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FINAL REPORT

ESTATE PLANNING AND CONSOLIDATION AGREEMENTS AT PROBATE FOR INDIVIDUAL INDIAN TRUST LANDOWNERS IN AN EFFORT TO REDUCE FRACTIONATED LAND OWNERSHIP IN INDIAN COUNTRY

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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 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’s management of the Indian Trust, and minimizing government resources allocated to fractionated land management. After eight months and 25 agreements, it is undeniable 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 DOI’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 as many as 1,800 owners.
- The 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 showed that the ever-increasing number of fractionated interests is necessarily coupled with increased workload, increased cost to maintain and

manage the interests, and increased records management responsibilities. With the foregoing declarations in mind, 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 it facilitate solutions for addressing fractionation by implementing some of the available statutory and regulatory mechanisms, including some of the under-utilized tools in AIPRA. 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, ITMA proposed coordinating with the Bureau of Indian Affairs 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 (intestacy rules for the descent of land where decedent's interest represents less than 5% of the total allotment), the larger interests (greater than or equal to 5%) will still descend to heirs in undivided interests, resulting in fractionation. Further, while AIPRA's intestacy rules—providing a life estate to a surviving spouse and the descent of land to a single heir—may stall fractionated land interests, these provisions may be inconsistent with how the decedent would have wanted and/or the heir would like the land distributed.

As an alternative to AIPRA's intestacy rules, consolidation agreements at probate allows heirs and devisees in a pending probate proceeding to consolidate interests in any tract of land in a decedent's land inventory; and allows heirs to bring in their own interests in trust land to incorporate into a consolidation agreement. 25 U.S.C. § 2206 (j)(9),(e). In addition, cases where the decedent died intestate (i.e. without a will), the proposal also envisioned utilizing consolidation agreements at probate where the decedent died with a valid will, as many testators devise land to their heirs 'to share and share alike.' Like AIPRA's intestacy rules, devises of this type also fractionate trust land interests; however, unlike AIPRA, where highly fractionated tracts descend to a single heir, will devises of land to heirs 'in equal shares' fractionates *all* of the land in the estate, including the interests where the decedent owned less than 5% of the entire allotment.

In summary, consolidation agreements allow heirs to accomplish the following, 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);
- 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 affects of the single heir and the life estate without regard to waste rules; and
- consolidate trust land interests owned by the decedent, as well as trust land owned by the heir/devisee which is not a part of the decedent's estate.

C. Will Drafting. AIPRA's intestacy rules only stall fractionation until the devisee or heir passes without a will. As such, the pilot 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' ceased drafting wills in 2006, it was thought that providing will drafting services to Indian landowners was even more critical to assist beneficiaries with thoughtful estate planning in order to prevent future fractionation.

With the three mechanisms in mind, the contractors proposed it provide these key estate planning services to Indian landowners as a pilot project in the Rocky Mountain Region of the BIA. Selecting the Rocky Mountain Region was based, in part, upon the fact that a majority of fractionated 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. Project change of scope. As indicated above, the initial scope of the pilot project included three mechanisms to address fractionation. However, the project commenced in June 2009 with the contractors receiving its first round of referrals from OHA to assist heirs and devisees of decedents owning trust property on the Blackfeet Reservation with consolidation agreements at probate. In reviewing the nine probate files that were referred to the contractors, it was uncertain—given the wide variety of dynamics in each case—whether these families would view consolidation as attractive, or even viable in spite of the many benefits consolidation offered. As such, it was equally uncertain what portion of the project would or could be devoted to consolidation agreements at probate.

Specifically, it was uncertain whether the 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 our surprise, six of the nine Blackfeet families were successful in consolidating the trust land interests in the decedents' estates.¹ 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. Thus, the

¹ Three families consolidated land in the estate utilizing consolidation agreements and three families consolidated land utilizing directional disclaimers (i.e. family members gifted their interests in the estate in favor of one heir).

initial scope of the project changed by focusing solely on consolidation agreements at probate.

