

# **INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST**



Final Report  
Estate Planning Pilot Project:  
Consolidation Agreements at Probate  
for Individual Indian Trust landowners  
in an effort to Reduce Fractionated Land Ownership in Indian Country

*submitted to*  
the Department of Interior  
Bureau of Indian Affairs

March 18, 2010

## TABLE OF CONTENTS

I.	Introduction	Page 3
II.	Background of Proposal	Page 3
III.	Scope of Initial Proposal	Page 4
	A. Lifetime transfers	
	B. Consolidation agreements at probate	
	C. Will drafting	
IV.	Implementation of Pilot Project	Page 6
	A. Narrowing the scope	
	B. Referral process	
	1. Attending the initial probate hearing	
	2. Gathering information	
	3. Conducting mediation/landowner education	
	4. Methods for consolidation	
	5. Drafting consolidation agreement	
	6. Submitting executed consolidation agreement	
V.	Project Overview	Page 13
	A. Overall Project statistics	
	B. Project cost savings	
	C. Case study: estate with a will	
	D. Case study: estate without a will (intestacy)	
VI.	Consolidation Impediments	Page 25
	A. Partial distributions	
	B. Partitions	
	C. Minors and <i>non compos mentis</i> heirs	
	D. Lack of family trust provisions	
VII.	Project Implementation Goals in FY 2010 and beyond	Page 29

## **I. Introduction**

In June 2009 ITMA and Elk River Law Office (“the contractors”) prepared to implement the Bureau of Indian Affairs Estate Planning Pilot Project (“Project”) by receiving its first round of probate referrals from the Office of Hearings and Appeals (OHA). The goal of the Project was to implement the under-utilized statutory provisions in the American Indian Probate Reform Act of 2004, 25 U.S.C. § 2201, et. seq., to address fractionation in Indian Country. With the goal of reducing fractionated ownership of trust land, the contractors prepared to assist individual Indian landowners with developing consolidation agreements at probate, not knowing how heirs and devisees would receive the opportunity to actively participate in decisions affecting trust property in an estate.

While consolidation was the primary focus, it was also hoped that these agreements would meet the secondary goals of improving the Department of Interior’s (“Department”) management of the Indian Trust, and minimizing government resources allocated to fractionated land management. After eight months and 25 agreements, it is clear that consolidation agreements at probate play an important role in addressing the daunting and ever-growing problem of fractionated ownership of Indian trust lands.

## **II. Background of Proposal**

In October 2008, the contractors presented its proposal to the Department of Interior to conduct an Estate Planning Pilot Project. The proposal declared that the burden of managing the fractionated interests in Indian Country impairs the Department’s ability to effectively manage the total Indian trust and deliver critical services to Tribes. In support of this declaration, the contractors provided some key statistics regarding the number of fractionated interests in Indian Country and the cost of management:

- The federal government manages approximately 4.2 million interests in approximately 11 million acres of trust land with the expected growth rate of undivided interests between 7 and 8 percent annually.
- The average trust allotment has 17 owners with some allotments still having one owner and other allotments having a many as 1,800 owners.
- The Department’s cost for each trust land probate case is approximately \$7,800; with approximately 3,500 deaths of Indian landowners per year, the total cost for probates of Indian lands is approximately \$27 million per year.

The proposal also proffered that the ever-increasing number of fractionated interests is necessarily coupled with the Department's increased workload, increased cost to maintain and manage the interests, and increased records management responsibilities. As such, the contractors predicted that without efforts to reverse fractionation and prevent future fractionation, Congress would be forced to consider drastic measures that would likely prove harmful to Indian Country.

### **III. Scope of Initial Proposal**

The contractors proposed that some of the available statutory and regulatory mechanisms, including some of the under-utilized tools in AIPRA, be implemented as solutions for addressing fractionation. Thus, the original scope of the proposal included three mechanisms to address fractionation:

- Coordinate with the BIA to assist Indian landowners with lifetime consolidation plans by utilizing gift deeds and trust land exchanges;
- Coordinate with the OHA to assist Indian landowners with consolidation agreements at probate in accordance with the recently adopted AIPRA provisions; and
- Coordinate with the BIA to identify large acreage landowners that could benefit from a concentrated will drafting/estate planning effort.

**A. Lifetime transfers.** Existing law and regulations allow for Indian landowners to convey interests in trust land utilizing gift deeds to lineal descendants, siblings, co-owners and the Tribe with jurisdiction over the land, and to exchange interests in trust land for other trust interests of equal value. These provisions provide landowners mechanisms to trade interests for purposes of consolidating small interests to achieve larger interests in tracts of land and to reduce the number of owners per tract; thereby reversing fractionation. However, landowners have not often utilized the gift deed and exchange provisions for the purpose of addressing fractionation. Thus, the contractors proposed coordinating with the Bureau of Indian Affairs ("BIA") for referrals of families of landowners that would likely benefit from a consolidation plan utilizing gift deeds and exchanges.

The consolidation plans would attempt to create larger interests with fewer owners that would allow landowners greater benefits in the areas of land

management and revenue receipt, as well as reduce the BIA's management responsibilities. The process would involve assisting landowners with understanding their land inventories, mediating exchanges of land, preparing necessary gift and warranty deeds, filing deeds with the BIA and following up to insure title work is completed.

**B. Consolidation agreements at probate.** While AIPRA provides mechanisms to prevent very small interests in trust land from fractionating further (i.e., the intestacy rules for the descent of land where decedent's interest represents less than 5% of the total allotment), the larger interests (i.e., interest representing greater than or equal to 5%) still descend to heirs in undivided interests, resulting in fractionation. Further, while AIPRA's life estate and single heir rules may stall fractionation, the result may be inconsistent with how the decedent would have chosen to distribute the land, and may be unworkable or undesirable for the heirs inheriting the land.

Additionally, AIPRA's testamentary rules do nothing to address fractionation created by will devises. For example, many wills include devises of their trust lands to more than one heir 'in equal shares,' or 'to share and share alike.' While AIPRA prevents fractionation of the highly fractionated parcels via the single heir rule, will devises to heirs 'in equal shares' results in fractionation of the entire estate, including the interests where the decedent owned less than 5% of the entire allotment. Since fractionation can occur even when a decedent dies with a will, the proposal envisioned utilizing consolidation agreements at probate for both testate and intestate estates.

As an alternative to intestacy rules and wills that fractionate land, AIPRA provides heirs and devisees authority to enter into consolidation agreements in a pending probate proceeding. Consolidation agreements can include any interest in any tract of land in a decedent's land inventory, as well as land owned by heirs that are not a part of the decedent's estate. 25 U.S.C. § 2206 (j)(9)(e).

In summary, heirs can accomplish the following through consolidation agreements at probate (without requiring compliance with the Secretary of Interior's rules and regulations):

- consolidate the greater than 5% tracts (which AIPRA fractionates by operation of law where there is more than one legal heir);
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- avoid further fractionation of the less than 5% tracts pursuant to wills that devise ‘all trust property’ to more than one heir ‘in equal shares,’ or to more than one heir ‘to share and share alike’;
- avoid the sometimes undesirable effects of the single heir rule by designating an heir, other than the oldest surviving child, to inherit those interests;
- avoid the sometimes undesirable effects of the life estate rule by vesting a spouse; and
- provide heirs an opportunity to own greater shares in land they owned prior to probate by gifting and exchanging those interests in the consolidation agreement.

**C. Will Drafting.** AIPRA’s intestacy rules only stall fractionation until an heir passes without a will. As such, the project also included a proposal to implement a concentrated will drafting effort in order to facilitate longer term solutions to fractionation. Moreover, since the BIA instituted a policy against will drafting in April 2005, the contractors believed that providing estate planning services to Indian landowners would be a critical component in meeting the project’s goal of providing long term solutions to fractionation.

In addition to determining which mechanisms could be utilized to provide estate planning services to Indian landowners, the contractors also proposed that the project be piloted in the Rocky Mountain and Great Plains Region. These regions appeared most appropriate, as the majority of fractioned interests in Indian Country are located in the Rocky Mountain and Great Plains Regions, with a significant number of individual landowners in these Regions owning large interests/acreage.

#### **IV. Implementation of Pilot Project**

***A. Narrowing the Scope.*** As indicated above, the initial scope of the project included three mechanisms to address fractionation. In June 2009, the project commenced with the contractors receiving its first round of referrals from OHA to assist heirs from the Blackfeet Reservation with consolidation agreements at probate. In reviewing the nine probate files that were referred to the contractors, it was uncertain whether these families would view consolidation as attractive or even viable, given the varied dynamics in each case. Therefore, it was equally

uncertain what percentage of project funds would be appropriated for consolidation agreements at probate.

