

**PASSING TITLE TO TRIBAL LAND AND FEDERAL PROBATE OF NATIVE  
AMERICAN ESTATES**

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## I. THE CHANGING LANDSCAPE OF INDIAN ESTATE PLANNING AND PROBATE

*Without a historical perspective, Indian law can be a mystifying collection of inconsistencies and anachronisms.<sup>1</sup>*

It has been 71 years since Felix Cohen, prominent scholar and writer in the field of Indian law, asserted that a historical perspective is necessary for a clear view of the field of Indian law which otherwise would seem complex and mysterious. An examination of the law pertaining to Indian wills and probate tends to disprove Cohen's theory. That is, even with the historical perspective, this body of law remains a mystifying collection of inconsistencies and anachronisms to practicing attorneys and even more so to the Indian people whose lives are affected daily by the myriad of statutes, court decisions, treaties and administrative regulations that define this body of law. The law pertaining to Indian wills and probate serves as a good illustration, if not a prime example, of a discrete but extremely complex body of law that has historically and continues today to impact the lives and property of Indian people directly and indirectly.

The history itself is complex. In summary, it begins when tribally-owned reservations were surveyed, divided into parcels of 80 to 160 acres and conveyed to individual tribal members pursuant to the General Allotment Act of 1877<sup>2</sup> and other acts and treaties. The policy was aimed at eliminating the need for tribal existence and the guardian-ward relationship<sup>3</sup> by having Indian people turn to agricultural pursuits. Allotments were held in trust<sup>4</sup> which means that the United States held legal title to the property while tribal members held the right to use the property under beneficial title. The Act required that upon the death of the allottee that beneficial ownership pass in accordance with state laws of intestate succession.<sup>5</sup> The passage of undivided interests over the generations since the Act was implemented has resulted in allotments often having hundreds and thousands of individuals holding undivided interests in one allotment. This process, often referred to as "fractionation," has reached the point where ownerships as small as one-nine millionth have been identified.<sup>6</sup> The allotment policy was

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<sup>1</sup> Cohen, Handbook of Federal Indian Law, 2 (1934).

<sup>2</sup> Act of February 8, 1887, 24 Stat. 388, codified in part at 25 U.S.C. §§ 331 – 381.

<sup>3</sup> *Montana v. U.S.*, 450 U.S. 544, 559 n.9 (1981).

<sup>4</sup> Act of Feb. 8, 1887, § 5, 24 Stat. 388, 389.

<sup>5</sup> *Id.*

<sup>6</sup> Testimony of Ross O. Swimmer, Special Trustee for American Indians, House Resources Comm. Hrg. on S. 1721 (AIPRA) (June 23, 2004). Also, one 160 acre allotment made in 1887 would, by 1985, have passed to 312 heirs.

ultimately recognized as a failure<sup>7</sup> resulting in the loss of over two thirds of Indian lands, some 90,000,000 acres, from Indian ownership by 1934.<sup>8</sup>

The probate of interests in trust allotments and trust personality is through a federal probate process.<sup>9</sup> In some areas, the federal probate process is backlogged with many estates pending for years. Non-trust assets in an Indian person's estate are subject to state and tribal probate as well and, in some instances, probates in all three jurisdictions can be necessary.

In October, 2004, Congress passed the American Indian Probate Reform Act<sup>10</sup> which becomes effective in June 20, 2006. The purpose behind the Act is to slow or reduce fractionation and facilitate consolidation of fractionated interests through a revision of the law governing Indian wills and probate. The Act is some 47 pages long. Consequently, only a brief description of some of its provisions is possible here. Generally, the Act encourages Indian people to have wills done, if for no other reason, that to avoid the effects of the Act if they were to die intestate.

The Act authorizes Indian Tribes to enact tribal probate codes, subject to some restrictions, that will govern the descent and distribution of trust property in the federal probate process.<sup>11</sup> Tribal codes must be approved by the Secretary of Interior and cannot violate federal law. Testamentary rules are defined under the Act, including who can inherit trust property.<sup>12</sup> Most interests must be devised in trust status to eligible heirs, though some interests may be devised in fee to a non-Indian.<sup>13</sup> However, a tribe with jurisdiction over that parcel has the authority to interrupt the fee transfer by paying fair market value to the Secretary of Interior.<sup>14</sup> Without express language to the contrary, any devise to a class of individuals will be presumed a joint tenancy with right of survivor. The Bureau of Indian Affairs is authorized to partition highly fractionated allotments which means consolidate ownership of undivided interests in one owner instead of the traditional definition of partition.<sup>15</sup>

Perhaps the most significant changes are found in the provisions regarding intestate succession. Rules differ based upon whether the testator's undivided interest in trust or restricted land is greater or lesser than 5% of the whole. If the interest is less than 5%:

- Only a spouse residing on the parcel may take a life estate;<sup>16</sup>
- Under the single heir rule, the remained would go to the oldest surviving child; If no surviving children then oldest surviving grandchild, if none, to the tribe and, if none, then divided equally among co-owners.<sup>17</sup>
- A third party purchase at probate is permitted without the consent of the heir.<sup>18</sup>

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The largest holding was 4 acres and the smallest was .0009 acres (the yearly income for the owner of this plot was less than one cent). McDonnell, *The Dispossession of the American Indian, 1887 – 1934*, 121 (1991).

<sup>7</sup> Nabokov, *Native American Testimony*, (1999).

<sup>8</sup> Cohen, *Handbook of Federal Indian Law*, 306 (1982 Ed.).

<sup>9</sup> See, 25 C.F.R. Part 15.