B. Referral Process for Consolidation Agreements at Probate. A fully executed consolidation agreement was 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 pilot project attorney began at the initial probate hearing and ended with a final consolidation agreement². As the project is currently being implemented, the pilot project attorney is typically charged with 5 major tasks, as listed below. However, in performing all of these tasks, the attorney makes clear to the heirs/devisees that he or she does not represent one or more of the heirs, and no attorney-client relationship is formed. Rather, the attorney is 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 attorney makes clear that a consolidation agreement is completely voluntary and if an agreement is not reached, then the case will be referred back to OHA for a decision under AIPRA or pursuant to a valid will. Reaching a consolidation agreement consists of the following steps:

1) Attending the initial probate hearing. A pilot project attorney attends 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 pilot project attorney provides the families with a brief education and explanation of the advantages of consolidation. The Indian Probate Judge explains that participating in mediation is voluntary, and if a consolidation agreement is not reached, a decision will be entered in the case, which will distribute the land based on either a valid will, or AIPRA's intestacy rules.

2) Gathering information. If families express interest in attempting to enter into a consolidation agreement, the Indian Probate Judge issues an *Order for Referral to Contracted Attorney for Consolidation Agreement*. Importantly, referring the case for consolidation has significant cost savings to OHA, as no further proceedings and/or actions are required by OHA, with the exception of issuing the final decision.

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

After receiving the probate file from OHA, our office coordinates with Land Title Records Office (LTRO) and BIA agencies to collect detailed information about the decedent's trust lands which assists families in making decisions at mediation. The information we request includes but is 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 has proved critical in assisting families with consolidation, the contractors have attempted to maintain regular contact with Agency Superintendents to ensure document requests are being processed in the most efficient way possible.

3) Conducting mediation/landowner education. After receiving all of the pertinent documents, the contractors summarize key details regarding the decedent's land interests into one easy-to-read chart. A mediation is then scheduled, typically at the BIA agency where the trust land is located. In the event an heir lives out of state, or cannot attend the mediation in person, we provide a conference call which allows the individual to fully participate in negotiations.

Each mediation begins with an emphasis on landowner education. Heirs are provided with two brochures and an explanatory letter describing how an estate would be distributed under AIPRA, and summarizing key land management tools. For many, the mediation is the first opportunity an heir/devisee has been given 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 interests. As such, the pilot project has the added benefit of encouraging and empowering heirs to be active landowners.

The attorney reviews with the heirs each of the land documents in the decedent's estate. For example, the attorney educates heirs on how to read an Individual Trust Inventory report; explains legal concepts, such as 'fractionation,' 'trust property,' 'trust personalty,' 'life estate without regard to waste,' and 'undivided interest;' explains the legal rights attached to a mineral interest versus a surface interest; and explains the distinction between an oil and gas rental versus an oil and gas royalty.

Next, the attorney describes 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 explains how AIPRA or the will fractionates the decedent's interests, and how dividing the decedent's land into smaller and smaller interests with more co-owners affects the usability and value of the land in the estate. By contrast, the attorney provides families with information about consolidation and how such agreements can maximize the

benefits of the land interests each heir stands to inherit. In the contractors' experience, the heirs have appreciated the opportunity to study and learn about the trust land in the decedent's estate, tools which can be applied to their own land interests.

4) Methods for consolidation. After the heirs review the pertinent information in the decedent's probate file, the mediator assists the heirs in consolidating the decedent's land interests. To date, the most common method families have used to consolidate the decedent's trust interests is 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 of keeping a decedent's 1/1 interests (i.e. a tract in which the decedent owned a 100% interest) in-tact. 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 one heir including her own trust land interests (outside of the decedent's estate), whereby she proposed to gift several of her interests to two other heirs in return for certain interests in the decedent's estate. These type of negotiations illustrate how beneficial allowing heirs to bring in their own trust lands into consolidation agreements can be. In that case, the exchange was particularly beneficial, as the heirs who received the interests outside of the decedent's estate were able to consolidate those with interests they also owned in those same tracts.