For example, it was uncertain whether families would view inheriting larger interests in a considerably smaller number of allotments beneficial, especially in cases where there were a large number of heirs, but a small number of tracts. It was also uncertain what effect a surviving spouse would have on a family's effort to consolidate; and additionally, whether families, comprised of heirs from multiple generations, would be successful in agreeing to a consolidation plan. Much to the contractors' surprise, six of the nine Blackfeet families were successful in consolidating the trust land interests in the decedents' estates.<sup>1</sup> Due to the overwhelming willingness of families to attempt consolidation, it became clear to the contractors that the funds appropriated for the project could easily be utilized solely on assisting families with consolidation agreements at probate. Accordingly, the initial scope of the project changed to focusing solely on consolidation agreements at probate.

***B. Referral Process for Consolidation Agreements at Probate.*** A fully executed consolidation agreement is the result of coordination between the contractors and OHA, and between the contractors and the BIA Agencies, and occasionally the Office of Special Trustee. The role of the contracted attorney began at the initial probate hearing and ended with a final consolidation agreement<sup>2</sup>. As the project was being implemented, the contractor was typically charged with 5 major tasks, as listed below. However, in performing all of these tasks, the contractor clarified that he or she did not represent one or more of the heirs, and no attorney-client relationship was formed. Rather, the contractor acted as a neutral third-party, with the primary tasks of information gathering and facilitating negotiations with the purpose of entering into a consolidation agreement. Additionally, the contractor made clear that a consolidation agreement was completely voluntary and if an agreement was not reached, the case would be referred back to OHA for a decision under AIPRA or a valid will. Reaching a consolidation agreement consisted of the following steps:

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<sup>1</sup> Three families consolidated land in the estate utilizing consolidation agreements and three families consolidated land utilizing directional disclaimers pursuant to 25 U.S.C. § 2206(j)(8) (i.e. family members gifted their interests in the estate in favor of one heir).

<sup>2</sup> However, see Section V—Goals for Project Implementation in Fiscal Year 2010—the goal for continuing the project in FY 2010 involves the contractor's participation as soon as practicable after a decedent's death, which could be months before OHA initiates a probate.

**1) Attending the initial probate hearing.** The contractor attended the initial probate hearing to meet with families interested in attempting to consolidate the decedent's interests in trust land. During the initial probate hearing, the contractor briefly explained the advantages of consolidation. The Attorney Decision Maker (i.e. the Judge) also explained that participating in mediation was voluntary, and if a consolidation agreement was not reached, a decision would be entered in the case, which would distribute the land based on either a valid will, or AIPRA's intestacy rules.

**2) Gathering information.** If families expressed interest in attempting to enter into a consolidation agreement, the Judge issued an *Order for Referral to Contracted Attorney for Consolidation Agreement*.

After receiving the probate file from OHA, the contractors coordinated with Land Title Records Office (LTRO) and BIA Agencies to collect detailed information about the decedent's trust lands which assisted families in making decisions at mediation. The information requested included but was not limited to the Individual Trust Inventory (ITI), Title Status Report, Owner Document Report, Landowner Income Report, Historical Query and detailed maps. Since Agency assistance proved critical in assisting families with consolidation, the contractors attempted to maintain regular contact with Agency Superintendents to ensure document requests were being processed in the most efficient way possible.

**3) Conducting mediation/landowner education.** After receiving all of the pertinent documents, the contractors summarized key details regarding the decedent's land interests into one easy-to-read chart. A mediation was then scheduled, typically at the BIA Agency where the trust land was located. In the event an heir resided out of state, or could not attend the mediation in person, the contractors provided a conference call which allowed those individuals to fully participate in negotiations.

Each mediation began with an emphasis on landowner education. Heirs were provided with two brochures and an explanatory letter describing how an estate would be distributed under AIPRA, and summarizing key land management tools. For the majority of families, the mediation was the first opportunity individuals had been provided to learn how to read a land inventory, to identify the location of their land on a map, and to understand the implication of their potential land interests. Therefore, the pilot project had the added benefit of encouraging and empowering heirs to be active landowners.

Next, the contractor reviewed with the heirs land documents in the decedent's probate file, and those documents requested by the contractors. For example, the attorney educated heirs on how to read an Individual Trust Inventory report; explained legal concepts, such as 'fractionation,' 'trust property,' 'trust personalty,' 'life estate without regard to waste,' and 'undivided interest;' explained the legal rights attached to a mineral interest versus a surface interest; and explained the distinction between an oil and gas rental versus an oil and gas royalty.

After the initial review of documents, contractor next described how the decedent's estate would be distributed absent a consolidation agreement; either pursuant to AIPRA's intestacy laws, or pursuant to a valid will. The attorney then explained how AIPRA or the will would fractionate the decedent's interests, dividing the decedent's land into smaller and smaller interests. The contractor also discussed how more co-owners would affect the usability and value of the land.

After the heirs demonstrated an understanding of fractionation, the contractor provided families with information about consolidation and how such a tool could maximize the benefits of the land interests each heir stood to inherit. The majority of heirs appreciated the opportunity to study and learn about the trust land in the decedent's estate, tools which could then be applied to decisions affecting their own land interests.

**4) *Methods for consolidation.*** After the heirs reviewed the pertinent land documents, the mediator assisted the heirs in consolidating the decedent's land interests. The most common method families used to consolidate the decedent's trust interests was to designate one heir or devisee to receive the decedent's entire interest in a single tract (rather than fractionating the decedent's interest based on the will devise or AIPRA's intestacy rules).

Partitioning has also been utilized by several families as a way to preserve a decedent's 1/1 interest (i.e. a tract in which the decedent owned a 100% interest) in a parcel. Partitioning allows all of the heirs or devisees to receive a 100% interest in a specific section of the tract, without fractionating the decedent's interest. As a result, each heir owns a defined part of the allotment, rather than having an undivided interest in the whole.

In one case, consolidation was also accomplished by including an heir's pre-existing land interests (outside of the decedent's estate) in the agreement. In that case, the decedent's estate contained land on the Northern Cheyenne Reservation and the Cheyenne Arapahoe Reservation. All of the heirs to the estate were the decedent's half siblings; two of the heirs resided on the Northern Cheyenne Reservation and two resided in Oklahoma. As a result of decedent's father's remarriages, one of the Oklahoma siblings had inherited interests on the Northern Cheyenne Reservation, despite the fact that the allotment's original allottee was not the heir's ancestor (but rather an ancestor of the heir's step-parent). However, the Oklahoma interests in the estate did originate from this particular heir's ancestors. As a solution, the heir gifted her pre-existing interests in the Northern Cheyenne Reservation back to the heirs who resided on the Northern Cheyenne Reservation and from whose side of the family the interests originated. In return, the Northern Cheyenne heirs agreed to gift several of their interests in the Oklahoma tracts to the siblings who resided in Oklahoma and from whose side of the family the interests originated.

As a result of negotiations, the heirs were able to gain interests in allotments that originated with his or her ancestor, rather than gaining interests in a tract where the original allottee was an ancestor of the heir's step-parent. These types of negotiations illustrate how a consolidation agreement can address a variety of factors, such as remarriages, which AIPRA does not account for.

As families deliberated about how to consolidate, they typically developed their own criteria, which included the following:

- whether the heir owned an undivided interest in any of the tracts in the decedent's estate;
- whether an heir's undivided interest was located near any of the tracts in the decedent's estate;
- amount of revenue generated on each tract;
- amount of acreage;
- amount of undivided interest decedent owned;
- the type of resources attached to the interests (i.e. mineral, surface or both);
- birth order of the heirs;
- relationship of the heir to the decedent (i.e. child or grandchild);
- an heir's relationship to the original allottee;

- economic status of an heir, including whether he or she owned very little or a significant amount of trust property (that was not part of the decedent's estate);
- whether an heir had children to whom the decedent's interest could later be gifted through a gift deed or will;
- an heir's connection to the land and/or involvement in the reservation community;
- competency of an heir to manage the land and income derived from the land; and
- the heir's ability to maintain current use of the land (e.g. maintaining family ranching operations).

**5) Drafting consolidation agreement.** If a consolidation agreement was reached, the mediating attorney drafted an agreement which included a statement of whether the decedent died with or without a will. If the decedent died without a will, the agreement included a description of how the decedent's trust property would be distributed absent the consolidation agreement, including distribution of trust personalty (i.e. IIM funds). If the decedent died with a valid will, the agreement referenced the date on which the will was executed. The agreement then listed the tract ID numbers, the type of resource attached, and the heir designated to receive that interest.

In addition, if the heirs agreed to a distribution of the IIM account, the agreement provided the percentage of IIM funds each heir would receive, and additionally, whether the account was to be distributed as of the date of the final decision, or as of the date of the decedent's death. Under AIPRA's intestacy rules, the funds in an IIM account are divided among the heirs as of the date of the decedent's death.<sup>3</sup> Any income accumulated after the date of death follows the land. For example, if three heirs are each entitled to a 1/3 share of the greater than 5% tracts in an estate, they will each take 1/3 of the balance in the IIM account as of the date of death, in addition to 1/3 of the income derived on those tracts following the decedent's date of death. The result is that the heirs receive an equal percentage of the IIM account.