<sup>10</sup> Act of October 27, 2004, 118 Stat. 1773, codified at 25 U.S.C. §§ 2201 – 2221.

<sup>11</sup> 25 U.S.C. § 2205.

<sup>12</sup> 25 U.S.C. § 2201(2).

<sup>13</sup> 25 U.S.C. § 2206(b)(2)(A)(ii).

<sup>14</sup> 25 U.S.C. § 2204(c)(1)(a).

<sup>15</sup> 25 U.S.C. § 2204(d).

<sup>16</sup> 25 U.S.C. § 2206(a)(2)(D)(ii).

<sup>17</sup> 25 U.S.C. § 2206(a)(2)(D)(I), (II), (III), (IV) and (V).

If the interest is greater than 5%, some of the provisions allow the following:

- Interests will pass to surviving spouse in a life estate without regard to waste and regardless of whether the spouse resides on the parcel at the time of death;<sup>19</sup>
- Remainders pass to children who are eligible heirs in equal shares by right of representation;<sup>20</sup>
- If no children survive then to grandchildren, then great-grandchildren, then to surviving parents, then to surviving siblings, then to tribe unless a co-owner offers to purchase the interest;<sup>21</sup>
- Interests may be purchased at probate only with the consent of the intended heirs.<sup>22</sup>

A thorough study of the Act is necessary to grasp the multitude of changes it creates.

For many years the Bureau of Indian Affairs drafted wills for tribal members. In April of 2005, the BIA announced that it would no longer provide this service and it would no longer store wills as it had done for decades previously. These announcements, coupled with the substantial changes wrought by the Act, created a vast void in terms of estate planning services as well as advice and information to tribal members.

The Institute for Indian Estate Planning and Probate was established in May of 2005 and opened its doors at Seattle University School of Law on August 1, 2005, with a mission of attempting, at least in part, to meet these needs in Indian Country. The Institute oversees several estate planning projects including three law school externship projects funded by the Indian Land Tenure Foundation,<sup>23</sup> and a \$519,000.00 contract with the Department of Interior for estate planning pilot projects in the Northwest and Great Plains regions. The Institute is actively working to establish new projects as funding permits, engaging in fund-raising activities to support this work, and providing training at all levels on estate planning in Indian Country under the new Act. The Institute hosted a national symposium and CLE on the American Indian Probate Reform Act and estate planning in Indian Country in March, 2006 at Seattle University School of Law. Another symposium will be held in South Dakota in July 2006. For more information about the Institute, please contact us or visit our website under construction at [www.indianwills.org](http://www.indianwills.org).

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<sup>18</sup> 25 U.S.C. § 2206(p).

<sup>19</sup> 25 U.S.C. § 2206(a)(2)(A)(ii).

<sup>20</sup> 25 U.S.C. § 2206(a)(2)(B)(i).

<sup>21</sup> 25 U.S.C. § 2206(a)(2)(B)(ii), (iii), (iv) and (v).

<sup>22</sup> 25 U.S.C. § 2206(p)(3)(B).

<sup>23</sup> <http://www.indianlandtenure.org>

## II. LOOKING DOWN THE RABBIT HOLE – FEDERAL INDIAN TRUST LANDS AND ESTATE PLANNING

*“Be what you would seem to be”- Lewis Carroll, Alice’s Adventures in Wonderland*

An initial introduction to federal trust land rules and regulations make the most learned practitioner of real property and estate planning feel “curiouser and curiouser.” Where terms such as title, partition, transfer, interest passing and property rights hold meaning other than what they would seem to be. For example, a “partition” under AIPRA is not the legal division of a parcel by co-owners. Rather a partition is a reconsolidation of all interests in that parcel to one petitioning co-owner with consent required from only 50% of all co-owners in that parcel.<sup>24</sup> Outside the rabbit hole, this would be titled a forced sale by one co-owner against another, or if governmental action – eminent domain.

The federal government holds legal title to all trust lands, with beneficial title held by the individual Indian. Federal law restricts when, where, and how trust lands can be transferred, leased, mortgaged or otherwise alienated or encumbered. The following is intended to be a brief, non-inclusive, introductory overview of the American Indian Probate Reform Act of 2004. A thorough review of the new law and regulations should precede any Indian estate planning legal services.

### A. Current Law

Section I of these materials provide a brief overview of the history leading to the passage of The American Indian Probate Reform Act of 2004 (AIPRA)<sup>25</sup>. AIPRA applies to the probate of estates of Native Americans who died after the Acts effective date of June 20, 2006. AIPRA creates, for the first time, a federal probate code that governs the testamentary and intestate descent and distribution of an individual’s trust land, as well as creating purchase options at probate and partitioning through forced sales outside of probate. AIPRA has specific provisions that make will drafting for individuals important. Under AIPRA, estate planning in Indian Country can be a complex blend of federal and tribal laws.

### B. First Steps for the Attorney

For the attorney with a Native American client, it is imperative to know certain information about your client to determine the proper laws and jurisdiction that may govern the estate plan.

#### 1. Is your client a legally defined “Indian”?

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<sup>24</sup> 25 U.S.C. § 2204

<sup>25</sup> 25 U.S.C. §§ 2201 - 2221

AIPRA provides its own definition of Indian, which is not applicable to other federal laws or definitions. Generally, your client is an “Indian” if he/she is a member of a federally recognized Indian tribe, or eligible to become a member, or was an owner of trust lands prior to October 27, 2004. AIPRA defines “Indian” as:

- a) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner, as of October 27, 2004, of a trust or restricted interest in land;
  - b) any person meeting the definition of Indian under 25 USC § 479
  - c) “All persons of Indian descent who are members of any recognized Indian tribe under federal jurisdiction, and all persons who are descendents of such members who were on June 1, 1934 residing within the present boundaries of any Indian reservation, and all other persons of one-half or more Indian blood. The act includes Eskimos and aboriginal people of Alaska.”
  - d) with respect to the inheritance and ownership of trust or restricted land in the state of California pursuant to Section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that state.<sup>26</sup>
2. What tribe is your client a member of and does that tribe have its own approved probate code?