As families deliberate about how to consolidate, they typically develop their own criteria, which has included the following:

- whether the heir owns an undivided interest in any of the tracts in the decedent's estate;
- whether an heir's undivided interest is located near any of the tract 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);
- the heir's relationship to the original allottee;
- economic status of the heir, including whether the heir owns very little or a significant amount of trust property (that is not part of the decedent's estate);
- whether the heir has children to whom the decedent's interest could later be gifted, or devised through a will;
- the heir's connection to land and/or involvement in reservation community
- competency of heir to manage the land and income derived from the land; and
- ability to maintain current use of the land (e.g. maintaining family ranching operations).

5) Drafting consolidation agreement. If a consolidation agreement is reached, the mediating attorney drafts a settlement agreement which includes a statement of whether the decedent died intestate. If the decedent died intestate, the agreement includes a description of how the decedent's trust property would be distributed absent the consolidation agreement. The settlement agreement is then sent to the BIA agency where the trust land is located, at which time a letter is provided to the heirs and/or devisees with a copy of the Settlement Agreement, instructing them to sign the original agreement at the BIA agency. If any of the heirs or devisees have questions regarding the settlement agreement, they are encouraged to contact the mediating attorney to discuss their concerns.

6) Submitting executed consolidation agreement. Upon execution of the settlement agreement, the document is filed with the Office of Hearings and Appeals, after which time the Indian Probate Judge determines whether to approve the agreement based on the factors provided in 43 C.F.R. § 30.150. Federal regulations provide that a judge will approve 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. Like a probate 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. 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. For example, since June 2009, the Office of Hearings and Appeals has referred 35 estates to Elk River Law Office. Out of the 35 families referred, 32 families have participated in mediation.³ Out of the 32 mediations held, 25 families were successful in executing consolidation agreements.⁴ To date, OHA has issued 8 final decisions approving consolidation agreements and directional disclaimers, and 8 consolidation agreements are currently pending approval and final decision.⁵

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

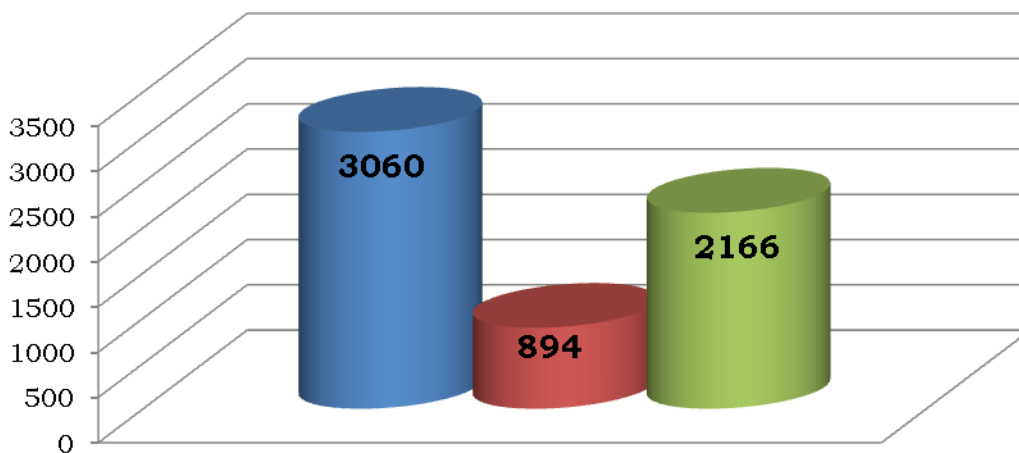
³ Four out of the 35 cases referred were sent back to OHA for decision. In these cases, for various reasons, some families decided that consolidation was not viable, while other families determined they did not want to participate in consolidation efforts.

⁴ Reference to '25 consolidation agreements' includes both the 22 consolidation agreements and the 3 directional disclaimer agreements.

⁵ 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.