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<sup>3</sup> Section 2206(a)(2)(A)(i) of AIPRA provides that a surviving spouse shall receive 1/3 of the trust personalty and the remaining 2/3 is split equally among the decedent's surviving heirs (i.e. children, grandchildren, great grandchildren, parents, or siblings).

However, that same distribution scheme applied to a consolidation agreement would result in disparate shares of the IIM account. Accordingly, a consolidation agreement allows heirs to split the funds that accumulated in a decedent's IIM account between the date of death and the close of the estate. For example, if all of the land in an estate generated exactly the same yearly income, then a consolidation agreement which splits the IIM account in accordance with AIPRA (i.e. as of the date of death) would be of no concern. However, that scenario was never seen. Instead, consolidation agreements typically designated some heirs to receive tracts that generated a significant yearly income, while other heirs received interests that produced less income. In those cases, the distinction between distributing the IIM account as of the date of death versus as of the date of final decision often became an important negotiating tool. As a result, families were able to craft agreements they believed demonstrated a fair distribution of the IIM account, rather than being limited to the distribution under AIPRA. Again, unlike a decision under AIPRA's intestacy rules, a consolidation agreement allows individuals to consider additional factors federal law does not take into account in arriving at what the family believes is a fair distribution of the decedent's estate.

Next, the contractor mailed the consolidation agreement to the heirs, instructing them to review the agreement, and provide their notarized signature. The heirs were encouraged to call the contractor if they had any questions or concerns regarding the settlement agreement.

**6) *Submitting executed consolidation agreement.*** Upon execution of the settlement agreement, the document was filed with the Office of Hearings and Appeals, after which time the Judge determined whether to approve the agreement based on the factors provided in the regulations. The Judge would approve the agreement as long as a consolidation agreement as long as: 1) all parties have been provided all material facts; 2) all parties understand the effect of the agreement; and 3) it is in the best interest of the parties to settle. Upon approval, the consolidation agreement is incorporated into the final probate decision. 43 C.F.R. § 30.150. Like a decision decided under AIPRA or a valid will, the parties to a consolidation agreement are provided a thirty day period in which to file for a rehearing if they dispute the agreement. 43 C.F.R. § 30.237.

## **V. Project Overview**

As stated above, one of the goals of the pilot project was to utilize estate planning tools provided in AIPRA to prevent lands from becoming further fractionated. Prevention of fractionation would in turn reduce the significant amount of funds expended to manage fractionated lands and allow the expenditure of such funds on critical programs and services in Indian Country. Based on project statistics, the conclusion is clear: consolidation agreements at probate have had a tremendous impact on preventing fractionation in the Rocky Mountain Region, and providing a significant cost savings to the government.

**A. Project Statistics.** From June to February 2009, the Office of Hearings and Appeals referred 35 estates to Elk River Law Office. Out of the 35 families referred, 32 families participated in mediation.<sup>4</sup> Out of the 32 mediations held, 25 families were successful in executing consolidation agreements.<sup>5</sup> As of February 2010, OHA issued 8 final decisions approving consolidation agreements and directional disclaimers, and 8 consolidation agreements were pending approval and final decision.<sup>6</sup>

Perhaps the most significant outcome of the 25 consolidation agreements was the incredible number of undivided interests that have been avoided as a result of consolidation.

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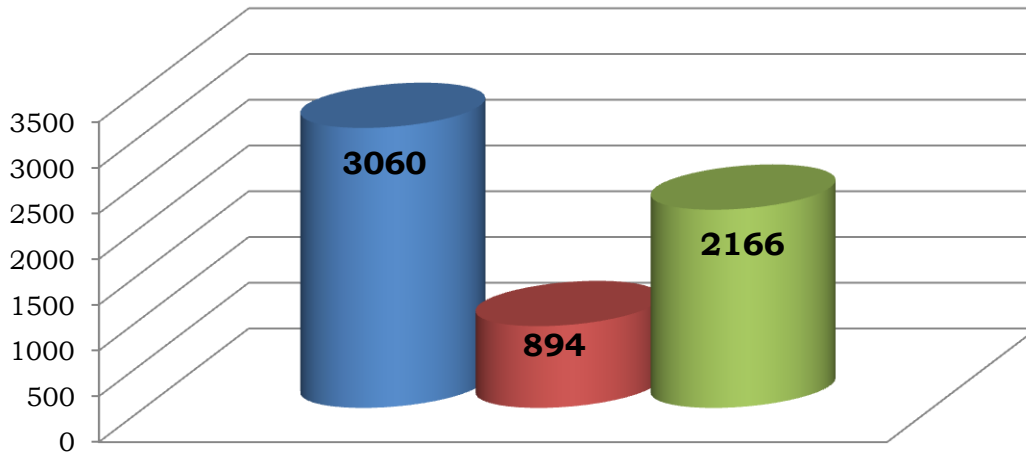
<sup>4</sup> Four out of the 35 cases referred were sent back to OHA for decision. In these cases, for various reasons, some families decided that consolidation was not viable, while other families determined they did not want to participate in consolidation efforts.

<sup>5</sup> Reference to '25 consolidation agreements' includes both the 22 consolidation agreements and the 3 directional disclaimer agreements.

<sup>6</sup> For a variety of reasons, 10 of the 25 consolidation agreements that were reached have not been submitted to OHA. Some families have asked the Tribe to participate in the consolidation agreement, and are awaiting a response; other families are attempting to locate heirs for signatures; and 4 families have opted to partition 1/1 tracts and are waiting for surveys to be completed. As of March 2010, OHA issued 9 final decisions approving consolidation agreements and directional disclaimers, while 8 consolidation agreements were pending approval and final decision.

## Estate Planning Pilot Project

- Undivided interests that would have been created under AIPRA or will
- Undivided interests created through project efforts
- Undivided interests avoided through project efforts

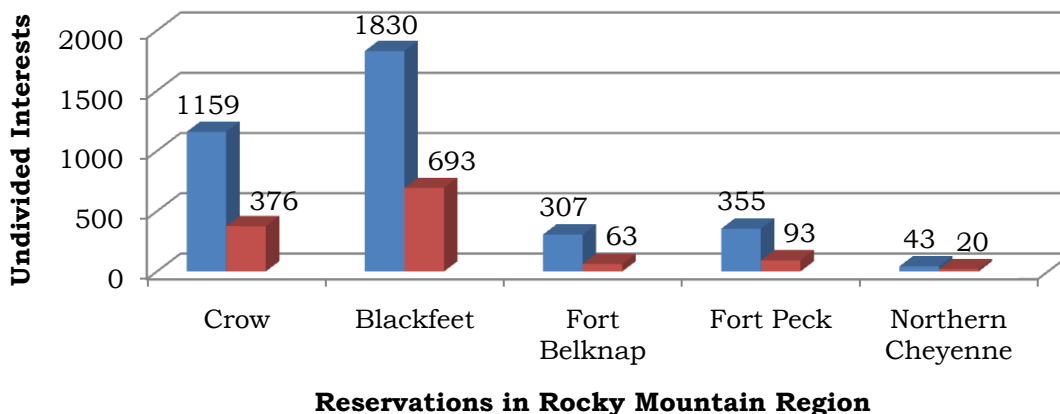


As shown above, a review of project efforts as of February 2010 reveals that 3,060 undivided interests would have been created in 25 estates, including interests created under AIPRA's intestacy rules and interests created as a result of an estate's will devises. However, as a result of project efforts, only 894 new undivided interests were created. This means that a total of 2,166 new undivided interests were *avoided* as a result of 25 consolidation agreements.

The chart below illustrates the breakdown, by reservation in the Rocky Mountain Region, of undivided interests that would have been created absent consolidation, and the much smaller number of interests created as a result of consolidation. For example, on the Blackfeet Reservation, 10 consolidation agreements were reached. Absent consolidation efforts, 1,830 new undivided interests would have been created under AIPRA or a will, compared to the 693 undivided interests that were created with consolidation efforts.

