

## What You Need To Know About the AIPRA...

### How Did Congress Change Indian Probate Laws?

The American Indian Probate Reform Act (AIPRA) of 2004 was enacted on October 27, 2004 amending the Indian Land Consolidation Act. One of AIPRA's goals is to reverse the severe consequences of "fractionation." Fractionation, where individual trust allotments have so many owners of small interests that no one can effectively use the land, has been an escalating problem since the passage of the Dawes Act in 1887 which began the allotment era.

This Act affects your ownership rights in trust or restricted land, unless the land is located in Alaska. AIPRA changes the way trust estates are distributed to your heirs after your death. This increases the importance and benefits of writing a will or doing an estate plan. AIPRA also improves your ability to consolidate your interests in trust or restricted land.

*Because AIPRA is a lengthy and complicated law and the probate code must be specific, you should contact an attorney to help you apply the law to your specific case.*

### Property Distribution, Wills and Estate Planning

The Act creates a new nation-wide probate code that changes how your trust property will be distributed among your heirs if you are an Indian allottee and die without a will. Other changes include amended definitions of "Indian" and "eligible heirs" for purposes of inheriting in trust. The changes also allow Indians or an Indian tribe to purchase your interest in trust or restricted land at probate.

### What Is Probate?

Simply put, probate is the process by which a person's estate (the property they own) is divided and passed on to heirs. If the person has a Will, the property will be divided according to the will. If there is not a Will, the property will pass according to applicable law. For Indian trust property owners, their estates may be subject to two different probate processes if they own both trust and non-trust property.

All non-trust property (for example, a house, car, personal items and regalia) must be probated through state or tribal court. Trust property (usually an allotment or an Individual Indian Money Account, or "IIM") is handled by the Office of Hearings and Appeals, which is a federal agency under the Department of the Interior. When an Indian person passes away, the Bureau of Indian Affairs must be notified and then the probate process begins.

AIPRA sets out the rules on how the Office of Hearings and Appeals will probate Indian trust property. Prior to AIPRA, trust property was probated under state law. AIPRA dramatically changes the probate rules for how trust property can be passed to one's heirs when the individual passes on "intestate" (without a Will) or with a Will.

To help you understand some of the most important changes, you need to know what happens if you do not have a will or an estate plan.

### **Should You Write A Will?**

The new law allows an Indian allottee to transfer your property by will. By writing a will, you can designate how your trust land will be transferred in trust to any Indian person or to your descendants even if they are not tribal members. You can control how your trust property is passed by creating an estate plan, such as a will or deed. There are also new provisions on wills. If you have already written a will, you should review it to make sure the will says what you currently want.

Who Can Receive Your Property at Death in Trust?

#### **Without a Will:**

#### **If your interest in a piece of land is more than 5% of the total:**

- If you do not write a will, your trust property will pass (intestate) under the new federal probate code or approved tribal probate code, rather than under the state laws as it used to. Your trust land (including any buildings on the property) will continue to be inherited by your immediate family – first to your children or grandchildren or possibly great grandchildren, and if you have none, then to your parents or brothers and sisters. All of these people will be eligible to inherit your trust property as long as each meets the definition of Indian, or are your descendants within two generations of an Indian, or they already are co-owners in the same parcel. Land not passing to one of the people above will then pass to the tribe where the land is located. If there is no tribe, then to other co-owners equally, if no co-owners, then to the Secretary of the Interior for sale with proceeds placed into a land acquisition account.
- If you have a spouse and other eligible heirs, your surviving spouse will inherit 1/3 of any money in your IIM account at the time of your death, and all of the money produced from your interest in trust or restricted land during your spouse's lifetime. Your other heirs get the remaining 2/3 of any money in your IIM account at the time of death, and the remaining ownership interest in the trust or restricted land. Your spouse may also continue to live in a family home located on allotted land (gaining a life estate in the property). Once your spouse dies, the land will pass to the surviving eligible children. If there are no surviving children, it will then pass in the following order to the eligible surviving grandchildren: to the surviving great-grandchildren; then parents; and finally siblings of the decedent. If there are no children or other eligible heirs, then the interest will pass to the tribe with jurisdiction over the land.
- If your spouse but no other eligible heirs survive you, the spouse gets your IIM account, and during the spouse's lifetime, the money produced from your land interest. The spouse may also continue to live in a family home located on allotted land. The remaining ownership interest in land goes to the tribe where the land is located.
- In addition – the regulations require the probate court to look at the interests your heirs will receive. If they receive anything less than 5% interest, they may be subject to a forced sale without consent – if you die without a will.

### **If your interest in a piece of land is less than 5% of the total:**

- If you do not write a will and your ownership interest is less than 5% of the total, your spouse may continue to live in the family home on the parcel and then the new probate law will limit inheritance (or even further fractionation) to the oldest eligible child, and then oldest eligible grandchild or oldest eligible great-grandchild (the single heir rule). If there are no heirs, then the trust property passes to the tribe and if no tribe, then the interest will pass to the other co-owners in the property.
- Additionally, the Department of the Interior may purchase interests in land that are less than 5% of the total, for fair market value during the probate proceeding without the consent of the heirs. However, this authority to purchase small interests without the heirs' consent DOES NOT APPLY IF THE INTEREST IS PASSING THROUGH A VALID WILL, or if the heirs were living on the land.
- Spouses living on the trust land at the time of your death will receive a life estate in that parcel. When the spouse passes on, the interest will go under the single heir rule. If the spouse is not living on it, the spouse will not receive a life estate in any interest less than 5%.

