

Dept. of Interior BIA
in conjunction with
ITMA and Elk River Law Office
Report on Estate Planning Pilot
Project
for
Intertribal Monitoring Association
19th Annual Conference
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Elk River Law Office

Goal of Pilot Project

- Utilize estate planning tools in American Indian Probate Reform Act to address and manage fractionated lands in Indian Country
 - Consolidation agreements at probate
 - Will drafting
- Coordinate with the OHA to assist families of decedents owning trust or restricted property
 - Rocky Mountain region
 - Great Plains region

How do Consolidation Agreements at probate address fractionation?

- Exchange small interests in numerous allotments for larger interests in fewer allotments
- Result:
 - Increase individual Indians' and tribes' ability to maximize benefits from the land
 - Increase individuals' decision making authority over land
 - Increase tribal government authority over land
 - Increase revenue generated from land
 - Allows heirs and devisees to retain larger interests in land to pass on to next generation

Method for Referring Families

- OHA refers families to mediation at initial probate hearing if:
 - Families agree; and
 - Decedent owned an interest in at least one tract representing **25%** or more of the entire ownership of which such interest is a part.

ROLE OF PILOT PROJECT ATTORNEYS

- Attend Initial probate hearing; educate families about consolidation
- If family expresses interest, receive probate file from OHA
- Request information from LTRO and agency
 - Title Status Report
 - Owner Document Report
 - Landowner Income Report
- Conduct mediation
- 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.

Introduction to AIPRA

- American Indian Probate Reform Act of 2004
 - 25 U.S.C. §§ 2201-2221
- 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

REPORT ID: TA0071R
 REQUESTOR: ADERICHE

BUREAU OF INDIAN AFFAIRS
 INDIVIDUAL/TRIBAL INTERESTS REPORT
 ALL TITLE HOLDINGS

PAGE: 1
 DATE: 2/20/2006
 CST TIME: 12:04:13

-----OWNER-----
 TRB CL NUMBER TRIBE NAME BIRTHDATE: 12/19/1979
 201 U 017693 BLACKPEET, MT

-----NAMES OR ALIASES-----
 LAST NAME FIRST NAME MIDDLE NAME
 BIRDSWING TARA LYNN
 BIRDSWING TARA LYNN

-----TRACT ID----- TITLE LAND AREA RESOURCES -----DATE OF LAST-----
 LAC PFX NUMBER SFX PLANT FORT PECK BOTH ExamDate / VerifDate
 206 83 BILLINGS, MT
 BOWE, SAM
 ** ORIGINAL ALLOTEE **

SEC	TOWNSHIP	RANGE	COUNTY	ST MERIDIAN	LEGAL DESCRIPTION	SECTION COUNTY ACRES	CUM SECTION ACRES
16	027.000N	052.00E	ROOSEVELT	MT Principal	E NE SW	20.000	20.000

TOTAL SECTION ACRES: 20.000 20.000

-----OWNER-----		-----DOCUMENT-----		NAME IN WHICH FIRST ACQUIRED		FRACTION ACQUIRED	AGGREGATE CONVERTED	SHARE TO LCD	AGGREGATE DECIMAL
TYP	OT	INT	CLS	TYP	NUMBER				
I	T	A	11	IT	TC124R988	BIRDSWING, TARA LYNN	5 288	5 288	.0173611111

REPORT CONT...

INTESTACY RULES— WHO INHERITS DECEDENT'S 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
 - Parent(s)
 - Siblings
 - Indian tribe
 - Co-owners

Less than 5%

• **SINGLE HEIR RULE**

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

UNLESS

- Surviving Spouse living on allotment at time of your death:
 - **Life estate** in 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.

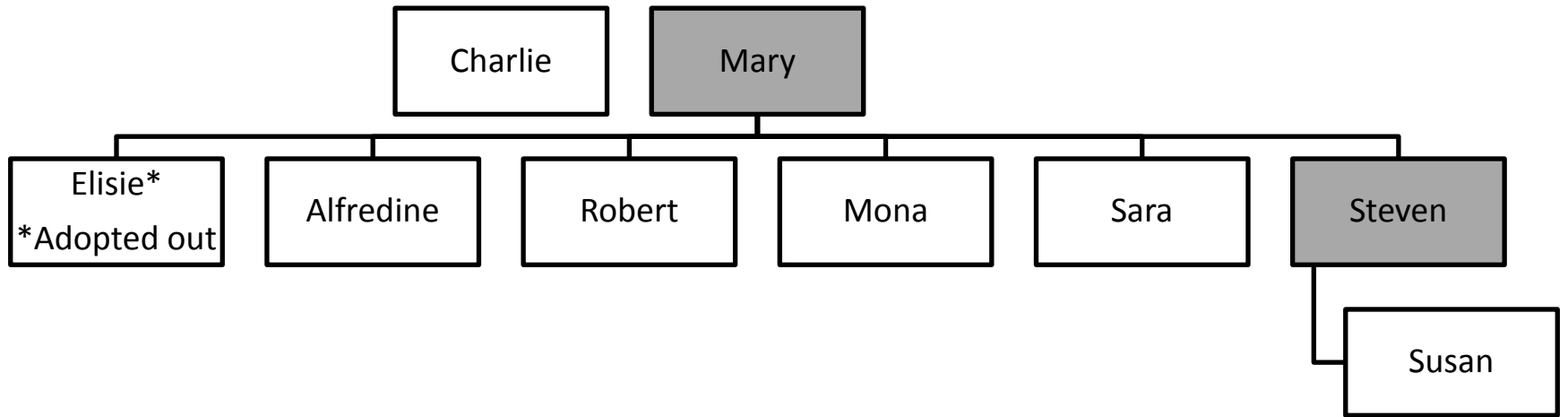
WHAT MOTIVATES FAMILY TO CONSOLIDATE?