## Estate Planning Pilot Project

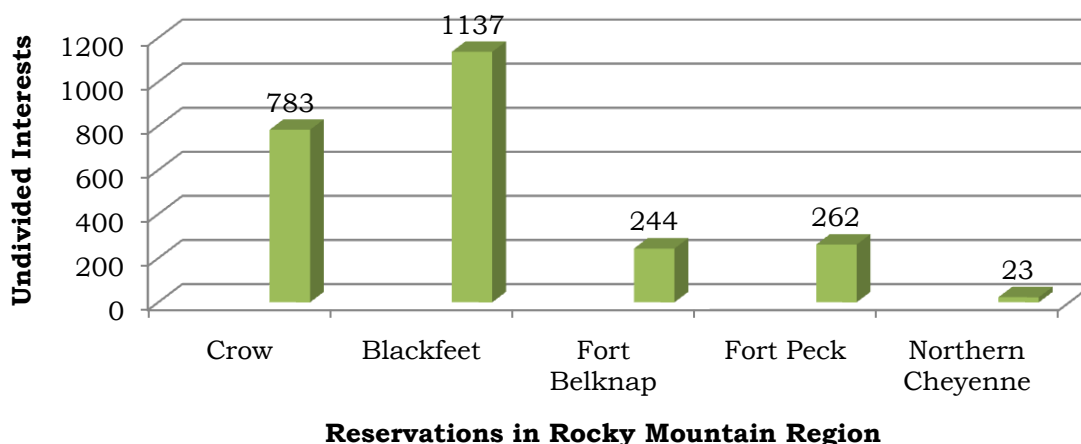
- Undivided interests that would have been created under AIPRA or will
- Undivided interests created through project efforts



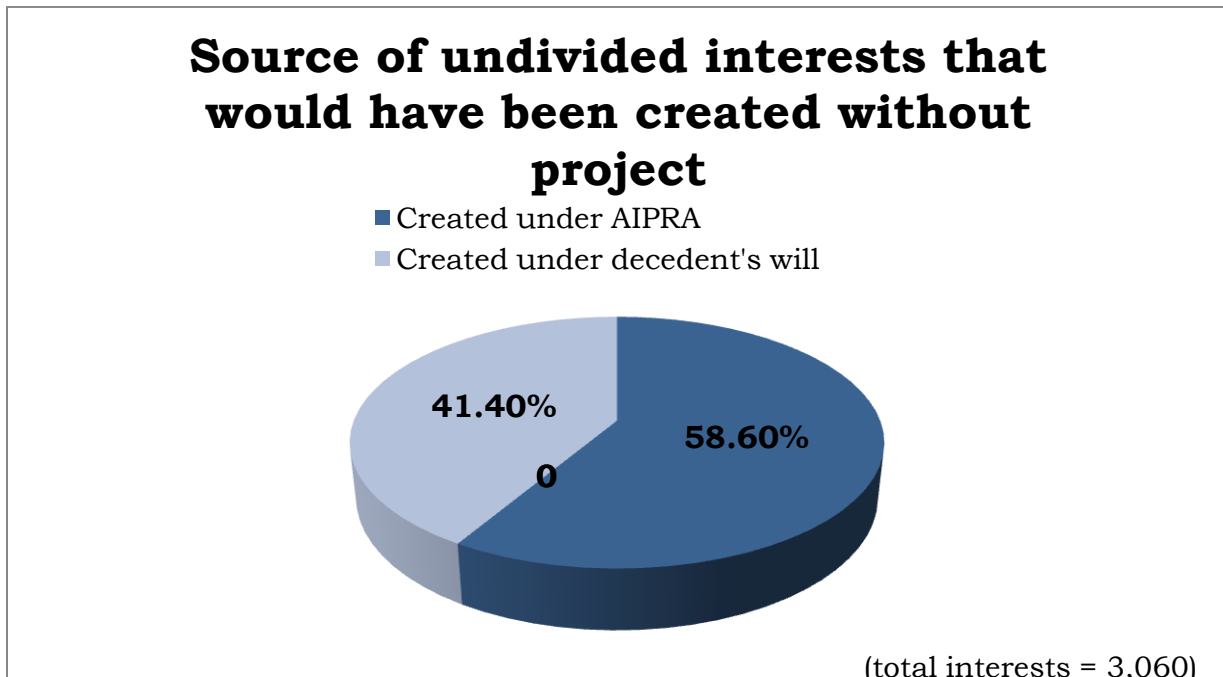
Additionally, the chart below represents the number of undivided interests avoided through project efforts, broken down by Reservation. Continuing with statistics from the Blackfeet Reservation, the chart indicates that 1,137 new undivided interests were avoided as a result of consolidation efforts.

## Estate Planning Pilot Project

- Undivided interests avoided through project efforts



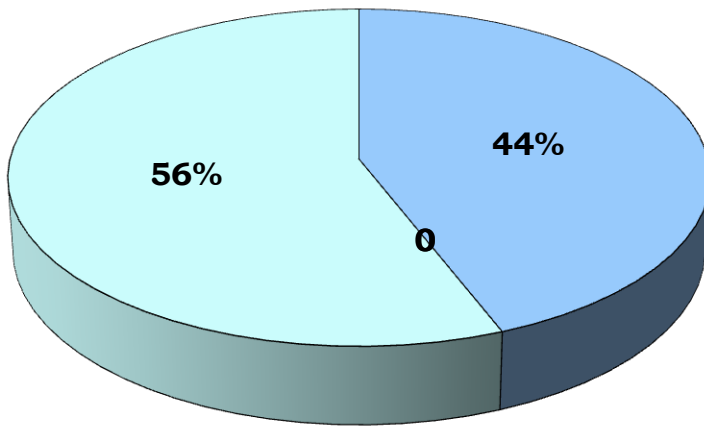
Additionally, as shown below, of the 3,060 undivided interests that would have been created absent consolidation, 58.6% of these interests would have been created as a result of AIPRA's intestacy rules, while 41.4% would have been created from wills. Thus, it appears that the undivided interests avoided would have been created almost equally from both intestate (no will) and testate (will) cases. However, this was clearly not the case, given the very small number of testate cases, compared to the much larger number of intestate cases. In fact, only 7 of the 25 cases that resulted in consolidation involved wills; yet this small number of cases represents close to half of the total number of interests avoided through project efforts. This disproportion illustrates the tremendous impact consolidation can have on preventing fractionation when used in testate estates. As the case study below illustrates, the impact of consolidation becomes even more evident when utilized in cases where the testator's will devises all trust property to several heirs 'in equal shares,' or to several heirs as 'tenants in common.'



As indicated above, AIPRA's intestacy rules, providing the descent of highly fractionated parcels to a single heir, stalls fractionation. However, as illustrated in the chart below, 56% of the interests in the 25 estates represented greater than or equal to 5%. Thus, in spite of the single heir rule, there remains a large number of interests that would be fractionated absent consolidation efforts.