A tribe may have federally approved tribal probate code that supersedes AIPRA and governs the descent and distribution of trust and restricted lands over which it has jurisdiction, as well as all non-trust property and personal property.<sup>27</sup>

3. What trust holdings does your client have and where are those trust lands located?

Trust property is governed by federal law and probated by the Department of Interior - Office of Hearings and Appeals. Even if the tribe has an approved probate code, OHA will probate the estate and the tribal probate code will be applied in the federal proceeding. If your client has trust land interests from several different tribes, the client’s estate could be probated using several different federally approved tribal probate codes or when no tribal code, AIPRA.

4. IRA or Non-IRA Lands?

Indian Reorganization Act (IRA) tribal lands cannot be transferred out of trust or restricted status, unless the Tribal constitution or by-laws specifically grant this ability.<sup>28</sup> Non-IRA tribal lands can be devised in fee to a non-Indian only, removing the land from trust status.<sup>29</sup> If a will

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<sup>26</sup> 25 U.S.C. § 2201(2)

<sup>27</sup> 25 U.S.C. § 2205(a)

<sup>28</sup> 25 U.S.C. § 2206(b)(2)(B) and 25 U.S.C. § 464

<sup>29</sup> 25 U.S.C. § 2206(b)(2)(A)(ii)

devises an IRA trust land interest in fee status to anyone, the devise will be considered invalid and that interest will be distributed under the federal or tribal laws of intestate succession.

For a complete list of IRA and Non-IRA Tribes, please see The University of Oklahoma Law Center's "Indian Reorganization Act Era Constitutions and Charters" on the World Wide Web at <http://thorpe.ou.edu/IRA/IRAbook/tribalgovpt1tblA.htm>

#### 5. Is your client a member of the Five Civilized Tribes and Osage?

AIPRA generally does not apply to the trust lands of the Five Civilized Tribes or the Osage. The Five Civilized Tribes of Oklahoma: Creek, Cherokee, Seminole, Chickasaw and Choctaw are governed and probated by State of Oklahoma laws, and have specialized rules. However, Five Civilized Tribe's members can have trust land interests within Oklahoma, which through purchase or fee to trust transfers, are subject to the federal probate process and AIPRA will apply.

Additionally, AIPRA will apply to members of these tribes who hold trust or restricted land interests outside the jurisdiction of the Five Civilized Tribes and Osage. For example, a Cherokee Indian with Crow trust or restricted land holdings, those Crow interests will be federally probated under AIPRA.

#### 6. How do I get information on the Tribe?

Consult with the tribal government, Bureau of Indian Affairs, and Office of Special Trustee of that region for more information on the applicable laws that govern your client's trust lands and estate plan.

For contact information, please see the 2006 Tribal Leaders and Bureau of Indian Affairs Offices National Guide by The Department of Interior on the World Wide Web at <http://www.doi.gov/leaders.pdf#search='DOI%20Tribal%20Leaders%20Directory'>

#### 7. Generally - What Laws Govern The Estate Plan

For federal trust lands and Individual Indian Money Accounts: Federal jurisdiction applies unless the tribe has a federally approved tribal probate code or land acquisition plan. Estate plans must comply with AIPRA as well as any tribal probate code. All federal trust property, both lands and monies, will be probated by the Department of Interior Office of Hearings and Appeals.

For personal property, fee lands, automobiles, etc.: Generally, there is no state jurisdiction over Indian people and their property within Indian Country<sup>30</sup> unless authorized by Congress.<sup>31</sup> State jurisdiction may apply where personal property is situated outside of Indian

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<sup>30</sup> 18 U.S.C. § 1151 defines Indian Country as all territory within the reservation boundaries, dependent Indian communities, and allotments situated outside of the reservation

<sup>31</sup> One example, though limited, is P.L. 280, 28 U.S.C. § 1360



Country. Otherwise, tribal jurisdiction will apply to personal property owned by an Indian person within Indian Country.

### C. Determining Your Client's Trust Holdings

#### 1. Individual Trust Inventory Record (ITI)

An ITI is similar to a county land title record, except that the ITI contains records of all title information held by your client nationwide. ITI information includes which reservation the lands are located, the legal description of the parcel, the type of interests held such as surface and/or mineral, as well as the percentage of ownership interest.

ITIs should be requested from the Bureau of Indian Affairs (BIA) Regional Agency. Tribal Realty offices also have this information, as well as maps of the allotments within their reservation. However, tribes generally only maintain records for their tribal lands. It is common for clients to have holdings on several different reservations, making it imperative to get the ITI from the BIA so a complete record of all trust interests is reported.

#### 2. Individual Indian Money Accounts (IIM)

IIMs are federal money trust accounts held by the government for your client. The money comes from revenue generated by the trust land interests your client holds, such as grazing, leasing, timber or mineral harvests. A statement of account for the IIMs must be requested from the Office of Special Trustee, Department of Interior regional agency or office.

IIM accounts are the subject of the Cobell v. Norton, a pending federal class action lawsuit. Millions, possibly billions of dollars are unaccounted for. Because it is possible that a class action settlement could occur, an attorney should draft a provision for IIM monies even if the client believes they do not have an account or the IIM report shows no monies in it.

