

**History of fractionation**  
**Overview of AIPRA**  
**An Approvable Probate Code**

Presentation to the  
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# Presentation Topics

- ▶ **History of fractionation**
- ▶ **Current status of fractionation**
- ▶ **Efforts to address fractionation**
- ▶ **AIPRA Provisions**

# Tribal Land Ownership Prior to Allotment

- Majority of Tribes were nomadic
- Individual property ownership was a foreign concept
- Initial treaties established boundaries between the US and Tribal Nations
- Reservations were established to restrict movement of Tribes and settle them into permanent localities
- Majority of Reservation lands were owned communally by the Tribe (all members of the Tribe)
- Reservations were a precursor to Allotments

# General Allotment Act of 1887

- Established the general policy to allot Tribal lands to individual Indians
- Specific Acts implemented allotment after negotiation with affected tribes
- Intent was to assimilate Indians into dominant society – Indians to become self-sufficient farmers
- Individual ownership and use of Reservation lands was viewed as the best economic basis for assimilation.

# General Provisions of Allotment

- 160 acres to each family head of household
- 80 acres to every single person over age 18 and every orphan under age 18
- 40 acres to children under age 18 who were not orphans
- Deed issued to every allottee but was to be held in trust for 25 years after allotment

## General Provisions, continued

- After 25 years, fee patents were to be issued to allottees
- Surplus lands, after Tribal members allotted, were ceded to the government and most often opened up for non-Indian homesteading/settlement
- 1906 legislation allowed alienation before 25 years upon “competency of allottee” and also allowed fee patents upon death of allottee

# Results of Allotment

- Between 1887-1900 - 118 reservations were allotted; by 1934 – 219 reservations and/or Land Area Codes (LACs today) were allotted to individual Indians
- Between 1887 and 1900 – US approved 53,168 allotments totaling 5 million acres
- By 1920 – 36 million acres of reservation lands had been allotted to individual Indians

# Loss of Allotted Lands

- By 1934 approximately 27 million acres or 2/3 of allotted lands had passed by sale or involuntary transfers out of trust status and into non-Indian ownership
- Approximately 11 million acres remains in individual Indian ownership in trust status
- Resulted in checkerboard (adjacent fee and trust lands) ownership status on many reservations

# Onset of Fractionation

- As early as 1892, Indian agents reported that after the death of the original allottee, title to the land was unclear
- No law existed to probate an Indian's estate if he died before expiration of the trust period until 1894 when State laws were applied to determine heirs of allottees
- Indians were unable to draft Wills until 1910

# ▶ **Current status of fractionation**

# Fractionated Land Ownership today

- Approximately **212,491** individual Indian allotments currently exist (104,116 multi-owner tracts and 108,375 1/1 individually owned tracts, as of 10/2008)
- There are approximately **240,000** individual Indian land owners
- The average trust allotment has **20** interests but many have hundreds and one tract has **1,800** interests
- Currently, there are approximately **4.3** million fractionated interests;
- Fractionated interests are expected to grow by **7% to 8%** annually; growth in the last 6 months has been **12%** (10/08 to 3/09, ILCC data)

## Status cont.

- ▶ **August 2008 – 4.3 million interests  
(3.8 million individually owned interests, not including 1/1 interests)**
- ▶ **About 85% of all interests are 5% or less  
(approximately 3.2 million--March 2008)**
- ▶ **About 75% of all interests are 2% or less  
(approximately 3 million--March 2008)**

# Repudiation of Allotment Policy

- The 1928 ‘Merriam Report’ found that the General Allotment Act had “failed to address society’s need to reduce the dependency of the individual Indian on the federal government.”
- The Indian Reorganization Act of 1934 prohibited any further allotment of Indian lands and
  - Authorized trust status of remaining allotments to continue until Congress provided otherwise,
  - Authorized the Secretary of the Interior to take lands into trust for tribes and tribal members

## Previous Attempts to Address Fractionation

- IRA contained unfunded provision for tribes to consolidate fractionated interests,
- IRA authorized the exchange of heirship lands,
- A 1948 amendment to the IRA allowed sales of fractionated lands

## Previous Attempts to Address Fractionation, continued

- Indian Land Consolidation Act of 1983 – included provision for interests less than 2% of a tract to escheat to the Tribe.
  - US Supreme Court found this provision an unconstitutional taking (Youpee Decision)
- 2000 Amendments to ILCA repealed escheatment and restricted devises of trust land to non-Indians
- Before implementation of 2000 Amendments, Congress adopted The American Indian Probate Reform Act in 2004

## AIPRA

Adopted in 2004

- Effective on June 20, 2006
- Encourages Indian landowners to draft wills
- Governs inheritance of trust lands when an individual landowner dies without a will

# AIPRA (P.L. 108-374)

- Intent—Congress declared its commitment, in Section 102, to solve fractionation and stated its policy to:
  - Prevent further fractionation of trust allotments made to Indians;
  - Consolidate fractional interests and ownership of those interests into usable parcels;
  - Consolidate fractionated interests in a manner that enhances tribal sovereignty;
  - Promote tribal self sufficiency and self-determination; and
  - Reverse the effects of the allotment policy on Indian Tribes.