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

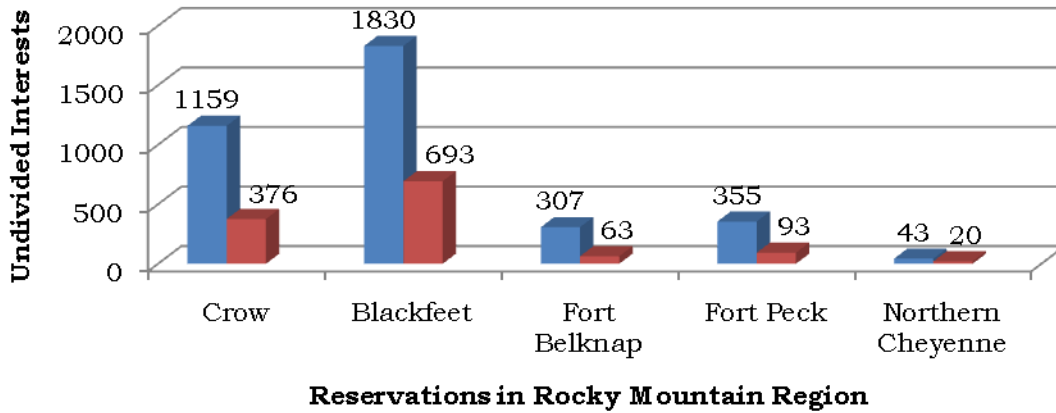


As shown above, a review of project efforts to date reveals that 3,060 undivided interests would have been created in the 25 estates, including interests created under AIPRA's intestacy rules and interests created as a result of the estate's will devises. However, as a result of project efforts, only 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 interest 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, compared to the 693 undivided interests that were created with consolidation efforts.

Estate Planning Pilot Project

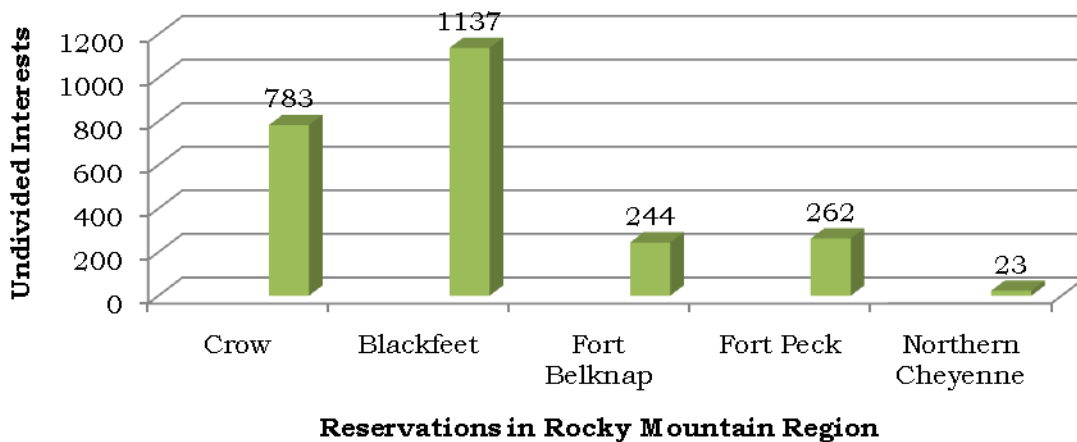
- Undivided interests that would have been created under AIPRA or will
- Undivided interests created through project efforts