#### 3. Trust Record Errors

Errors are not uncommon in Trust Records. Examples of trust land errors include a tribal member who has trust holdings listed under two separate BIA numbers for which the second BIA number would not come up under their name. Another example is missing trust lands from their ITI report, even though client has historical documentation showing ownership. If you discover errors, file the a request for correction with the BIA/OST.

#### 4. Requesting a copy of your client's trust or restricted land records

A release of information form will allow you to obtain copies of Individual Trust Interest Reports (also known as ITI or ITR) and Individual Indian Money Account Reports (IIM). Request any information on encumbrances or assignments, some regions use the term "branch review." You will find in Section III of these material, copies of federal release forms for ITI &

IIM accounts, as well as a document prepared by Dakota Plains Legal Services titled “How to read an ITI.”

#### D. Requirements for a valid Indian Will

1. 18 years or older with testamentary capacity<sup>32</sup><sup>33</sup>
2. Testator has trust land interest or trust personalty<sup>34</sup>
3. Written and dated<sup>35</sup>
4. Signed by Testator<sup>36</sup>
5. Attested by two disinterested Adult Witnesses<sup>37</sup>

Please note that two disinterested adult witnesses are required for the will to be valid. This differs from state law where a presumption of undue influence may be applied rather than invalidating the will if an interested witness signs.

#### E. AIPRA’s Intestacy Provisions for Federal Trust Lands

Trust or restricted property will be divided into two categories at probate: those interests less than 5% and those interests 5% or greater. Different intestacy rules apply to each category. The rules were drafted in an attempt to stop the further fractionation of trust lands and to support reconsolidation efforts. The Act defines who eligible heirs are with and without a valid will.

##### 1. Eligible Intestate Heirs<sup>38</sup>

To receive trust lands, the heir must be eligible under AIPRA. An eligible heir is:

- a. An Indian, or
- b. Lineal descendants within two degrees of consanguinity of an Indian, or
- c. Co-owners of a trust or restricted interest in the decedent's trust or restricted parcel to be inherited

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<sup>32</sup> 25 C.F.R 15.3

<sup>33</sup> Testamentary Capacity has been defined as consist with American Jurisprudence, the requisite mental capacity an Indian must possess, including the ability to remember the nature and extent of his property, to recognize the natural objects of his bounty, and to understand the nature of the testamentary act. Estate of Red Eagle, 4 IBIA 52, 82 I.D. 256 (1975)

<sup>34</sup> Id.

<sup>35</sup> 25 C.F.R 15.4

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> 25 USC § 2201(9)

## 2. Trust Interests less than 5% - The Single Eligible Heir Rule<sup>39</sup>

Without a valid will, interests less than 5% will be distributed as follows:

The surviving spouse will receive a life estate only in the trust or restricted parcel they reside upon at the time of decedent's death.

All other interests and the spouse's remainder will transfer to a single eligible heir only - the oldest surviving eligible child, grandchild or great grandchild.

If none, the interest will transfer to the tribe with jurisdiction.

If no tribe, then to other co-owners.

If none, then to Secretary for sale with proceeds placed into a federal land acquisition account.

## 3. Trust Interest 5% or Greater

Without a valid will, interests 5% or greater will be distributed as follows:

To the surviving spouse in a life estate without regard to waste. The spouse will have the right to live on and benefit from any income generated by the interests for their lifetime.

When the spouse dies, the interest(s) will pass to the decedent's eligible children equally by right of representation.

If no surviving eligible children or grandchildren, then to parents or siblings.

If none, the interest will transfer to the tribe with jurisdiction.

If none, then to other co-owners.

If none then to Secretary for sale with proceeds placed into a land acquisition account.

## 4. Intestate Distribution of Trust Personalty (IIMs)

Without a valid will, Trust Personalty (IIMs) will be distributed as follows:

To a Spouse and Children - 1/3 to Spouse and 2/3 to children equally by right of representation

To a Spouse and Decedent with no Children - 100% to Spouse

To Children (no surviving spouse) - 100% to children equally by right of representation

To Grandchildren (no surviving spouse or children) - 100% to grandchildren equally by right of representation

If none, then in descending order to be shared equally by the class - Parents, Siblings, Tribe

## 5. Purchase Options at Probate

Purchase Options at Probate includes provisions for sales of trust or restricted land interests without consent of heirs. Without a Will, a co-owner, either an individual or the tribe, may petition to purchase the decedent's trust or restricted land interests at probate for no less than fair market value. Consent is required from the heir(s) for the sale of interests 5% or greater.<sup>40</sup> Consent is required from the heir if the heir lives on that parcel at the time of decedent's death<sup>41</sup>.

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<sup>39</sup> 25 U.S.C. 2206(a)(2)(D)

<sup>40</sup> 25 U.S.C. § 2206(p)(3)

<sup>41</sup> 25 U.S.C. § 2206(p)(3)

No consent is required from the heirs for the sale of interests less than 5% unless the interest is devised by a valid will or the heir lives on that parcel at the time of decedent's death.<sup>42</sup>

Under the interpretation of the current published for comment draft of the Code of Federal Regulations, the "interests passing" under AIPRA<sup>43</sup> are not the decedent's interests, but the future expectancy that will vest with the heirs.<sup>44</sup> This means that not only those interest that the decedent holds less than 5% at the time of death, but those interests 5% or greater that fall below 5% with application of AIPRA's intestacy rules at probate. The result of this provision is a decedent with a 20% interest and five children, will have the 20% divided between all children, reducing it to a 4% interest and subjecting all to sale without consent

## 6. Ways to Avoid Purchase without Consent at Probate

1. A valid will precludes sales without consent at probate, or
2. The heir lives on that trust or restricted parcel at the time of decedent's death, or
3. The heirs agree to a consolidation plan at probate<sup>45</sup>, consensually agreeing to consolidate by transferring their individual interests to another heir at probate so as to maintain the total interest above the 5% threshold. Only those heirs that choose to join the agreement will have their interests consolidated.