## Undivided interests that would have been created without project efforts

- Interests less than 5%
- Interests greater than or equal to 5%

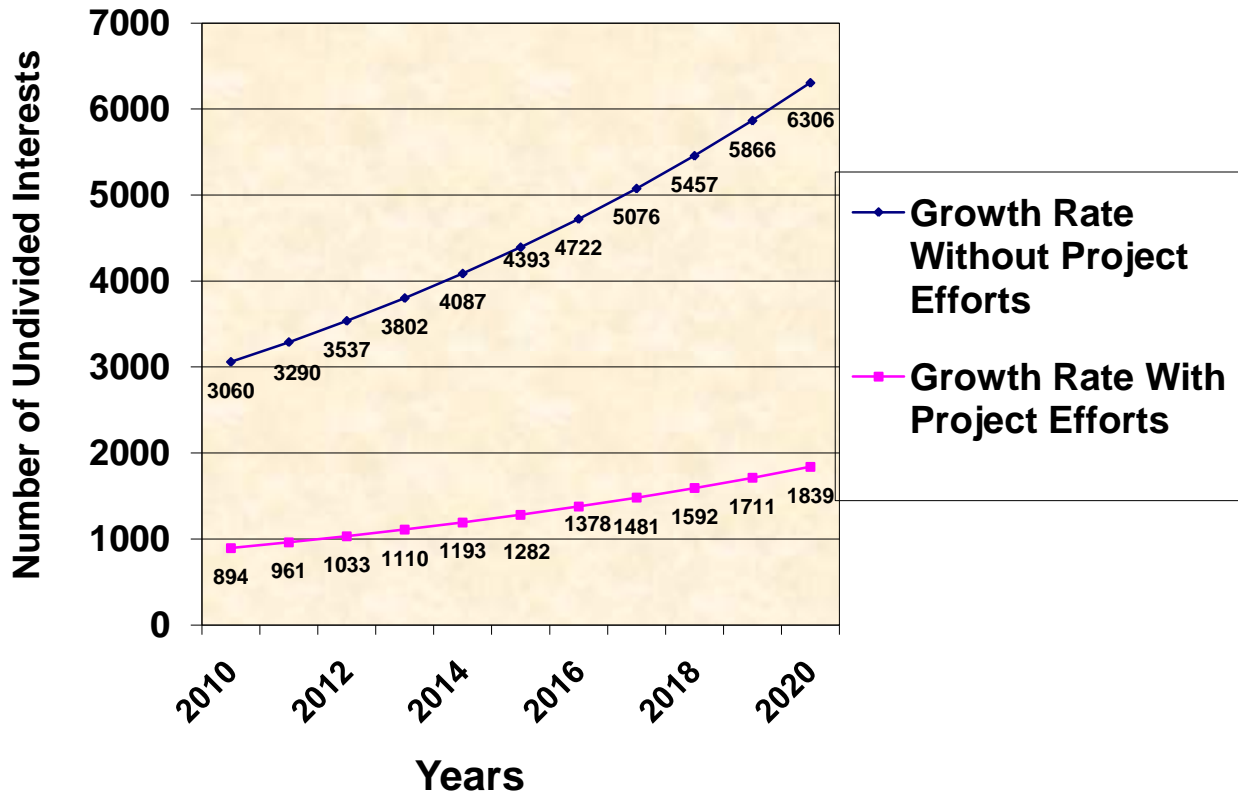


(total interests =

Finally, as of October 2008, fractionated interests were expected to grow by 7% to 8% annually. The chart below compares the effect of a 7.5% growth rate over the next decade to two scenarios. The blue line demonstrates the rapid growth of the 3,064 undivided interests that would have been created absent project efforts. The pink line begins in the year 2010 with the actual number of undivided interests that were created as a result of consolidation efforts, and applies a 7.5% growth rate over the next ten years. As illustrated below, the 3,060 undivided interests that would have been created absent consolidation could be expected to increase to 6,306 interests by the year 2020. On the other hand, consolidation efforts in 2009 and 2010 could be expected to prevent the creation of 4,467 new interests over the next ten years.<sup>7</sup>

<sup>7</sup> (6,306 undivided interests expected in 2020 absent project efforts) minus (1,839 undivided interests expected in 2020 with consolidation efforts) = 4,467 new interests prevented over the next ten years.

## Comparison of Growth Rate of Undivided Interests over the Next 10 Years



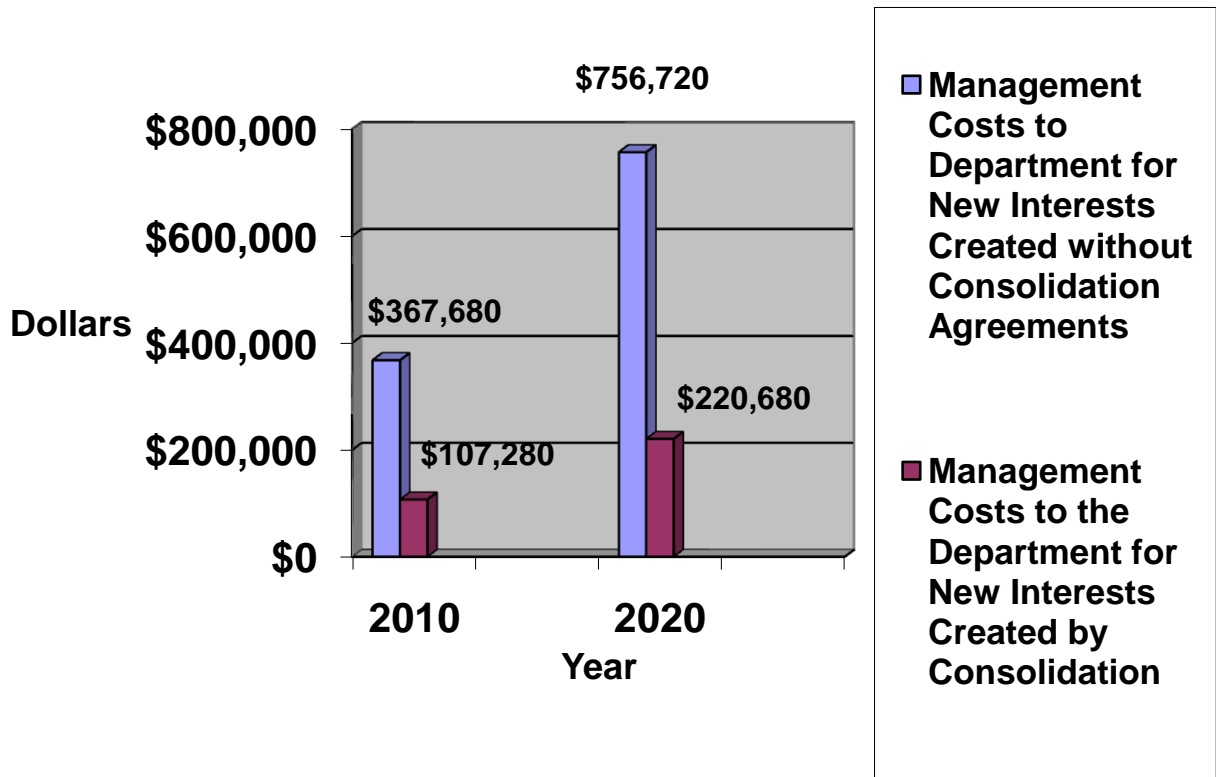
### *B. Project Cost Savings*

In their proposal, the contractors predicted that consolidation agreements at probate would prevent future fractionation, and provide a cost savings to the federal government. As illustrated through the project statistics presented above, the first goal was clearly realized. Further calculations also demonstrate that consolidation agreements have a significant cost savings to the Department both in terms of costs to manage interests and costs to probate estates.

**1. Management Cost Savings.** The Department has recognized a direct link between fractionation and the cost of managing and maintaining trust land. The Department expends a significant amount of administrative costs associated with accounting for monies from multiple interests, increased records management responsibilities, and the need to obtain and manage ownership information. In fact,

it has been estimated that the Department spends approximately \$120 per undivided interest in management costs. Applying that figure to project statistics, the chart below indicates the Department's cost to manage the 3,060 interests that would have been created without project efforts compared with the Department's cost to manage the 894 interests created as a result of consolidation efforts. The chart demonstrates that 25 consolidation agreements alone provided a cost savings to the Department of \$260,400.<sup>8</sup> Additionally, the Department's cost savings in 2010 (as a result of 25 consolidation agreements) would more than double by 2020, taking into account a 7.5% growth rate over ten years.

### Projected Cost of Managing Newly Created Trust Land Interests



<sup>8</sup> (3064 interests created without project efforts \*\$120/interest) minus (894 interests created under project \*\$120/interest) = cost savings of \$260,400.

**2. Probate Cost Savings.** The administrative costs incurred by the Department to probate an estate could be significantly reduced by utilizing consolidation agreements.<sup>9</sup> As of October 2007, it was reported that the Department spends an average of \$7,800 to probate one case. By contrast, the contractors expended approximately \$1,500 to \$4,000 per estate to facilitate a consolidation agreement.<sup>10</sup> As such, the Project provided the Department a cost savings of \$3,800 to \$6,300 per case.

Every estate included initial contact with the family via written correspondence, gathering land title documents from the respective Agency or Agencies, conducting a mediation with the family, drafting the resulting consolidation agreement, follow-up work with the families after mediation, and travel time and expenses. Completing a case cost significantly less when the mediation was conducted by telephone in cases where the heirs lived out of state, when the family lived on a reservation in close proximity to the contractor's office, or when the family elected to meet in the contractor's office.

Conversely, the cost of completing a case rose proportionately in accordance with the distance the contractor traveled to conduct a mediation, and the amount of follow-up work each case required. For example, if an heir did not participate in the mediation, however did not oppose consolidation, the contractor drafted a letter to that heir explaining the outcome of the mediation, how the estate would be distributed under federal law absent a consolidation agreement, and how his or her interests would be affected by the consolidation agreement. Additionally, the cost increased in cases that required the mediator to conduct a second mediation. For instance, heirs that had previously agreed to a consolidation agreement contacted the contractor after the mediation with proposed amendments to the agreement. While renegotiation of the consolidation agreement may be accomplished by telephone or written correspondence, the contractor found a second mediation was often necessary to ensure the heirs reached a mutually acceptable agreement. Further examples of cost additive issues included, but were not limited to, coordination with an heir's legal guardian and/or conservator and the family's desire to partition an allotment.

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<sup>9</sup> Additionally, consolidation agreements also provide the Office of Hearings and Appeals significant cost savings, as no further proceedings are required once an estate is transferred to the contractor and a consolidation agreement is executed.

<sup>10</sup> In the few cases where the family elected to partition an allotment, the costs are expected to exceed this amount.

As noted above, there are 3,500 deaths of Indian landowners per year. Multiplying the number of deaths by the Department's cost per probate reveals the annual costs to the Department of \$27.3 million. By contrast, even if only 100 out of the 3,500 probate cases per year utilized consolidation agreements, the Department would only incur \$26.5 million to \$26.9 million per year providing assistance to families to enter into consolidation agreements at probate. This would provide the Department a cost savings of \$380,000<sup>11</sup> to \$780,000<sup>12</sup> per year.