# AIPRA, continued

## Three Purposes

1. Preserve trust status of Indian lands and preserves tribal jurisdiction over trust lands
2. Attack fractionation
  - a. Establishes single heir rule
  - b. Authorizes tribal tract consolidation

## Purposes, continued

3. Empowers tribes and individual land owners
  - a. Streamlines trust-to-trust and fee-to-trust consolidation
  - b. Encourages negotiated land use and land consolidation agreements at probate
  - c. Authorizes “owner management” of agriculture land

# AIPRA Definitions

- “Indian” – 25 U.S.C. §2201(2)
  - Enrolled tribal member in any federally recognized tribe, or
  - Person eligible to be enrolled in any federally recognized tribe
  - Person who owned an interest in trust lands prior to October 24, 2004

# Definitions, cont.

- **“Heir”** – person who will inherit when decedent has dies without a will
- **“Eligible Heir”** without a will – Indian, co-owner, or non-Indian children and grandchildren who are w/in 2 generations of an Indian 25 U.S.C. § 2201(9)
- **“Eligible Devisee”** with a will – any Indian, any co-owner, any lineal descendant (children, grandchildren, great grandchildren) whether Indian or not

# “Land”

- Land means any real property. 2201(7)
  - Buildings on trust lands will pass to the heirs inheriting lands without will 25 U.S.C. § 2206 (a)(2)
  - With a will, a landowner can devise the home to one person and the land to a different person 25 U.S.C. §2206 (h)(1)(b)
    - These provisions from Dec. 2008 amendments

# AIPRA rules of Intestacy- Dying without a Will

- Trust land interests will be divided into 2 categories:
  - Trust land interests that are 5% or greater of the total allotment, and
  - Trust land interests that are less than 5% of the total allotment

# Without a will, 5% or less interests

- Single Heir Rule provides:
  - 5% of less interest will pass to you old eligible living child, if no living child, then to oldest eligible grandchild or great grandchild.
  - If no living eligible children, grandchildren or great grandchildren, then interest go to Tribe where land is located.
  - Spouse will receive life estate in a 5% of less interest only if living on the parcel at time of decedent's death

# Without a will, 5% or greater interests

- Surviving spouse (Indian or non-Indian) receives only a life estate
- Land passes to eligible children equally
- If no surviving children, to eligible grandchildren equally, or if none, to eligible great grandchildren equally
  - A deceased child's heirs will inherit the deceased child's interests

# 5% or greater interests, cont.

- If no eligible children, grandchildren or gg children, then to surviving eligible parents equally
- If no parents, then to eligible siblings equally
- If none, then to Tribe with jurisdiction

# Spousal Life Estate

- Without a will, decedent's spouse (Indian or non-Indian) will receive a life estate of all interests 5% or greater of total allotment; and
- The 5% or less interest if the spouse is living on the interest at the time of decedent's death

# Spousal Life Estate, cont

- Life estate is “without regard to waste”
  - Secretary must distribute all income, including bonuses and royalties, to the life estate holder to the exclusion of any holders of remainder interests 25 CFR §179.201
  - The life estate holder may deplete resources except holder cannot damage property due to culpable negligence or malicious destruction 25 CFR §179.202

# Devising Land by Will

- For a Spouse, a Indian landowner can
  - Give an Indian spouse land in trust status,
  - Give Indian or non-Indian spouse a life estate,
  - Give non-Indian spouse land in fee status only if the tribe has a law, code or enactment to allow this —Dec. '08 Amendment
  - Give nothing to a spouse if you provide for the spouse by other means (life insurance)

# Devising by Will, cont.

- Devise individual interests to different children or grandchildren
- If give spouse a life estate, can devise to children upon spouse's death
- Devise land to children as “joint tenants with right of survivorship” - children will share land with last surviving child to take all interests in the land
- Devise no land to child or children

# Purchase at Probate

- At probate, trust interests may be purchased by:
  - Persons who are eligible to receive by Will an interest in the same parcel of land
  - Any trust co-owner in the trust parcel
  - The Tribe with jurisdiction over the land
  - The Secretary on behalf of the Tribe

# Tribal Probate Codes

## 25 CFR Part 18

- To Avoid application of some AIPRA provisions, tribes may adopt Probate Codes
- Must be approved by the Sec. of Interior if includes provisions for descent and distribution of trust property
- Cannot include provisions for trust Personalty (IIM Funds)

# Tribal Probate Code must

- Prevent further fractionation
- Consolidate fractional interests into usable parcels
- Consolidate fractionation interests to enhance tribal sovereignty
- Promote tribal self-determination
- Reverse effects of allotment policy

# Tribal Probate Code, cont.

- May change definitions for spouse or child including adopted children,
- Cannot change definitions for
  - Indian,
  - Consolidation agreements
  - Land
  - Purchase option at probate
  - Without regard to waste

# Intestate Succession

- Tribe may adopt a different order of descent than that set forth in AIPRA for small fractional interests (less than 5% interests)
  - A single heir different from the oldest child
- Must allow for a spousal life estate “without regard to waste”
- Can adopt provisions that allow a spouse to inherit interests from decedent

# Testamentary Disposition

- A landowner can draft a will at age 18 or older
- Will must be written – no legal recognition of a verbal or video taped will
- AIPRA allows self written will but must be witnessed by two disinterested persons (persons unrelated and who will not inherit from the decedent)

# Testamentary Disposition, cont.

- Must allow the devise of an interest to:
  - An Indian lineal descendant of the original allottee; and
  - An Indian who is not a member of the Tribe with jurisdiction over the interest in land;

# Allowable Restrictions

- May restrict the ability of the devisees above if the code allows:
  - Devisees to renounce their interests to eligible devisees
  - A devisee who is spouse or lineal descendant to reserve a life estate without regard to waste, and
  - For payment of fair market value as determined by DOI

# Summary

- AIPRA is an effort to reduce fractionation, but
- AIPRA doesn't stop fractionation,
- Tools in AIPRA can effectively reduce fractionation,
- Without a Tribal Probate Code, Tribal control over descent and distribution of trust lands is limited.

# Questions?