### F. Permissible Testamentary Devises under AIPRA

1. A devise in Trust or Restricted Status to:<sup>46</sup>
  - i. Any lineal descendents of the testator, such as any children, grandchildren, great grandchildren, regardless of their status as Indian
  - ii. Any co-owners of trust or restricted interest in the that same parcel to be inherited, regardless of their status as Indian
  - iii. Tribe with jurisdiction
  - iv. Any Indian from any tribe
2. A devise in Fee status:

There are limited eligible devisees for transfer of trust lands into fee status without federal restrictions. If non-IRA lands, a non-Indian devisee is eligible.<sup>47</sup> If IRA lands, there are no eligible devisees – the land cannot be transferred in fee status unless a Tribe's constitution or by-laws permit this.<sup>48</sup> We are aware of no IRA tribes that permit this transfer. Additionally,

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<sup>42</sup> 25 U.S.C. § 2206(p)(5)

<sup>43</sup> 25 U.S.C. § 2206(p)(5)(ii)

<sup>44</sup> 43 CFR 30.163 (Draft dated August 8, 2006 published for comment, period expiring January 2, 2007)

<sup>45</sup> 43 CFR 30.150 – 30.153

<sup>46</sup> 25 U.S.C. § 2206(b)(1)(A)

<sup>47</sup> 25 U.S.C. § 2206(b)(2)(A)(ii)

<sup>48</sup> 25 U.S.C. § 2206(b)(2)(B) and 25 USC § 464

devises in fee may only serve your client's goals if they are a 100% interest holder in that parcel. A devise in fee of a partial interest will transfer your client's percentage into fee status, subjecting it to state taxation but will not partition that interest from the rest of the allotment. So in essence, the client will have undivided fee interest subject to taxation within the trust allotment.

### 3. Joint Tenancy with Right of Survivors (JTROS) Presumption<sup>49</sup>

AIPRA presumes a JTROS, unless the testamentary language expressly states otherwise. This presumption applies to all wills executed after June 20, 2006.

### 4. A life estate to:<sup>50</sup>

Anyone can receive a life estate, with the devise of the remainder to eligible heir(s) as listed above in section 1.

#### a. Life Estate Information

Life Estates allows the beneficiary(s) the right to enjoy the property and any income from it for their life, then gives the remainder to an eligible heir(s) or the Tribe. Two (2) Consecutive Life Estates are allowed under federal law. The parenthetical language is the traditional federal method of expressing the devise of the remainder.

*To A for life, at A's death to B,C & D for life remainder (over) to \_\_\_\_\_ Tribe.*

To draft for a life estate that ensures a JTROS before the remainder vests, careful drafting language should reflect this intent. One example of drafting Life Estates for multiple beneficiaries as JTROS:

*A 100% life estate [in the entire estate or in Allotment "X"] to A, B and C, initially in equal shares, but with each surviving tenant's share increasing at the death the other life tenants. At the death of the last surviving life tenant, 100% of remainder to \_\_\_\_.*

#### b. Life Estates Without Regard to Waste

AIPRA provides that a life estate is given "without regard to waste." This is defined as follows:

"with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen."<sup>51</sup>

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<sup>49</sup> 25 U.S.C. § 2206(c)

<sup>50</sup> 25 U.S.C. § 2206(b)(1)(B)

<sup>51</sup> 25 U.S.C. § 2201(10)

The current draft of 43 CFR 179.9 further clarifies the meaning, that a life tenant may possess and use estate assets, receive profits, rents, income produced by estate, sell or mortgage life estate described in the conveying order or document. Under Draft 43 CFR 179.9, life estates created prior to AIPRA, the life tenant can take no action that would diminish the remaindermen's estate, such as depleting resources like mineral or timber without consent of remaindermen. There are no similar protections under the current draft CFRs. Therefore, drafting restricted life estates may be appropriate for your client.

## 5. Residuary

Careful drafting is required for residual clauses. Consideration should be given to include an eligible heir in the residuary clause. If not, all trust property that passes into the residue without an eligible heir will be considered an invalid devise as to those trust assets. The laws of intestate succession will then be applied to the invalid devise and the trust assets will be subject to purchase options at probate.

## 6. Inter Vivos Transfers

Gift Deeds are the legal transfers of trust property during your client's lifetime. The gift deed can transfer the trust property to another eligible heir or co-owner with the client reserving a life estate for themselves in that interest. Gift deeds once executed are not revocable. All federal gift deeds applications contain questions of competency and best interest testing to allow transfer. The application must be filed with and approved by the BIA. Contact the local BIA office for a copy of its Gift Deed form. Each region uses different forms and the form must be filed using that region's procedures. Be aware that there are at least two different types of forms, one for IRA and one for non-IRA land.

## 7. Important Land Definition under AIPRA

"LAND" means any real property, including improvements permanently affixed to it.<sup>52</sup>

While this is a standard definition under state property law, it is a new definition under federal law. Previously under ILCA, structures built upon the land were undefined and the federal probate courts often treated the home as personal property<sup>53</sup>.