C. Case Study: Estate with a will. The estate of John Doe illustrates the important role that consolidation plays in preventing fractionation in cases where the decedent died with a will. John Doe died in May 2008. In August 2009, an initial probate hearing was held, at which time the estate was referred to the contractors to assist the family with consolidation efforts.

Before John's death, he executed a Last Will and Testament leaving all of his trust property to his 3 children and 12 grandchildren. At the time of his death, John owned 58 interests in trust property. Specifically, John devised all of his trust property to his 12 grandchildren 'as tenants in common' subject to a life estate in his 3 children. Therefore, if the estate was distributed pursuant to the will, John's three children would each receive an equal 1/3 life estate to all of the 58 tracts, with the 12 grandchildren would each receive an equal one-twelfth (1/12) remainder interest. However, upon reviewing John's interest in the estate, it was quickly apparent that distribution under the will would be extremely detrimental to John's land interests. Specifically, distribution under the will would fractionate each interest into 12 smaller interests, resulting in 696 new undivided interests, with each of those interests (with the exception of one 1/1 tract) representing less than 1%.

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<sup>11</sup> Potential cost savings of \$380,000 was calculated as follows: (3,500 deaths \* \$7,800 per probate = annual cost to Department of \$27,300,000) minus (100 deaths \* \$4,000 per consolidation agreement + 3,400 deaths \* \$7,800 per probate = annual cost to Department of \$26.9 million); \$27,300,000 minus \$26,920,000 = potential cost savings of \$380,000.

<sup>12</sup> Potential cost savings of \$780,000 was calculated as follows: (3,500 deaths \* \$7,800 per probate = annual cost to Department of \$27,300,000) minus (100 deaths \* \$1,500 per consolidation agreement + 3,400 death \* \$7,800 per probate = annual cost to Department of \$26.5 million); \$27,300,000 minus \$26,520,000 = potential cost savings of \$780,000.

For example, of the 58 tracts in the estate, only 17 of the tracts represented greater than or equal to a 5% undivided interest. Additionally, of the 17 greater than 5% tracts, with the exception of one 1/1 tract, all of the interests in the estate were 8.34% or less. Thus, under the will, each of the decedent's 8.34% interests would be fractionated into 12 smaller interests, with the end result placing all of the land in the estate into the less than 5% category under AIPRA. Accordingly, since John owned 11 interests representing 8.34%, the will would have created an additional 132 interests, with each interests representing only .0695%.<sup>13</sup>

Given the devastating effect that fractionation would have on each heir's interest, John's family quickly determined that the land should be consolidated, rather than distributed under the will, resulting in further fractionation of the land. In devising a method for consolidation, the family utilized the contractor's chart, which organized the tracts by the type of resource, the amount of John's interest, the yearly income generated from leases, the total acres in each tract and if available, the estimated value of the land.

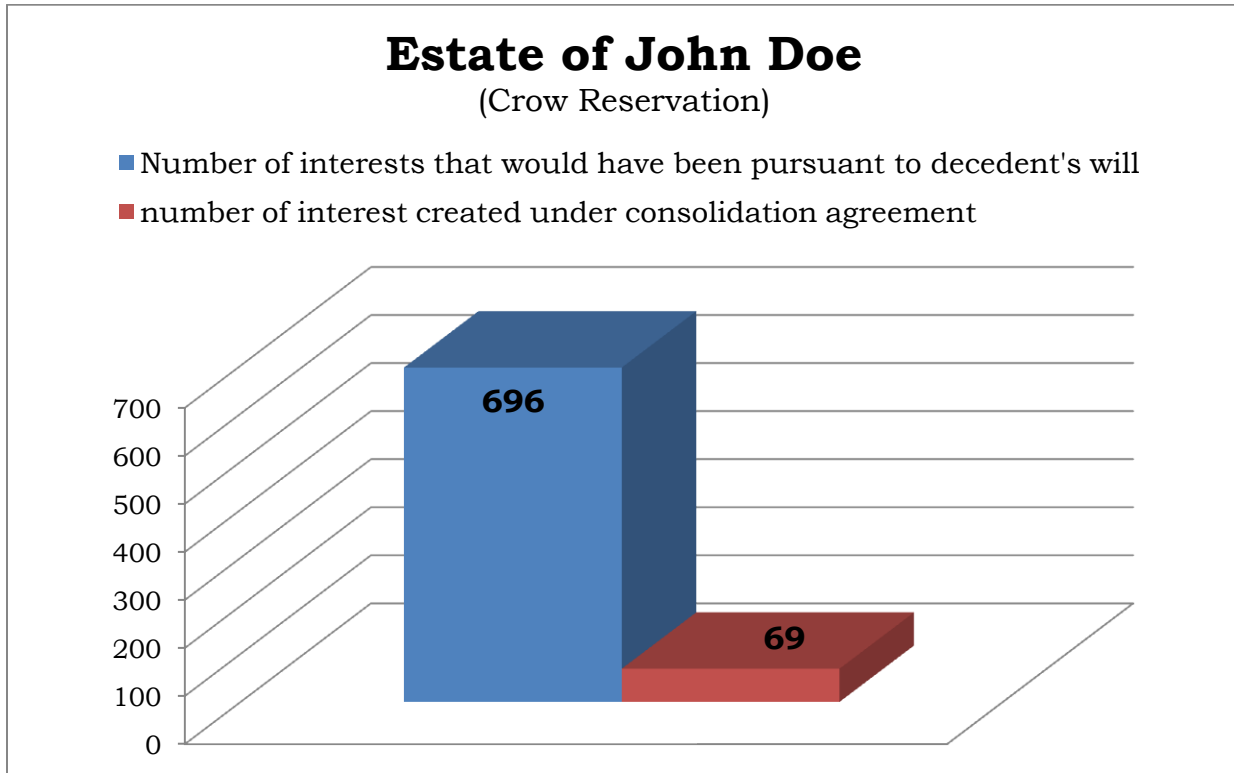
After reviewing the chart, and maps indicating the location of John's interests, the devisees first distributed the 17 greater than 5% tracts, then the remaining less than 5% tracts, based on the following method: John's three children—Ann, Frank, and Robert—put each of their names in a hat to determine who would pick first. Ann's name was drawn out from the hat first, so the family agreed she would have first pick to distribute one of the 17 tracts to one of her children. Frank's name was drawn from the hat second, so Frank then chose one of remaining 16 tracts to distribute to one of his children. Finally, Robert distributed one of the 15 remaining tracts to one of his children. After the first round, in which 3 of the 17 tracts were distributed, the names were replaced in the hat to determine the order in which the next 3 tracts were distributed. By utilizing an agreed upon method to distribute the land, the family was successful in consolidating each of the 58 tracts in the estate (agreeing to partition the 1/1 tract) with considerable ease and no conflict.

As the chart indicates below, consolidation becomes a very important tool in cases where the decedent died with a will. In the estate of John Doe, whereas only the 17 greater than 5% tracts would have been fractionated if John had died

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<sup>13</sup> 11 interests multiplied by 12 (number of grandchildren listed in the will) = 132 new undivided interests. 8.34% divided by 12 = 0.695%; thus, 132 new undivided interests, with each representing less than 1%.

without a will<sup>14</sup>, all of the 58 tracts in the estate would have been fractionated pursuant to the will.<sup>15</sup> Clearly, consolidation is useful in testate estates, much like AIPRA's single heir rule in intestate estates.



D. Case Study: Estate without a will. The *Estate of Jane Doe* illustrates the important role that consolidation plays in preventing fractionation of lands where the decedent died without a will (intestate), owning greater than or equal to 5% undivided interests. Jane Doe died in December 2007. In September 2009, an initial probate hearing was held, at which time the estate was referred to the contractors to assist the family with consolidation efforts.

Jane did not execute a last will and testament before her death. At the time of her death, Jane owned 28 interests in trust property, 11 interests representing greater than or equal to 5% and 17 interests representing less than 5% . Jane had 8 legal heirs, all of whom were her children.

<sup>14</sup> If John had died without a will, AIPRA's intestacy rules would have fractionated the 17 greater than 5% tracts into 3 equal shares (with each child receiving a 1/3 interest); however, under AIPRA's single heir rule, John's less than 5% tracts would have been distributed to John's oldest surviving child, Ann.

<sup>15</sup> John's will, like all of the wills the contractors reviewed in the project, devised 'all trust property.' In other words, unlike AIPRA, John's will, drafted before the enactment of AIPRA, did not draw a distinction between the greater than or equal to 5% tracts, and the less than 5% tracts.

Since Jane died without a will, her trust property would be distributed pursuant to AIPRA's intestacy rules. Therefore, all of the 17 less than 5% tracts would distributed to Jane's oldest surviving child, Sarah. The 11 interests in which Jane owned greater than or equal to 5% undivided interests would be divided equally among her 8 surviving children.

