

ITMA Estate Planning Pilot Project

Land & Trust Resources Listening
Conference

September 10, 2009

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Goal of Pilot Project

- Utilize estate planning as tools to address and manage fractionated lands Indian Country including:
 - Consolidation agreements at probate
 - Will drafting
- Increase individual Indians and tribes' abilities to maximize benefits from the land
 - Increase individuals' decision making authority over land
 - Increase tribal government authority over land
 - Increase revenue generated from land
 - Retain land to pass on to next generation

AIPRA—

Tools to Manage Fractionated Lands

- American Indian Probate Reform Act of 2004
 - What is AIPRA?
 - Who does it apply to?

LAND MANAGEMENT TOOLS IN AIPRA— INTESTACY RULES

- What are intestacy rules?
- How do they manage fractionated trust lands?
 - Provide limitation on who can inherit trust land
 - Depending on the decedent's interest in land:
 - Greater than or Equal to 5% of the total allotment
 - Less than 5% of the total allotment

INTESTACY RULES— WHO INHERITS YOUR LAND?

Greater than or Equal to 5%

- **LIFE ESTATE** without regard to waste to surviving spouse
- Your heirs take a future interest in **EQUAL SHARES**:
 - Children
 - Great grandchildren
 - Surviving parent(s)
 - Indian tribe

Less than 5%

• **SINGLE HEIR RULE**

- Oldest surviving child
- Oldest surviving grandchild
- Oldest surviving great grandchild
- Indian tribe

UNLESS

- Surviving Spouse living on allotment at time of your death:
 - **Life estate** to that allotment only

LAND MANAGEMENT TOOLS IN AIPRA- CONSOLIDATION AGREEMENTS

- AIPRA allows heirs and devisees in a pending probate proceeding to consolidate interests in any tract of land in decedent's land inventory (25 USC 2206(j)(9)).
- AIPRA also allows heirs to bring in their own interests in trust land to incorporate into a consolidation agreement (25 USC 2206(e), 43 C.F.R. 30.151).
- Consolidation Agreement is incorporated into the final probate order.

WHY CONSOLIDATE?

- Primary Benefit: Reduce fractionation
 - Result:
 - Ownership of a larger more beneficial interest in land rather than numerous small interests in land.
 - Reduces federal government's financial burden associated with managing large number of fractionated trust interests
- Other Benefits:
 - Consolidation at probate is only time heirs can sell, gift or exchange land without complying with Secretary's rules
 - Avoid potential litigation
 - Pilot project provides a service free of cost to participants!

What can consolidation look like?

- Mary died without a will on December 1, 2007 owning trust property on the Crow Reservation. Mary had five children, all enrolled members of the Crow Tribe. Four children survived Mary: Alfredine, Robert , Mona , and Sara.
- Steve pre-deceased Mary; however his daughter, Susan survived Mary.
- Mary has a surviving spouse, Charles.
- Mary owned a $\frac{1}{4}$ (25%) undivided interest in Allotment 202-3438.
- How will this land be distributed to Mary's heirs?

How would Allotment 202-3438 be distributed?

Probate Order

- Greater than 5%
- LIFE ESTATE: Charles
- FUTURE INTEREST: Mary's heirs in EQUAL SHARES
 - Alfredine 1/5
 - Robert 1/5
 - Mona 1/5
 - Sara 1/5
 - Susan 1/5

Consolidation Agreement

- Designate one heir to take Mary's entire 25% interest in Allotment 202-3438

Rather than:

- Fractionating or splitting the 25% interest into five smaller interests.

Probate vs. Consolidation Order

| Mary's interest in Allotment 202-3438 | Heirs' Future Interest under Probate Order – EQAUL SHARES $\frac{1}{5}$ of $\frac{1}{4}$ = 1/20 or 5% | Heirs' Interest in Consolidation Agreement — KEEP DECEDENT'S INTEREST IN TACT: 25% |
|---------------------------------------|---|---|
| 1/4 or 25% | Alfredine 5% Robert 5% Mona 5% Sara 5% Susan 5% | Alfredine 25% Or Robert 25% Or Mona 25% Or Sara 25% Or Susan 25% |

ROLE OF PILOT PROJECT ATTORNEYS

- Attend Initial probate hearing
- Meet with interested families
- Educate families
- Receive probate file from OHA
- Request information from LTRO and agency office necessary to assist families at mediation
- Contact heirs to set up mediation
- If agreement reached, draft Settlement Agreement
- File signed Settlement Agreement with OHA

Requirements of Consolidation/Settlement Agreements

43 C.F.R. 30.150.

Judge will approve agreement if:

1. All parties have all material facts;
2. All parties understand effect of agreement;
and
3. It is in the best interest of the parties to settle.

The Other Half to Estate Planning: WILL DRAFTING

- Alfredine inherited her mother's entire interest in Allotment 202-3438: 25%.
- Alfredine has four children. Will Alfredine's 25% interest stay in-tact if she dies without a will?
- NO! The consolidation agreement delays future fractionation of Allotment 202-3438. Alfredine must take affirmative steps to ensure her interest does not fractionate in the future.

HOW? WILL DRAFTING

Will Drafting Basics

- What is a valid will? 25 C.F.R. 15.3 and 15.4
 - 18 years or older
 - Signed and dated by testator in the presence of 2 witnesses
 - Signed by two disinterested witnesses in presence of testator
- Section 25 USC 2206(b) of AIPRA governs who can inherit trust property.

Eligible devisees include:

- any lineal descendant of the testator
- A co-owner in the same allotment
- Indian tribe
- Any Indian

Will drafting Basics

Devises to non-Indians

- Can I devise my trust property to my non-Indian spouse?
 - Can devise land as a life estate to your spouse;
 - Future interest must go to eligible heir.
 - If land located on non-IRA reservation, can devise land in fee.

Will Drafting Basics

Joint tenant with right of survivorship

- AIPRA presumes the devise of trust land to more than one person creates a joint tenancy with the right of survivorship.
- WHY? Reduces fractionation.
- To avoid this presumption, you must specifically state in your will that you are devising your trust property to your heirs as tenants in common

Will Drafting

Take Home Lesson

- Consolidation agreements are a good start to reducing fractionation in that they delay fractionation until the devisee or heir passes without a will.
- However, will drafting is a key land management tool to provide a more long-lasting solution.
- But draft carefully:
 - If you do not follow the testamentary rules in AIPRA, your devise will be INVALIDATED, and the intestacy rules will kick in.

STATUS OF PILOT PROJECT— OHA REFERRALS FOR CONSOLIDATION

- 26 referrals
 - Blackfeet, Crow, Fort Belknap, Fort Peck and Northern Cheyenne
- 11 estates mediated
- 15 set for mediation
- 8 settlement agreements reached
 - Smallest estate mediated contained 3 interests in trust land
 - Largest estate contained 141 interests; one estate set for mediation contains 197 interests.