- Primary Benefit: Reduce fractionation
- Other Benefits:
 - Consolidation at probate is only time heirs can sell, gift or exchange land without complying with Secretary's rules
 - Avoid potential litigation (e.g. will contests)
 - Pilot project provides service free of cost to participants!

Example of Consolidation

- Mary died without a will on December 1, 2007 owning trust property on the Crow Reservation. Mary had six children, all enrolled members of the Crow Tribe. Five children survived Mary: Elsie, Alfredine, Robert, Mona and Sara.
- Elsie was adopted out.
- 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?

Mary's Family Tree



How would Allotment 202-3438 be distributed under AIPRA?

AIPRA

- 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

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

Factors to consider in consolidation

Allotment	Legal Description	Type B = Both	Decedent's Interest	Total Acres	Estimated Value of Decedent's Interest	Yearly income Generated from Lease(s)
206 83	S16, T27N, R52E, E NE SW	B	5/288 1.74%	20	55.87	9.27

Allotment	Legal Description	Type S = Surface	Decedent's Interest	Total Acres	Estimated Value of Decedent's Interest	Yearly income Generated from Lease(s)
206 373	S5, T27N, R53E, N NE S6, T27N, R53E, NE SE	S	1/42 2.38%	280	595.24	14.63
206 M 373	S5, T27N, R53E, N NE S6, T27N, R53E, NE SE	M	1/42 2.38%	280	Nominal	—
206 154	S22, T27N, R52E, S SE SW S23, T27N, R52E, S SW SE	S	1/42 2.38%	80	238.10	6.61

Allotment	Legal Description	Type M = Mineral	Decedent's Interest	Total Acres	Estimated Value of Decedent's Interest	Yearly income Generated from Lease(s)
206 M 341	S8, T27N, R52E, SE SE NE	M	5/294 1.7%	160	Nominal	—
206 M 180	S8, T27N, R52E, NW SE	M	4/525 .76%	40	Nominal	—

The Other Half to Estate Planning: WILL DRAFTING

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

Will Drafting Basics

- What is a valid will? 25 C.F.R. §§ 15.3, 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
 - AIPRA governs who can inherit trust property.
 - any lineal descendant of the testator
 - Whether Indian or non-Indian
 - A co-owner in the same allotment
 - Indian tribe
 - Any Indian
- 25 USC § 2206(b)

Will Drafting Basics

Devises to non-Indians

- Can I devise my trust property to my non-Indian spouse?
 - Can devise life estate in the land to your non-Indian spouse;
 - Future interest, called a remainder interest must go to eligible devisee.
- Can I devise my trust property in fee to my non-Indian spouse?
 - ONLY IF: land from non-IRA tribe.
 - BUT: Tribe can purchase interest for FMV before transfer
 - UNLESS: Spouse renounces interest to eligible heir

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!
- 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 AIPRA's intestacy rules (i.e. life estate to surviving spouse and single heir rule) will kick in.

STATUS OF PILOT PROJECT— OHA REFERRALS FOR CONSOLIDATION

- 30 referrals
 - Blackfeet, Crow, Fort Belknap, Fort Peck and Northern Cheyenne Reservations
- 24 estates mediated
 - Of 24 mediated, 19 resulted in settlement agreements
- Smallest estate mediated contained 3 interests in trust land
- Largest estate mediated contained 141 interests

Consolidation Statistics

Greater than or Equal to 5% tracts

- Approximately 992 new undivided interests created absent consolidation agreements.
- Consolidation agreements resulted in approximately 201 new undivided interests.
- 29 1/1 tracts
 - 26 of the 29 remain 1/1

ISSUES IN CONSOLIDATING

- Appraisals
 - Valuation of mineral interests
 - Valuation of permanent improvements
- Obtaining decedent's updated ITI where decedent inherited land post-death and LTRO has not transferred title.

ISSUES IN CONSOLIDATION, cont.

- Minors and Non compos mentis. Who should sign when there is no legal guardian in place?
 - If Guardian ad litem, who should be appointed?
 - What duties does GAL have in signing consolidation agreement for minor or incompetent person?
- Partial Distribution of IIM account
 - 25 C.F.R. § 15.403