

A Quick Guide to the American Indian Probate Reform Act

National Congress of American Indians
April 13, 2006

The American Indian Probate Reform Act (AIPRA) was passed by Congress in late 2004. The Secretary of Interior sent notices to Indian landowners and tribes in April of 2005. The new law will take effect on June 20, 2006 and will apply to most allotted reservations. This guide is intended to help inform tribal leaders and landowners about the major effects of the new law.

Background

The federal government implemented the "allotment" policy in the late 1800's and individual Indians were given ownership to tracts of reservation land. Allotment is most common on reservations in the Great Plains, Rocky Mountain, Northwest and Western Regions. Allotment ended in 1934 with the passage of the Indian Reorganization Act, but there are still over 120,000 tracts of allotted land held in trust by the federal government for individual Indian owners. When the owners die, the Department of Interior must "probate" the land to pass it to the owner's heirs.

For most of the last 120 years, Indian allotments have been probated under state laws. Most landowners did not write wills and the land passed under the state "intestate" laws. State laws have had two negative effects. First, land ownership has become fractionated among multiple heirs. There are now more than three million ownership interests in the 120,000 tracts. Many tracts have over 500 owners and some more than 1000 owners. Fractionation creates difficulty for the owners in putting the land to use and enormous costs for the Interior Department in managing title, leasing and accounting. Second, state laws tend to pass ownership to the surviving spouse, who is often a non-Indian. This land goes out of trust status, resulting in a significant loss of trust land and problems with tribal jurisdiction. Both of these problems significantly worsen with the passage of time.

How AIPRA Changes the Probate of Indian Allotments

The big change in AIPRA is that it will replace state law with a federal probate code. The federal probate code is intended to limit fractionation, keep land in the hands of the Indian children of the owner, and encourage the drafting of wills. The basic rules are:

- If you write a will, you can do almost anything you want with your property. In general, you cannot devise your land in trust to non-Indians unless they are your lineal descendants.
- If you don't write a will:
 - Your spouse gets a "life estate" and holds property until death, then it passes to your children.
 - The land is inherited by children, grandchildren, parents, or siblings. If none, it goes to the tribe. Eligible heirs must be Indian or within two generations.
 - If land is less than 5% of the tract, your spouse gets a life estate only if she lives on the land, and it is inherited only by the oldest child or grandchild ("single heir rule", prevents fractionation). If none, it goes to the tribe.
 - The federal government, tribe and co-owners may purchase the land during probate. Consent of the heir is required, but if the interest is less than 5% and passes without a will, no consent is required unless the heirs live on the land.
 - Your heirs may enter a consolidation agreement and avoid purchase without consent.

Can Tribal Governments Write Their Own Probate Codes?

Yes, tribes can adopt their own probate codes for allotments on their reservation, and they can create or amend a code at any time in the future. Tribes have had this authority since at least 1983 but very few tribes have adopted their own codes. The new federal probate code may provide a starting point for tribes to develop their own laws. The tribal codes must be approved by the Secretary of Interior and there are some restrictions. A tribal code may not prevent inheritance by a lineal descendant (e.g., child, grandchild and so on) of the original owner. A tribal code must have some rule that limits fractionation like the single heir rule, but tribes have a great deal of flexibility and can be creative in drafting their codes to meet the needs of their own community.

Can You Get Help Writing a Will?

The new law makes it beneficial to write a will and control the inheritance of your property. However, the BIA is no longer providing assistance with the drafting of wills. Some Indian tribes and some Indian legal services organizations provide assistance with estate planning and will drafting for Indians. For more information, contact the Institute for Indian Estate Planning and Probate at 206-398-4284 or www.indianwills.org.

AIPRA says that the Interior Department is supposed to provide estate planning services “to the extent that amounts are appropriated for such purpose.” AIPRA also provides for grants to Indian tribes and legal services organizations to provide estate planning services. Interior has started a pilot project in South Dakota and Washington State, but is not currently funding any other estate planning services. If you are interested in the estate planning grants, you can submit a statement of interest to Office of Trust Services at the Bureau of Indian Affairs in Washington, DC.

Does AIPRA Apply on Every Reservation?

No. AIPRA does not apply on non-allotted reservations and does not apply to any property except federal allotments held in trust. It does not apply to tribal assignments or any property interest created under tribal law. Also, some reservations have special federal laws that determine the probate rules – like the Sisseton Wahpeton Reservation or the Five Civilized Tribes in Oklahoma.

What Else is in AIPRA?

AIPRA has a number of other new provisions that are aimed at land consolidation. There is a process for partition of highly fractionated land. The federal voluntary repurchase program has been expanded and made permanent, and the FY2007 budget request is at an all time high of \$59.5 million. There is also a provision for “owner management” where an owner or group of owners can make short term agricultural leases without Secretarial approval. Finally, tribes have a new right to purchase land to prevent it from being transferred out of trust status.

This is only a brief overview of the new law and is not intended as a guide for estate planning. AIPRA is a set of amendments to the Indian Land Consolidation Act found at 25 U.S.C. 2201 et seq.; the law itself is Public Law 108-374. For more information, please contact the National Congress of American Indians at 202-466-7767 or jdossett@ncai.org. Or contact the Institute for Indian Estate Planning and Probate at 206-398-4284 or www.indianwills.org.