

TOPIC IN DEPTH

AMERICAN INDIAN PROBATE REFORM ACT

HISTORY

Over the course of its history of interacting with Indian tribes, the United States federal government has adopted a number of distinct policies, from treaty-making to self-determination. Some of those policies were decidedly detrimental to the tribes and have long – term harmful consequences. One of these was the General Allotment Act.

The Dawes or General Allotment Act was passed by the United States Congress in 1887. The stated goal of the act was to eradicate Indian tribalism and poverty by "civilizing" Indians to become landowners and farmers. Additionally, the Act was designed to open new lands for white settlement. The Act divided communally-held lands on Indian reservations into discrete parcels called allotments. These parcels were to be held in trust by the federal government for 25 years, and then transferred in fee, one to each tribal member. The size of the parcel depended upon who was receiving it, varying typically from 40 to 160 acres. Any reservation land that was left over after all tribal member allotments had issued was considered "surplus" land and was made available for non- Indians to purchase.

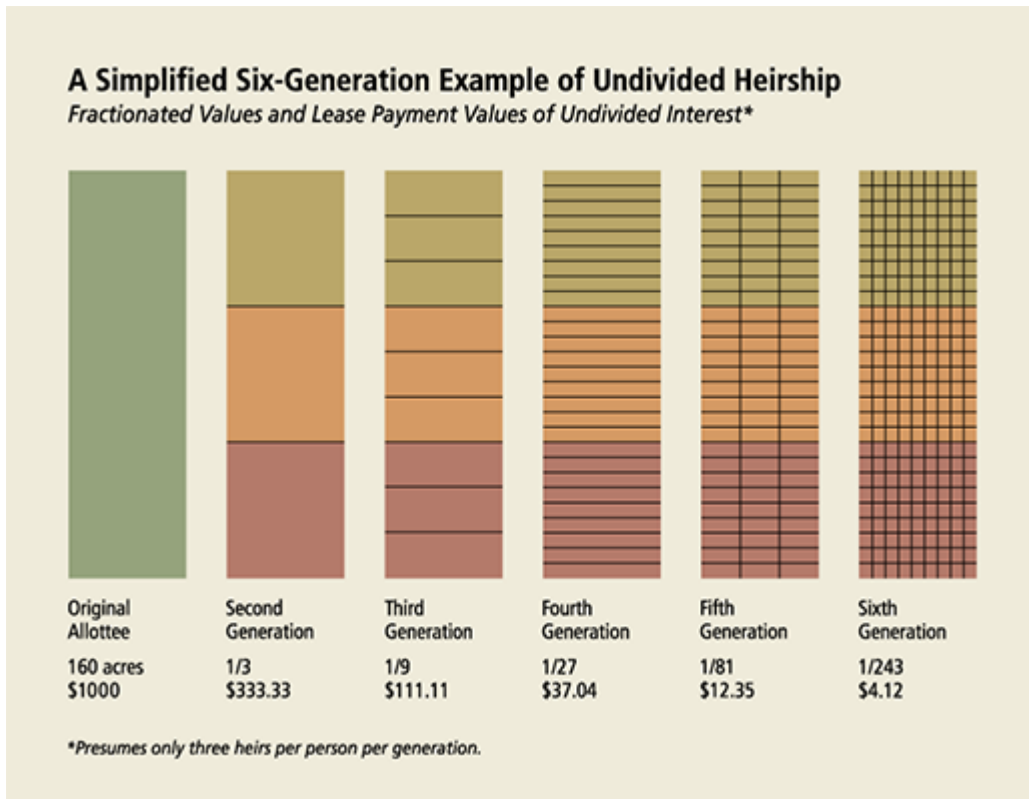
Subsequent legislation speeded up the process of issuing fee titles to tribal members, rather than waiting the full 25 years. Many recipients were actually unaware when land titles were issued to them and subsequently lost their parcels due to tax foreclosures. Sales to non- Indians proceeded apace, however. Ultimately more than 80,000,000 acres of "surplus" lands were sold, representing almost 70% of what had originally been reservation lands.

