate these Tract Purchases, which may be completed on any tract, “highly fractionated” or otherwise.
- Under the Proposed Rule, owners in “authorized possession” of the entire tract for at least three years will have the right to step into the tribe’s shoes and complete the purchase, but such an owner may only purchase tribally-owned interests if the tribe consents.
- BIA must establish FMV, send notices to non-consenting owners, and execute a Secretarial Transfer Order to convey the interests of the non-consenting owners; the Proposed Rule indicated that the BIA’s transfer authority would extend to fee interests (as suggested in tribal comments on the Consultation Draft), but this will likely be changed in the Final Rule based on the fact that the BIA does not hold legal title and such a conveyance would result in a fee-to-trust conversion of such an interest.

Subpart E: Advertised Sales of “Highly Fractionated” Tracts

- Subpart E of the Proposed Rule would implement Section 205(c) of ILCA, enacted as part of AIPRA in 2004 and authorizing “Consolidation by Sale” upon application by any one owner, with limited consent requirements; the tract to be sold must be “highly fractionated,” as based on BIA records at the time of application (with a “highly fractionated” tract being defined as any tract with 100 or more owners, or any tract with 50 or more owners if none owns more than a 10% interest), and if minerals have been severed - creating separate ownerships - only the surface may be sold.
- The tract sale can be triggered by any trust owner, including the tribe (if an owner), no matter how small the interest and even if the applicant does not wish to purchase; BIA cannot initiate a tract sale on behalf of the tribe, and the applicant must bear the cost of notice to the co-owners (unless waived by BIA), with actual notice to be given by certified mail (and public notice, following a documented search, to be given to owners whose whereabouts are unknown).
- Whereas notice to all owners is always required, their consent may not be needed at all; consent will always be needed from the tribe (if an owner) and any owner in “bona fide” possession for at least three years preceding the filing of the application, and consent will also be needed from 50% of the trust ownership if any interest is valued at more than \$1500 (but with BIA being given broad authority to consent on behalf of pending estates and owners whose whereabouts are unknown, in order to reach the 50% threshold).

Subpart E: Advertised Sales of “Highly Fractionated” Tracts Contd.

- A site-specific appraisal is needed to determine not just the minimum acceptable bid but also the level of owner consent required (i.e., whether any interest is valued at more than \$1500); even if consent is not required, all owners must be advised of FMV and given an opportunity to object to (and, if necessary, appeal) the appraisal, before the tract sale is conducted.
- The tract sale must be competitive, through sealed bid and/or auction, with eligible purchasers comprising only the tribe, members of the tribe or individuals eligible for membership, trust co-owners who are members of other tribes (or are “membership-eligible”), and non-owner lineal descendants of the original allottee who are members of other tribes (or are “membership-eligible”), meaning that the tract will always remain in trust status immediately after sale; in California, trust co-owners of Public Domain Allotments who are not members (and not “membership-eligible”) will also be eligible purchasers.
- The tribe will have a right to match the high bid if a non-member Indian is the high bidder and the tribe has reserved the right to match in advance, and the largest tribal member co-owner will have a superior right to match if he/she owns at least a 20% interest and bid at least the FMV at sale.

Subpart E: Advertised Sales of “Highly Fractionated” Tracts Contd.

- As under Subpart D, the Proposed Rule indicated that the BIA’s transfer authority would extend to fee interests (as suggested in tribal comments on the Consultation Draft), but this, too, will likely be changed in the Final Rule, based on the fact that the BIA does not hold legal title and such a conveyance would result in a fee-to-trust conversion of such an interest.
- The Proposed Rule provides that federal grant or loan funds may also be made available (up to a maximum of 20% of the purchase price), and that if no eligible purchaser bids FMV, BIA may step in and purchase on behalf of the tribe, using Buyback funds; in all cases, the conveyance of the outstanding trust interests in the tract would be accomplished by some type of Secretarial Transfer.
- Perhaps significantly, there is nothing in AIPRA to prohibit the use of third party or purchase money financing by individual purchasers, and tracts acquired under this authority are subject only to the general trust-to-fee restrictions in Section 217(f).