Under AIPRA, the definition is now settled and raises serious problems for tribes and trust land owners with homes built upon them because all co-owners in that parcel will now share a similar interest in the home UNLESS the client has been proactive and judicious, garnering a lease agreement or release of interest from all other co-owners.

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<sup>52</sup> 25 U.S.C. § 2201(7)

<sup>53</sup> *Olsen v. Portland Area Director*, 31 IBIA 44, 51 (1997); *Rhead v. Acting Portland Area Director*, 18 IBIA 257 (1990); *Estate of Ross*, 5 IBIA 277, 279 (1976)

Homes are often built on trust lands using tribal or governmental finance contracts because the land underneath cannot be encumbered with a mortgage. The home may not legally merge with the land until the contract is fulfilled. Review all contracts involving the home to determine the status of the structure. Additionally, the contract can supersede disposition by will if the contract designates its own beneficiary.

Senate Bill 3526 is currently pending for vote in the U.S. House of Representatives, which would alter the definition of land as follows:

*“land”*

*(A) Means any real property; and*

*(B) for purposes of intestate succession only under section 207(a), includes with respect to any decedent who dies after July 20, 2007, the interest of the decedent in any improvements permanently affixed to a parcel of trust or restricted lands (subject to any valid mortgage or other interest in such an improvement) that was owned in whole or in part by the decedent immediately prior to the death of the decedent.*

#### 8. Drafting One Will or Two?

ONE – that covers both trust and personal property is safer, easier, simpler for the client.

TWO - If you draft a will only for the client’s trust property, you must specifically advise them to include reference to this will in any future non-trust property wills executed. If this is not done, the standard revocation language shall invalidate the first will.

#### 9. Where to begin - Drafting for Trust Property

- b. Ask your client about the trust holdings they are aware of, and for copies of any documentation they may have
- c. Get a release and request copies of their ITI and IIM reports from BIA/OST
- d. Note where the lands are located and check for approved tribal probate codes and tribal land consolidation agreements.
- e. Determine if the tribe is IRA or non-IRA
- f. Different rules govern IRA/non-IRA lands. IRA lands may not be devised in fee status unless tribal constitution or by-laws permit it.<sup>54</sup> Non-IRA lands can be devised in fee to a non-Indian<sup>55</sup>
- g. Request a realty map from the Tribe’s realty office if available. This will allow your client to locate where the interests are located and make informed decision about their distribution.

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<sup>54</sup> 2206(b)(2)(B)

<sup>55</sup> 2206(b)(2)(A)(ii)

### **III. AIPRA INTESTACY CHARTS AND FEDERAL RELEASE FORMS**

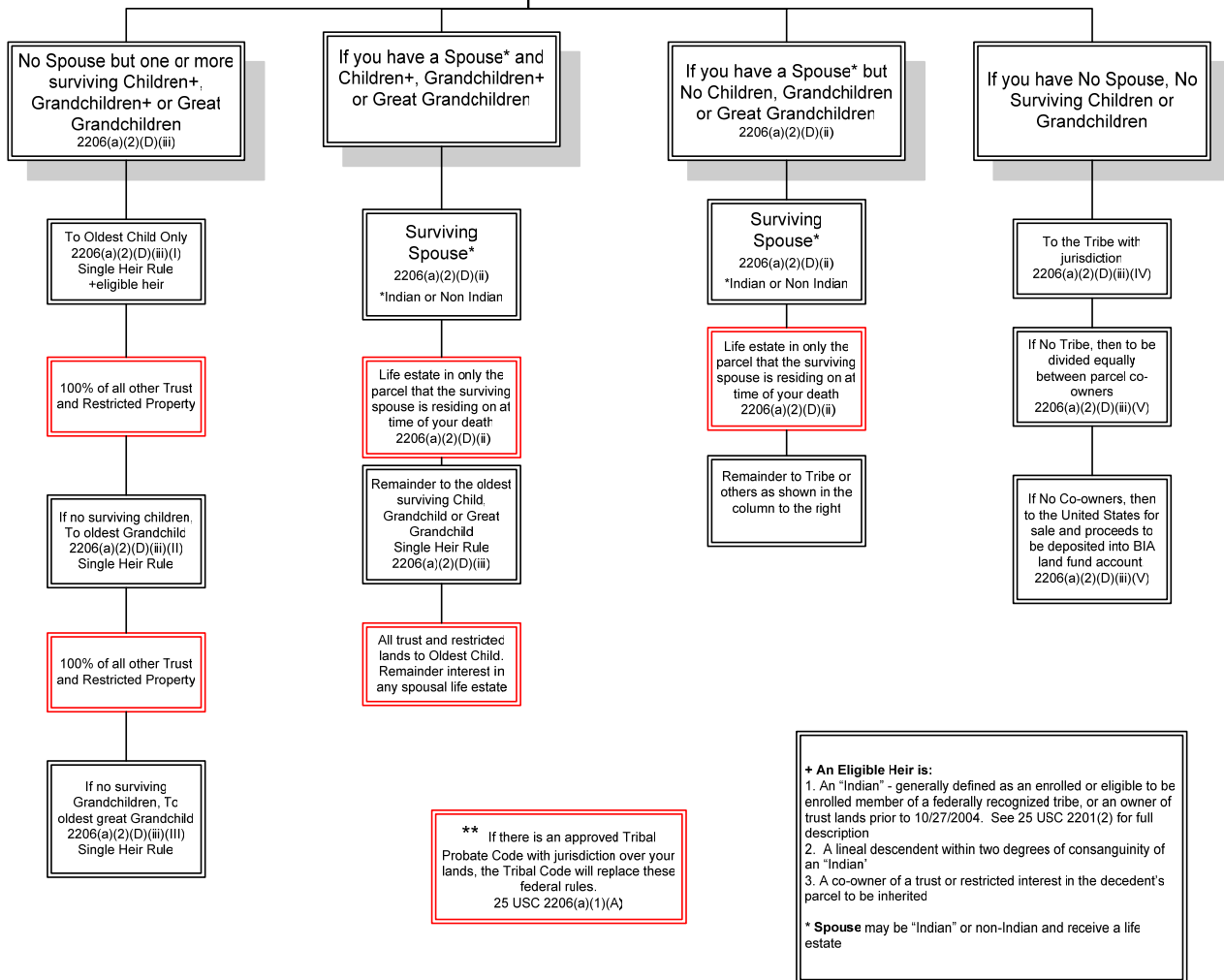
The following charts illustrate intestate succession under AIPRA, for those interests less than 5% and those interests 5% or greater.