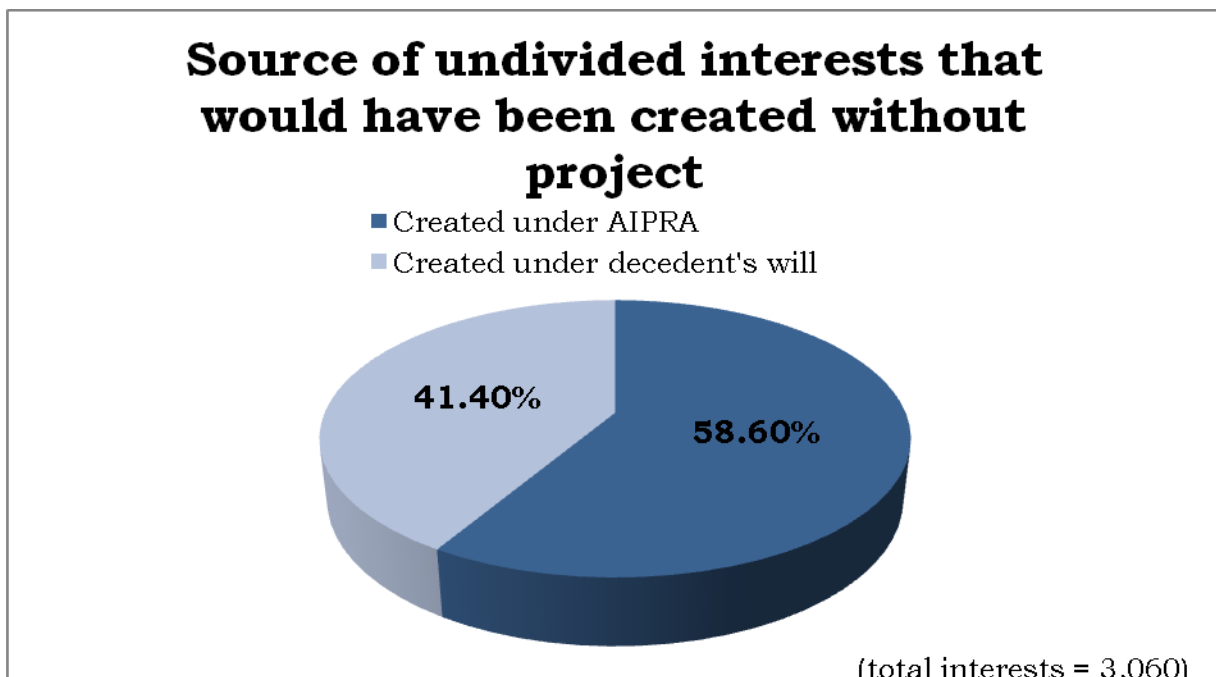
The green bars in the chart below represent the number of undivided interests avoided through project efforts. Continuing with the statistics from the Blackfeet Reservation, the chart indicates that 1,137 new undivided interests were avoided as a result of consolidation efforts.

Estate Planning Pilot Project

- Undivided interests avoided through project efforts



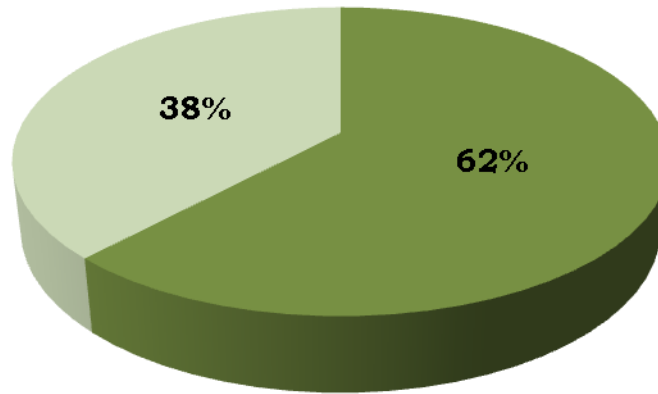
Additionally, as shown below, of the 3,060 undivided interests that would have been created absent consolidation, 58.6% of these interests would have been created as a result of AIPRA's intestacy rules, while 41.4% would have been created under the decedent's will. Thus, it appears that the undivided 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 involved a will, yet this small number of cases represented 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 cases where the decedent had a will. 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.'



Finally, AIPRA's intestacy rules, providing the descent of highly fractionated parcels to a single heir stalls fractionation. However, as illustrated in the chart below, it is clear that there still remains a large number of greater than 5% tracts where consolidation becomes critical in preventing fractionation.

Undivided interests avoided through project efforts

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



(total interests = 894)

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 project statistics, the first goal was clearly realized. Additionally, a review of time spent on the project also showed that the goal of providing a cost savings was also met.