### **With a Will:**

By writing a will, your land can be transferred in trust to any Indian person, the tribe that has jurisdiction, or any Indian co-owners. You can also transfer your land in trust to any of your descendants (children, grandchildren, great grandchildren, and great-great grandchildren) even if they are not Indian. You can control how your trust property is passed by creating an estate plan, such as a will or deed. You can transfer your interests out of trust to anybody. Even if your spouse is not mentioned in a will, your spouse may inherit some of your trust property.

### **Who May Inherit Land in Trust Under the AIRPA?**

There is an amended definition of "Indian" that helps determine who can inherit an interest in land in trust, particularly where there is no will. Under AIPRA, an "Indian" is a person who:

1. Is a member of an Indian tribe, or
2. Is eligible to become a member of an Indian tribe; or
3. Was an owner of an interest in trust or restricted land on October 27, 2004; or
4. Meets the definition of "Indian" under the Indian Reorganization Act, or
5. In California, any person as in 1, 2, 3, and 4, or who owns trust or restricted land in California (often called "public domain allotments")

This will not affect your eligibility for other federal Indian programs. Your heirs who are not Indian may be able to inherit in trust if they meet the statutory requirements for "eligible heirs." Trust property left to a person who is not an "eligible devisee" is passed as a life estate with the remainder going to the "eligible devisees" of the decedent. If an Indian allotment owner wishes to pass their trust property in fee (meaning it will no longer be in trust), they can only do so to a person who is not eligible to receive the property in trust. Trust property can be left to any person or entity; if passed to an Indian person, it will remain in trust.

The provisions of AIPRA are complex. Be sure to seek information for any questions you may have. The BIA no longer provides assistance with drafting wills.

## **Consolidating Ownership**

One of the main purposes of the Act is to preserve the trust status and reduce the number of small, fractionated interests in Indian lands. The Act does this by providing individuals and tribes with more opportunities to consolidate fractionated interests and by removing some restrictions on what tribes and individuals can do with their lands.

### **What is the Purchase Option at Probate?**

Certain people can purchase your interest in the parcel during probate. Your heirs, other co-owners, and the tribe where the land is located will be able to purchase your interest in the parcel. The purchase price must equal or exceed the fair market value. Your heirs would receive the money paid for your interest in the parcel instead of a share of your interest in the parcel. If your heirs are to receive 5% interest or more in the parcel, or if they live on the parcel, your heirs' consent to the purchase is required.

### **What are Consolidation Agreements?**

Heirs can decide how they want the trust estate distributed at the probate hearing. For example, they may decide whether they wish to inherit their share, or sell it to other co-owners or the tribe where the land is located. Heirs may also give their share to another named Indian person instead of inheriting it.

### **How Can a Person Acquire Other Fractionated Interests?**

The Act contains a number of provisions that are important to Indian landowners. Some examples are:

- Land consolidation options for landowners,
- Partition by sale of Indian lands,
- Continuation and expansion of the federal "buy back" program, and
- Greater flexibility for landowners to consolidate and acquire interests during the probate process.

### **How Can You Transfer an Interest in Property During Your Lifetime?**

Please seek information from your trust officer, your local BIA office or your lawyer for information on estate planning options during your lifetime such as: Negotiated sales, gift deeds, land exchanges, and other transactions.

## **Tribal Probate Codes**

AIPRA allows tribes to adopt their own Tribal Probate Codes, through which the tribe can determine its own rules for intestate succession and testamentary devise thus trumping the federal probate code. The Code must be approved by the Secretary of the Interior. If approved by the Secretary of the Interior, a Tribal Probate Code will be applied by the Office of Hearings and Appeals during the probate process to determine what will happen to a tribal member's trust interests.

The probate code can also change the rules for testamentary devise, however AIPRA does place limits on how the code may affect those devises. These provisions are very complicated, and the important point is that trust property owners should be aware of whether their tribe, or the tribe where their land is located, has an approved Tribal Probate Code and how it may affect their estate.

If the tribe does write a code it must be very specific and clear so intent is not in question. The code must also contain details about what is important to the culture – including the passing down of personal family items. In addition, tribes can make up their own definition of who qualifies as an Indian for purposes of implementing the Probate Code.

## **Federal Model Tribal Probate Code**

Please visit, <http://www.indianz.com/FederalRegister/2007/09/26/e7-19103.asp>, to view the Federal Model Tribal Probate Code.

### **Indian Probate Process Diagrams from Institute of Indian Estate Planning and Probate**

Click below to see diagrams:

**[Diagrams 1, 2, 3](#) [Diagram 4](#)**

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