Subpart F: Partitions in Kind

- Subpart F of the Proposed Rule would expand on one section in the current Part 152, to authorize “forced” partitions that effectively subdivide a tract to create one or more economic parcels, upon the application of any one trust owner.
- The new Subpart F is significant in that it authorizes Partitions on IRA and non-IRA allotments alike (the current CFR only authorizes such actions on non-IRA allotments), and the Proposed Rule has eliminated other limits on the scope of the partition authority, in response to comments on the Consultation Draft; ILCA does not authorize Partitions in Kind, but such actions on non-IRA allotments are authorized by a 1916 Act, and the courts have held that partitions of IRA allotments may be “forced” under a 1948 Act which generally authorizes conveyances of IRA tracts (although such actions have not been encouraged in the absence of regulations, due to concern about clouded titles arising from other “Secretarial Transfers” made under the same Act).
- Under the Proposed Rule, “before and after” surveys and appraisals are required in an Application to Partition, with the applicant bearing the costs and the co-owners being given notice and an opportunity to object or provide an alternative Partition Plan; the Proposed Rule also establishes a standard of review for determining whether the tract may be equitably partitioned to the benefit of all of the owners, and provides that the partition will be accomplished through some type of Secretarial Partition Order rather than by the issuance of patents (except where a fee interest is involved).

Subpart G: Mortgages and Deeds of Trust

- Subpart G of the Proposed Rule would expand on one section in the current CFR, to incorporate certain provisions enacted in the 1980's and 1990's to amend the 1956 Act that authorizes Mortgages and Deeds of Trust by individual Indians (so long as all of the ownership interests in an allotment are encumbered); these amendments clarified that Mortgages and Deed of Trust may be enforced under tribal law (or, where there is no applicable tribal law, under state law) in the event of a default by the individual Indian borrower, and that tribal and individual Indian purchasers at foreclosure or trustee's sale may retain title in trust status.
- In the late 1990's, concern was expressed within BIA about the potential loss of trust status resulting from foreclosure or trustee's sale; the Proposed Rule would establish new standards of review which would require limited BIA "underwriting" to limit the risk of default, reasonable loan-to-value ratios, and landowner review/acknowledgment of the remedies provisions in the loan documents.
- In response to comments on the Consultation Draft, the Proposed Rule was clarified to reflect that while tribes do not have a statutory Right of First Refusal to prevent the loss of trust status through foreclosure or trustee's sale (at least as a matter of federal law, Section 217(f) having been made expressly inapplicable), tribes will have such a right where a tribal foreclosure and eviction law so provides.

Miscellaneous - Appraisal Issues

- To facilitate consolidation, the use of alternative/streamlined appraisal methods - including USPAP-compliant automated valuation models, mass appraisals, and market studies - is authorized for all ILCA transactions (and not just Buyback purchases) under Section 215; the use of these methods need not be viewed as a departure from USPAP standards (and would thus extend to other standard conveyance transactions as well), although Section 215 might also be cited in support of a “Jurisdictional Exception,” if necessary.
- “Involuntary” Tract Purchases and Forced Sales under Section 205 will likely require site-specific appraisals, but it may not be feasible for the FMV determination in Purchase at Probate cases to be based on site-specific appraisals; while appraisal information may be waived (in writing) for conveyances to family members and most gifts involving interests < 5%, all other trust-to-trust transactions will need a USPAP-compliant FMV determination (and not just an amorphous “estimate of value,” as suggested in Section 217(a)).
- Under AIPRA, “Land” was originally defined to expressly include permanent improvements, but the definition was amended in 2008 to simply mean “real property,” with the apparent intent (as reflected in 2011 rulemaking) being to clarify that the ownership and value of permanent improvements would generally not be considered in the probate context; the new definition should not be seen as limiting the appraisal of permanently-improved property - to require just the value of the unimproved land - in the conveyancing context, however.

Miscellaneous – Disclosure of Ownership Information

- To facilitate consolidation, under Section 217(e) of ILCA 2000, the names, addresses, and interests of landowners (but no other personal information) must now be disclosed upon proper request by an Eligible Requester, with the owners' consent no longer being required; Section 207(k) of AIPRA (as re-numbered by technical amendment) also requires that any trust owner be provided with location information and his/her co-owners' names and interests, upon written request.
- Each request under Section 217(e) must be in writing, come from an Eligible Requester, and pertain to one or more specific tracts, with Eligible Requesters defined as: (1) members of the tribe on whose reservation the land is located, individuals eligible for membership, owners of trust land on the same reservation, and any other prospective purchasers who meet the ILCA definition of "Indian"; (2) the tribe; or (3) prospective Indian or non-Indian users who demonstrate a legitimate purpose; under AIPRA, ownership information is now also releasable to non-Indian co-owners as well as Indian co-owners, and current users as well as new applicants.
- ILCA 2000 authorized the release of this ownership information, but not necessarily access to records containing ownership information; DOI is still planning to broaden the Privacy Act Notice of Routine Uses to allow the records themselves to be released under certain conditions.