In this case, Jane owned five 1/1 tracts (i.e. her interest was 100%). Although the family acknowledged the benefit of consolidation, at the same time, the family wanted to ensure that each of the heirs had equal access to the land. Specifically, the family used many of the 1/1 tracts for ceremonial purposes, and also hoped to start a family business utilizing the 1/1 tracts as a visiting center for tourists. Since AIPRA does not allow the family to put all of these tracts into a family trust, the family decided that each of the 1/1 tracts would be distributed into several undivided interests; however, the number of undivided interests would be less than the number created under AIPRA, thereby preventing fractionation.

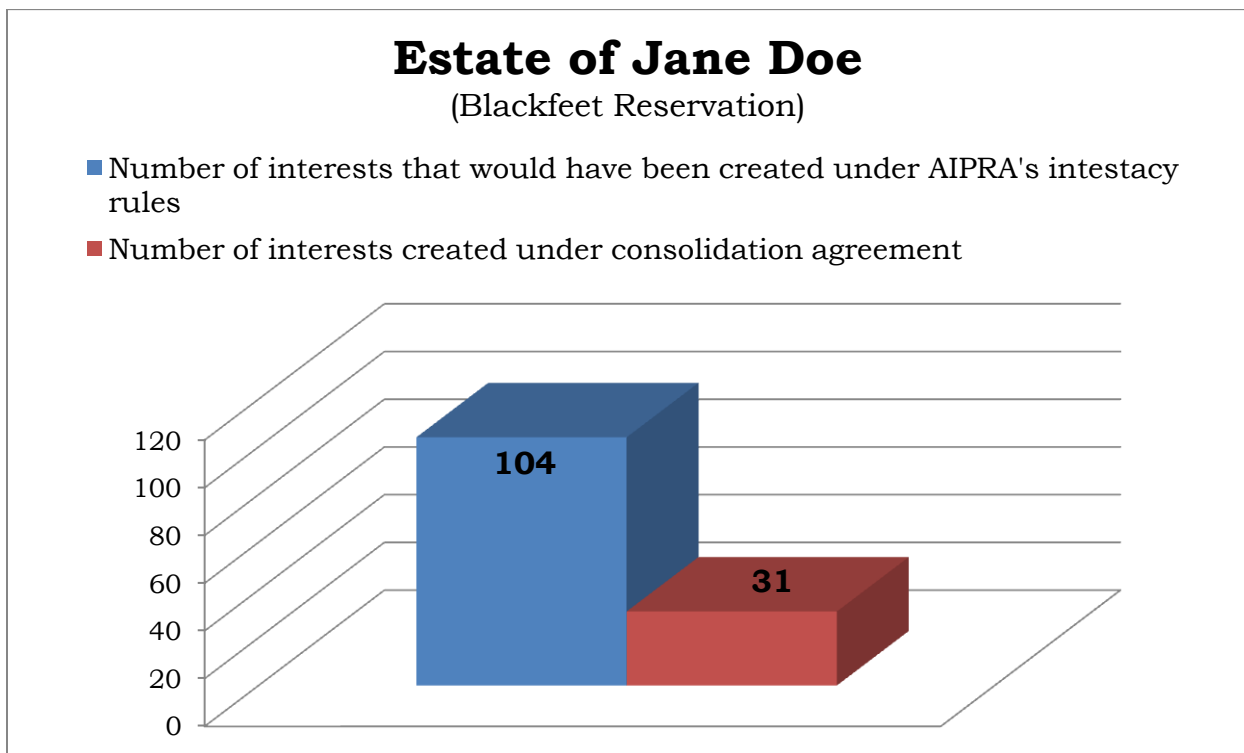
For example, under AIPRA, each of the 1/1 tracts would be fractionated into 8 smaller interests, with each new interest representing 12.5%. Thus, in order to prevent fractionation, the family determined which heirs would likely want or have the means to participate in the family business, and divided the tracts into the same number of undivided interests. The individuals who did not wish to participate in the family business gifted their interests in those tracts to the heirs who were interested in the family business. Thus, for 3 of the 1/1 tracts, the family divided Jane's interests into 5 undivided shares. As a result, each heir will inherit a 20% undivided interest, compared to a 12.5% interest each heir would receive under AIPRA's intestacy rules. Had the family been able to place the 1/1 tracts into a family trust, they would have preserved the 1/1 interests. Despite this, the family was able to decrease the extent of fractionation that would have resulted under AIPRA by designating 5, rather than 8 heirs to share the 1/1 tracts.

With regard to the remaining greater than 5% interests (i.e. the interests less than 100%), the heirs consolidated by designating one heir to receive each of these tracts. In doing so, the heirs were able to prevent fractionation of 6 tracts of land, four of which had than a 30% undivided interest.

Unlike the devisees in the Estate of John Doe, the heirs in this case consolidated the land without much regard to objective factors, such as the amount of interest, the income generated from the land, and the type of resource. Instead,

Jane's heirs relied on the anticipated use of the land, the economic status of the heir, and the heir's ability to manage the land. Although the family's chosen method to consolidate was markedly different than the John Doe family, both methods proved successful in consolidating the decedent's trust land.

As seen below, consolidation played a critical role in Jane's estate in order to prevent fractionation of the greater than 5% interests. While AIPRA would not have fractionated the less than 5% tracts, 88 new undivided interests would have been created in the greater than 5% category. In summary, distribution of the estate under AIPRA would have fractionated Jane's land into 104 new undivided interests. As a result of consolidation, only 31 new interests were created.



## **VI. Impediments to consolidation**

Although the pilot project has experienced enormous success, the last nine months have revealed a variety of issues that may present obstacles to consolidation.

A. Lack of express authority to issue partial distribution. The majority of consolidation agreements included the family's agreement on how to distribute the decedent's IIM account. Not surprisingly, the first questions heirs often ask at the

initial probate hearing, or at the mediation is ‘when will we have access to the IIM account?’ The answer is that like land, trust personalty (i.e. IIM funds) is not distributed until 45 days after a decision is issued, provided that nobody appeals the decision. § 25 C.F.R. 15.403. Unfortunately, for many of the heirs experiencing financial hardships with an immediate need to receive the IIM funds, this answer can influence their decision on whether to participate in consolidation, or have the case returned to OHA for a decision that will no doubt fractionate the decedent’s land.

In the simplest of cases, all of the heirs participating in mediation get along, and there are no complicating factors, such as minor or *non compos mentis* heirs, partitions, missing heirs, or valuation questions regarding permanent improvements or mineral interests. In these cases, the turn around time for conducting a mediation and providing OHA with an executed settlement agreement can be as quick as two weeks. On the other hand, when complicating factors arise, consolidation, while not impossible, often require more research, delaying a final agreement. It is the latter of these two types of cases that make the lack of statutory authority to issue partial distributions problematic.

One possible concern over approving partial distributions before a final decision is issued is the possibility that an heir could appeal the final decision, and if successful, the new decision could change how the trust personalty is to be divided among the heirs. However, a statutory or regulatory provision allowing partial distributions could be narrowly drafted to alleviate this concern. Specifically, partial distributions could be expressly allowed in cases where the decedent died intestate, allowing distribution of the IIM account consistent with AIPRA’s intestacy rule for distributing trust personalty.

B. Partitions. A partition can be particularly helpful when family members want to preserve a 1/1 interest, but discord among heirs makes agreeing on the use, improvement, or disposition of the trust property unlikely. However, the expense and time required to survey and monument a parcel could potentially exclude partitioning as a viable option for heirs wanting to preserve a decedent’s 100% interests.

C. Minors and *non compos mentis*. When a legal heir to an estate is determined to be a minor or *non compos mentis* (an individual determined to be incompetent), the probate Judge appoints a guardian ad litem, if one has not already been appointed. While these classes of individuals can still participate in a

consolidation agreement, a ‘simple’ case can easily turn complicated, delaying a final agreement.

Regulations currently do not provide who can be appointed as a guardian to a minor or incompetent heir. At first glance, appointing a family member seems sensible as that individual is likely familiar with the estate and the various family dynamics that could influence a final consolidation agreement. However, questions arise as to whether a family member—who is also participating in the consolidation agreement—would have a conflict of interest when looking out for the minor’s or incompetent’s best interests. Even so, appointing an unrelated, neutral individual to act as a guardian also has disadvantages. In the contractors’ experience, families do not always feel comfortable allowing a stranger into what is often considered a very personal matter. Second, a guardian may not be as open to considering some of the non-objective, or emotional factors—that, for some families—weight heavily in their consolidation decisions. As a result, a guardian who is not familiar with the family could compromise an agreement by focusing solely on the hard figures, such as the amount of decedent’s interest, type of resource and revenue generated on each tract.