The following forms are samples of release of information for ITI and IIM, as well as a quick guide on how to read an ITI.

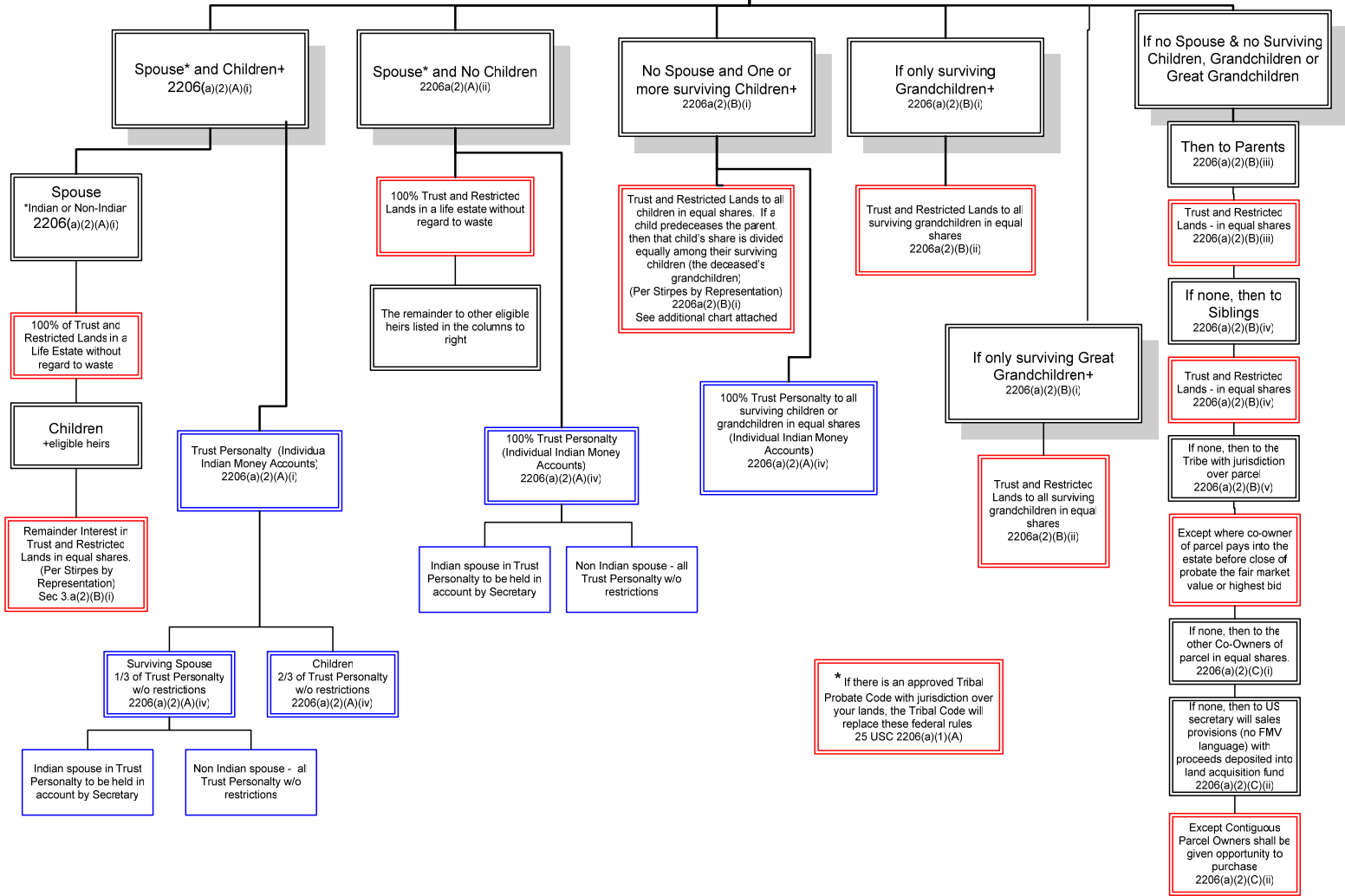


Without a will, your Trust Land Interests less than 5% are divided as follows  
2206(a)(2)(D)\*\*

Chart by Cecelia Burke, Institute for Indian Estate Planning  
www.indianwills.org



Without a valid will, your Trust Land Interests 5% or greater will be divided as follows under  
**25 USC 2206a(2)(A)&(B)\***  
 Chart by Cecelia Burke, Institute for Indian Estate Planning  
 cburke@indianwills.org



Date: \_\_\_\_\_

Bureau of Indian Affairs  
Land Titles and Records Section  
Agency/Agencies: \_\_\_\_\_

To Whom It May Concern:

I am preparing a will and need a current list of my interests in trust property. Please provide me a list of any interests I have in trust property anywhere, and the names, addresses, and interests of any co-owners of such property. Specifically, please provide me with a copy of my **Individual Trust Inventory Report (ITI)**. The following is my information:

\_\_\_\_\_  
(My name)

\_\_\_\_\_  
(My BIA Number)

\_\_\_\_\_  
(My Social Security Number)

\_\_\_\_\_  
(My mailing address)

\_\_\_\_\_  
(City, State, and Zip Code)

\_\_\_\_\_  
(My telephone number)

You have my authorization to send the information to the following person who is assisting me:

\_\_\_\_\_  
(My name)

c/o \_\_\_\_\_  
(My attorney or assistant's name)

\_\_\_\_\_

I make this request pursuant to 5 U.S.C. § 552(a) and 25 U.S.C. §2216(e). I look forward to your response within the required time. Thank you for your assistance with this matter.

Sincerely,

\_\_\_\_\_  
(My signature)

**CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_ [Date] by  
\_\_\_\_\_ [name of principal].

[Notary Seal, if any]:

\_\_\_\_\_  
(Signature of Notary)

Notary Public for the State of:

\_\_\_\_\_

My commission expires:

\_\_\_\_\_



## **READING YOUR INDIVIDUAL/TRIBAL INTERESTS REPORT IN SOUTH DAKOTA**

**The following is intended to simplify your reading of your ITI (Individual/ Tribal Interest Report). This report is generated by the Land Record Information System at the Land Title and Records Office in Aberdeen, SD and lists all you land (surface) and mineral (mineral rights) holdings. (Fractionated or Whole)** The report is both vertically (columns) and horizontally (lines), depending on the information given. Each report has a page number in the upper right hand corner and had an End of Report note on the last page.

**REPORT-ID:** - This is an internal code to identify the type of BIA report.

**REQUESTER:** - These are the initials of the BIA employee who has requested your report.

**DATE:** - The date the report was requested.

### **OWNER**

**RES** – (Reservation) 340 is the code for Cheyenne River

**NUMBER** – This is your enrollment number.

**NAME** – Your name and aliases. The BIA tracks all land ownership by enrollment number and not by name, so don't be alarmed if an alias appears in this section.

### **TRACT ID**

**RES** – This is the reservation code and can vary. 340 is the code for Cheyenne River, 302 for Standing Rock, 345 for Rosebud, etc.

**PFX** – This stands for Prefix and is part of the tract numbering system. T is for Tribal, TM is for Tribal mineral, TX is for Tribal exchange, TMX is for mineral exchange, X is for exchange, M is for mineral, MX is for mineral exchange. There is very important as it is the main identifier of your land.

**NUMBER** – Tract number. This is very important as it is the main identifier of your land.

**SFX** – This strands for Suffix and it is part of the tract numbering system. Normally when a tract is subdivided it is assigned an A, B, C etc.

**TITLE PLANT** – Aberdeen

**STATE** – SD South Dakota

**MERIDIAN** – BH (Black Hills)

**RESERVATION NAME** – Self-Explanatory

**RESOURCES** – This is what you own. BOTH is surface and mineral, SURFACE is surface rights only, MINERAL is mineral rights only.

**DATE OF LAST EXAMINATION/VERIFICATION** – This is the date of the last activity in this tract. Such as ordering a Title Status Report or other activity.

The next section is the land description and includes the **SEC-** Section, **TOWNSHIP, RANGE, & COUNTY** the land is located in. There is also an area which has the **NE QTR** (Northeast quarter), **NW QTR** (Northwest quarter), **SW QTR** (Southwest quarter), and **SE QTR** (Southeast quarter) each having 160 acres more or less in them. Each of these has NE, NW, SW, & SE vertically under each of them. These represent forty acres each within each quarter. There will be an X directly below each section that represents the land within the tract that is part of the tract. If there is a number rather than an X below the section, then the number represents a lot or lots described to the far right of the land description under **LAND DESCRIPTION NOTES**. Generally this will account for the tract being smaller than the 160 normal acres in a quarter.

**SECTION COUNTY ACRES** – these are the number of acres in this tract. Keep in mind that there may be more than one land description in the tract. This is summed up in the **TOTAL TRACT & CUM SECTION ACRES**.

The last section is information on your percentage of ownership of this tract. The **OWNER-\_\_\_\_\_DOCUMENT** provides the BIA with information about ownership status (probate, inheritance, and documentation) and will not be necessary to be read.

The **NAME IN WHICH ACQUIRED** is the name you used when you first acquired the land. The BIA tracts all land ownership by enrollment number and not by name, so don't be alarmed if an alias appears in this section.

**FRACTION OF TRACT AS ACQUIRED** – this is the fraction of ownership when you first acquired your share of land in this tract. 1 over 2 would be  $\frac{1}{2}$  ownership share or 50%. 7 over 405 would be  $\frac{7}{405}$  or 1.72839506% ownership share. 1 over 1 is  $\frac{1}{1}$  or 100% ownership share. This is very important, as this is the percentage of your ownership interest in the land in this tract.

This is totaled in **AGGREGATE SHARE CONVERTED TO LCD** (lowest common denominator), which is your total fraction. This is converted to a decimal, which appears under the column **AGGREGATE DECIMAL**.

You can multiply the **TOTAL TRACT ACRES IN CUM. SECTION ACRES** column by your **AGGREGATE DECIMAL** (the total percentage of your share in the tract) to find out exactly what your fractionated share is in the tract. If your **AGGREGATE DECIMAL** is 1.000 then you own the whole tract and no further math is needed.