The Allotment Act did nothing to relieve poverty among tribal members. Nor did it consider their wish to continue with their customary, communal way of life or whether they possessed funds with which to pay for necessities with which to actually farm the land. Ultimately, almost 50 years later, the Allotment policy was abandoned. By then a great deal of damage had been done.

FRACTIONATION

The allotted parcels which were actually deeded to individual Indians during the allotment era and not subsequently lost have been held in trust by the federal government and managed by the Bureau of Indian Affairs. This management consisted, most often, of leasing the parcels of land to non-Indians and periodically paying the owner the lease proceeds into the owner's Individual Indian Money account and disbursed from there.

Over the years, upon the death of an allotment owner who did not write a will, that person's property was processed through a state court probate proceeding. In the absence of a will, the state's law dictated who received a decedent's property. The goal of state laws in such a situation was and is typically to distribute the property fairly and evenly among the deceased person's living family members. A parent's property was the generally divided equally among his or her children. It does not take many generations of passing a piece of property down through one's children, and their children, etc., before the heirs end up with smaller and smaller pieces, owned in conjunction with more and more people:



This process, known as fractionation, has occurred with respect to almost all allotments. The tiny size of the fractions of many inherited parcels renders the land itself essentially useless for the owners and the income from them generally minute. When parcels were inherited, they were taken as a fractionated undivided interest in the entire parcel. To do anything with such a piece requires permission from the majority of the other (dozens or hundreds) of owners.

A 2011 report by the Department of the Interior calculated that there were 4.1 million fractionated interests in Indian Country, reflecting ownership of 99,000 fractionated tracts. The national Congress of American Indians reported in 2006 that 120,000 allotted tracts existed, with over 3 million ownership interests.

TRUST MANAGEMENT

Since the passage of the Allotment Act, the federal government has been the manager of the allotted lands held in trust. The federal government's role is to administer and protect the money and property of the allottee. In practice, the management of allotted lands has generally consisted of leasing the parcels or negotiating for royalties from, for example, road rights-of-way, grazing, mining, farming, and utility pipelines. The proceeds from these ventures have gone into the federal trust account to be distributed to the appropriate individuals – those who share ownership of the allotment. An Individual Indian Money account is set up for each landowner and includes each of their allotted interests. Payments are made through those accounts on a periodic basis. Some payments are miniscule – under \$10 per quarter, for example. And the actual use of the land is not in the hands of the various allottees. Meanwhile, management of these lands, tracking the income, and distributing it to allottees, is very expensive to the Bureau of Indian Affairs, and will only grow more so as allotments continue to be further fractionated.

These are not the only difficulties with federal management of allotments. Over generations, there has been a great deal of mismanagement of the trust fund, as evidenced in the Cobell litigation. That class-action lawsuit claimed that the Bureau of Indian Affairs had grossly mismanaged over 500,000 Individual Indian Money accounts. The \$3.4 billion settlement in Cobell recognized that accounting for actual missing or misapplied money was hopeless, and instead agreed-upon set sums that would be paid to Indian trust beneficiaries. These amounts bear no measurable relationship to the amount actually paid pursuant to any given lease over the years of its operation.

Finally, trust the management includes the requirements that the BIA probate these allotted parcels when an owner dies. The BIA is required to open a probate for any owner, no matter how small their fractional interest, who passes away holding an interest in allotted land. The cost involved in such probates may well exceed the amount of money distributed to an owner. And the probate often takes a year or longer to resolve.

The INDIAN LAND CONSOLIDATION ACT and the AMERICAN INDIAN PROBATE REFORM ACT

In 1983 Congress passed the INDIAN LAND CONSOLIDATION ACT (ILCA) as a first attempt to solve the problems of allotment. The ILCA aimed to prevent further fractionation of protected trust lands, and provided that tribes could develop their own land consolidation plans and probate codes, which would need to be approved by the Secretary of the Interior. The Act contained a special "escheat" provision, which mandated that any interest in trust land consisting of less than 2% of the original plot, which had earned less than \$100 in the previous year, would revert permanently to the tribe. The Supreme Court nullified the escheat provision under *Hodel v. Irving*, however. The court found that the escheat resulted in an unconstitutional uncompensated taking of Indian property.