For example, the contractors expended approximately \$1,500 to \$4,000 per estate case to facilitate a consolidation agreement; in the few cases where the family agreed to partition an allotment, the costs are expected to exceed this amount. Every estate case 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 the mediation, and travel time and expenses. Completing a case cost significantly less when the mediation was conducted by telephone due to heirs living 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. Further, the amount of follow-up work each case required contributed greatly to the rise in cost. 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 he or she would benefit from participating in 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.

As noted above, it is estimated that the Department of Interior spends an average of \$7,800 on one probate case. As such, the contractors estimate that the Project provided a cost savings to the Department of the Interior of \$3,800 to \$6,300 per case.

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%.

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%.⁶

Given the devastating effect the will 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 and the estimated value of the land.

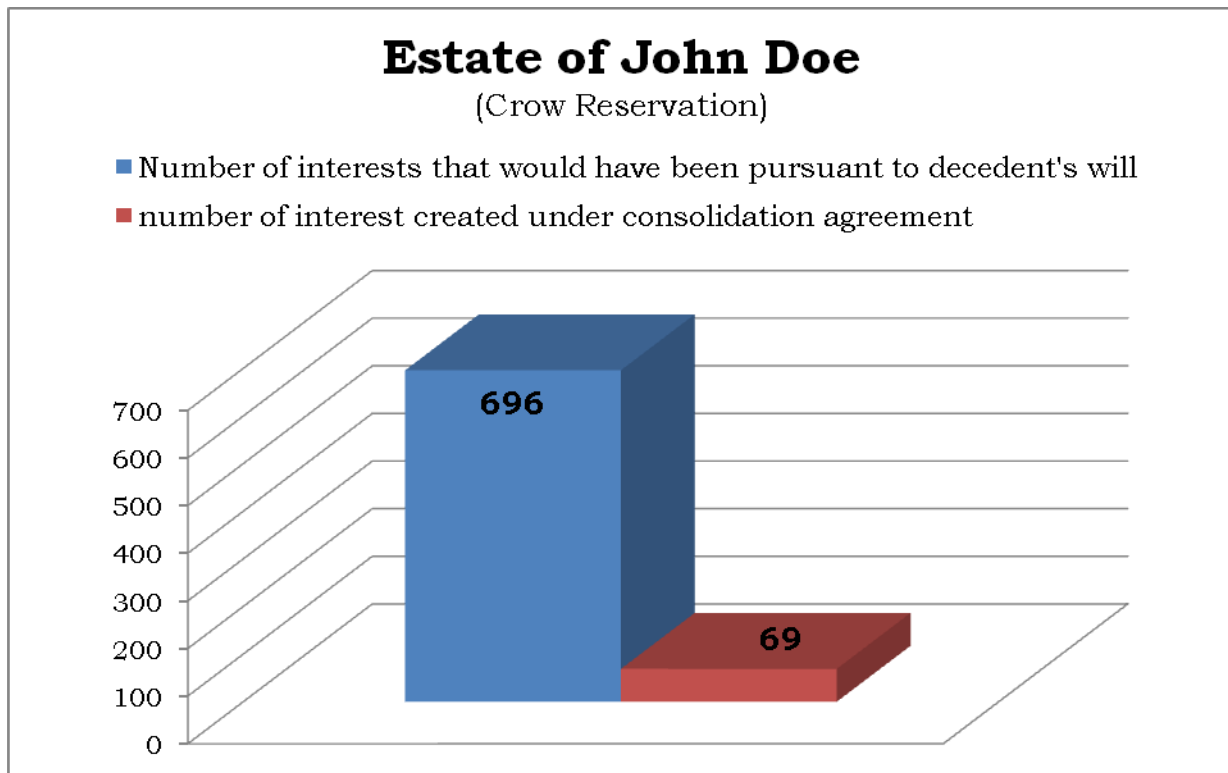
After reviewing the chart, and maps indicating the location of John's interests, the devisees first distributed the 17 greater than 5% tracts, then the remaining less than 5% tracts, based on the following method: John's three children—Ann, Frank, and Robert—put each of their names in a hat to determine 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 without a will⁷, all of the 58 tracts in the estate would have been fractionated

⁶ 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%.