In other areas of trust administration, Agency Superintendents are provided authority to make decisions on behalf of an heir, such as signing agricultural and mineral leases. Accordingly, regulations could also provide Agency Superintendents with authority to sign a consolidation agreement on behalf of a minor or *non compos mentis* heir. Such a provision could preserve the family’s privacy concerns, while allowing the family to develop a culturally and family-specific method for consolidating a decedent’s trust land. The contractor could provide the Superintendent a summary of the family’s deliberations, which he or she could review before signing the agreement.

D. Lack of family trust provisions. More often than not, families ask whether all of the land in the decedent’s estate can be placed into a family trust. In the contractor’s experience, after educating the heirs about fractionation, no one disputed the benefits of consolidation. However, many of the families also wanted to ensure that the agreement would provide all heirs equal benefits from the decedent’s land. Some families were primarily concerned with all of the heirs receiving an equal share of the revenue generated from the land, while other families had an interest in maintaining or starting a family business.

Regulations allow family members to disclaim their interests in the estate in favor of one heir in order to avoid fractionation and accomplish the aforementioned goals. However, in the contractor's experience, the majority of heirs were not comfortable giving up their interests and/or relying on one heir to administer all of the decedent's trust property for the benefit of the family.

In one case, the inability to consolidate the decedent's land by utilizing a family trust has stalled consolidation efforts, and the case will likely be returned to OHA for a decision. In that case, the number of heirs outweigh the number of tracts in the estate; and as such, the heirs currently do not believe consolidation without a family trust would be a fair way to distribute the estate.

With one exception, families were successful in reaching a consolidation agreement, despite the inability to put the decedent's land into a family trust. However, although this family was the exception in the pilot project, it is more likely the norm when considering all of Indian Country. For consolidation to have the greatest impact on fractionation, it is imperative that Congress amend AIPRA to allow an entity, such as a family trust, to hold title to trust property.

E. Valuation of permanent improvements on lands. While some families are very familiar with a decedent's land interests, other families learn for the first time at the mediation what land interests the decedent owned. One concern when assisting families who know very little about the trust property is whether a family can truly be advised of 'all material facts' (as required in order for a judge to approve an agreement) when it is unknown whether the tracts include permanent improvements, and if so, the value of those improvements.

Current regulations provide that a probate file (prepared by the BIA agency that serves the tribe where the decedent was an enrolled member) must include a certified inventory of trust land including "accurate and adequate descriptions of all land and appurtenances." 25 C.F.R. § 15.202. However, inadequate resources make complying with this provision currently impossible for local Agencies. Nonetheless, for an heir to truly be advised of all material facts, resources need to be set aside to allow Agencies to comply with this provision. Not only could permanent improvements affect a family's deliberations in the simplest of consolidation agreements, access to this information could become even more critical in cases where families are opting to partition. In either case, to truly be advised of 'all material facts,' a BIA probate file should include appurtenances.

Although the Bureau currently has the responsibility to list appurtenances, it may be more efficient and cost-effective to contract for informal inspection services outside of the Bureau. Additionally, the Bureau or a private contractor could utilize GSI technology to reduce the cost associated with identifying appurtenances. However, after identifying appurtenances, valuation of those improvements may pose an additional issue for consolidation.

## **VII. Project Implementation Goals for Fiscal Year 2010 and beyond.**

Due to the project's success in the Rocky Mountain Region, the DOI has approved expanding the project into the Great Plains Region. To date, the contractors have received two cases in this region, and have assisted one family with a consolidation agreement. The contractors hope to significantly expand project efforts in the Great Plains Region in FY 2010.

An additional goal for continuing the project in FY 2010 is to implement the will drafting portion of the project. As the contractors worked with families on consolidation agreements, there was an overwhelming request from heirs to obtain assistance with drafting wills. The heirs' forward-thinking concern to preserve the interests that were consolidated is evidence that the pilot project's emphasis on landowner education is empowering landowners to make active decisions about their land, with the goal of avoiding fractionation at the forefront of those decisions.

The fact that 25 consolidation agreements alone have prevented the creation of an additional 2,166 undivided interests is evidence that consolidation plays a critical role in reducing fractionation in Indian Country. Given the project's success thus far, the contractors believe that obtaining referrals prior to probate can increase the success of the project with even greater results. Obtaining referrals prior to probate would allow the contractors to review the BIA probate file months, and perhaps even a year or more before an initial probate hearing is held. Early referrals would then allow the contractors more than adequate time to assist families with negotiating a consolidation agreement, which could be then be presented to the Judge at the initial probate hearing; which, in turn, would significantly expedite OHA's final decision.

Further, obtaining referrals prior to probate could ensure timely completion in all estates, but especially in cases where families have requested a partition. Additionally, early referrals would allow families to participate in more than one

mediation, which is often necessary to successfully enter into a consolidation agreement. Early referrals would also allow the contractors to work through some of the legal issues that affect the timeliness of consolidation agreements, such as obtaining appraisals, locating missing heirs, appointing guardians ad litem, and working with guardians and conservators of heirs determined to be incompetent.

Based on the referrals the contractors received, it is estimated that families are not afforded the opportunity to participate in consolidation efforts until seven to 22 months after the decedent's date of death. One method for implementing early referrals might include providing heirs notice of the BIA's estate planning project, and the benefits of consolidation, as a document included in the probate packet each potential heir/devisee receives from the BIA agency responsible for compiling the probate file. Based on the fact that the majority of families who participated in the project were not even aware of their legal right under AIPRA to consolidate, 25 C.F.R. § 15 should be amended to mandate that heirs receive notice of the opportunity to consolidate before the estate is transferred to OHA.

After reviewing the statistics from the project, it is clear that consolidation agreements play a key role in preventing fractionation. Not only did the project experience tremendous success, there was an overwhelming positive feedback from heirs who participated in the Project. As such, a training module for qualified contractors should be developed to provide insightful guidance on how to assist families with consolidation agreements. Such a module should be developed to ensure this under-utilized, yet critical tool in AIPRA can be widely accessible to landowners throughout all of Indian Country.

# **INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST**



**SUPPLEMENT TO**  
Final Report  
Estate Planning Pilot Project:  
Consolidation Agreements at Probate  
for Individual Indian Trust landowners  
in an effort to Reduce Fractionated Land Ownership in Indian Country

*submitted to*  
the Department of Interior  
Bureau of Indian Affairs

July, 2010

## **I. Introduction**

Elk River Law Office, P.L.L.P. in conjunction with Inter Tribal Monitoring Association conducted an Estate Planning Pilot Project from June 1, 2009 through April 1, 2010. At the conclusion of the Pilot Project, Elk River Law Office continued assisting several families to finalize consolidation agreements utilizing the limited funds remaining from the Pilot Project.

Before the Pilot Project ended, Elk River Law Office contacted Sanderson Stewart to provide surveying services in order to assist five families who requested their consolidation agreements include partitions of 1/1 tracts in order to avoid fractionation of a 100% owned interest. Sanderson Stewart completed a preliminary field study of one Crow allotment before the end of the Pilot Project. When the Pilot Project neared completion, Elk River Law Office requested Sanderson Stewart provide an estimate to complete all remaining surveying work for the five families requesting partitions. Sanderson Stewart provided an estimate of \$121,000 to complete all survey work. Given the limited funding remaining for the Pilot Project, and the uncertainty of future funding to continue the Project, Elk River declined to proceed further with Sanderson Stewart's services.

In an effort to seek out a less costly alternative for completing the surveys, Elk River obtained an estimate from Archambault and Company, an Indian-owned engineering firm. Archambault and Company returned an estimate of \$25,000 to complete all necessary surveying work. However, with all Pilot Project funds expended, additional funding is needed in order to complete surveying work and finalize consolidation agreements for these families.

## **II. Final Pilot Project Overview**

After Elk River Law Office submitted the March 18, 2010 Final Report on the Pilot Project to the Bureau, the Office of Hearings and Appeals referred two additional estates to Elk River Law Office. One family reached an agreement; however, Elk River Law Office has not received signatures from all heirs. The other family was unable to reach an agreement. Additionally, two families finalized consolidation agreements since the Final Report. Thus, from June 1, 2009 to the date of this Report, 34 of the 37 families referred participated in mediation. Out of the 34 mediations held, 27 families (or 79%) were successful in

executing consolidation agreements. As of June 2010, the Office of Hearings and Appeals issued 13 final decisions approving consolidation agreement and directional disclaimers, and 14 were pending approval and final decision.

### III. Final Pilot Project Statistics

As shown below, a review of project efforts as of July 2010 reveals that absent consolidation agreements, 3,246 undivided interests would have been created in 27 estates, including interests created under AIPRA's intestacy rules and interests created as a result of an estate's will devises. However, as a result of project efforts, only 937 new interests were created. This means that a total of 2,309 new undivided interests were *avoided* as a result of 27 consolidation agreements.