⁷ 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.

pursuant to the will.⁸ 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.

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 be distributed to Jane's oldest surviving child, Sarah. The 11 interests in which

⁸ 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.

Jane owned greater than or equal to 5% undivided interests would be divided equally among her 8 surviving children.

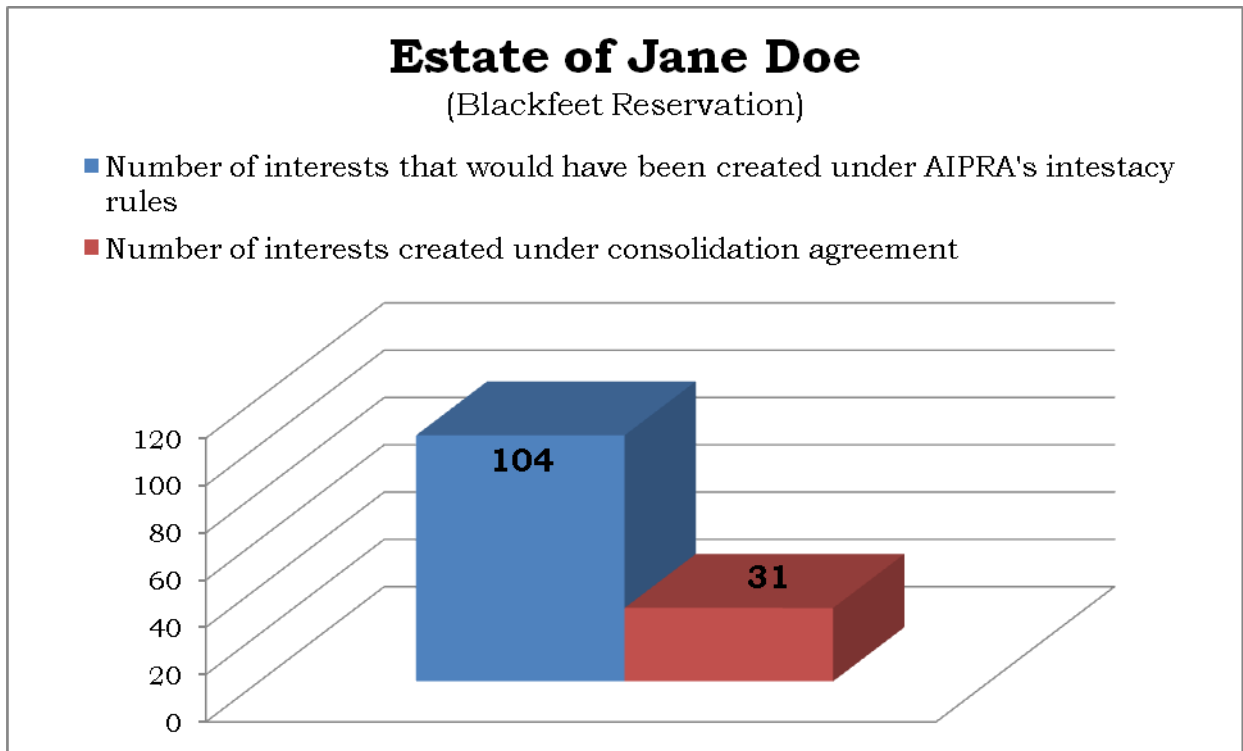
In this case, Jane owned five 1/1 tracts (i.e. her interest was 100%). Although the family acknowledged the benefit of consolidation, at the same time, the family wanted to ensure that each of the heirs had equal access to the land. Specifically, the family used many of the 1/1 tracts for ceremonial 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 our 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 our 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 expect 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 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 attorneys 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 received 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.

An additional method of obtaining early referrals that may alleviate some of the burden placed on Bureau staff might include the Bureau forwarding contractors a monthly list of deceased landowners, including a list of the decedent's potential heirs and devisees. At that time, the contractors, rather than Bureau staff could be charged with forwarding the potential heirs/devisees with information on consolidation.

After reviewing the statistics from the project, it is hard to argue that consolidation does not 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.