The American Indian Probate Reform Act (AIPRA) represents the third amendment to the Indian Land Consolidation Act and takes a unique approach to halting fractionation. The statute is the first-ever federal probate code and preempts state intestacy laws that contributed to fractionation. AIPRA allows tribes to institute their own probate codes, again subject to Secretarial approval, which could preempt the Act. To date, only a handful of Tribes have done so, including the Umatilla tribe of Oregon. Several other tribal probate codes are pending approval.

What the American Indian Probate Reform Act does:

Intestacy

In the event that a tribal member dies intestate, the next generation will inherit his or her trust property, subject to AIPRA "eligibility" requirements, which are not present in state law. So long as no post – AIPRA tribal probate code exists, AIPRA states that any descendent, parent, or sibling may inherit Indian trust land only so long as the person who will inherit is:

- Indian;
- A lineal descendant within two degrees of consanguinity of an Indian; or
- An owner of a trust asset or restricted interest in the parcel of land prior to 2004.

AIPRA's eligibility requirements do not extend to surviving spouses, who may keep a life estate (the right to live on and use the resources of the land during their lifetime) in the decedent's property, regardless of whether the surviving spouse is a tribal member or eligible to be a member. The only stipulation is that the surviving spouse must live on the estate in question. Retaining a life estate includes the right to

use the land, to keep any income it generates, and to receive royalties – all to the exclusion of any heirs who will inherit the trust property after the surviving spouse’s death.

Less than 5% Interest & Single Heir Rule

The American Indian Probate Reform Act identifies two categories of restricted or trust land within the context of tribal intestacy and the eligible heir requirements, and treat those two categories differently.

- Interests less than 5% of the total allotted parcels; and
- Interests in the allotted parcels equal to or greater than 5%

If a tribal member dies intestate or his will fails and the portion of restricted trust land that he owns is less than 5% of the original allotted tracts, the AIPRA states that this interest can only be distributed to a single heir. The oldest surviving eligible child, grandchild, or great grandchild will inherit.

If no such eligible heir exists, then the interest returns in ownership to the tribe where the land is located. If there is no tribe with jurisdiction to take possession of the interest in the parcel, it is to be distributed equally among the decedent’s co-owners. If there is neither a tribe nor co-owners, then the property goes to the United States, to be sold. The parcel shall be offered at not less than fair market value, first to the owners of the contiguous parcels. If more than one contiguous owner is interested in buying, the sale must be by public auction or sealed bid with contiguous owners participating. If there are no contiguous allotted parcels, the sales shall be to any interested buyer.

Any recipient of a life estate in the protected interest that passes to the tribe, co- or contiguous owner(s), including a surviving spouse, would retain all use and income from the interest until his or her death.

5% or Greater Rule

If a tribal member dies intestate, and his interest in an allotted parcel is 5% or greater, the life estate in any surviving spouse still applies. The spouse also receives a portion of the decedent's trust personal property.

After the surviving spouse dies, the remainder of the interest passes first, to any eligible children. If a child of the decedent has died, that share goes to the grandchildren. If neither children nor grandchildren survive, then the share goes to the surviving great grandchildren in equal shares. Sometimes there are no descendants who are living or eligible to take the land, and in that case surviving parents and siblings can inherit as long as they meet the eligibility requirement. If neither eligible descendants nor extended family are alive to take the interest, then the tribal jurisdiction takes ownership. However, if an Indian co-owner wishes to purchase rather than allow the property to go to the tribe, there are provisions which allow for that.

If there is no Indian tribe with jurisdiction than the property is to be divided equally among co-owners or, absent co-owners, it goes to the federal government, to be offered for sale. Proceeds from such a sale are to be deposited by the government to an Acquisition Fund, “to be available for the purpose of acquiring additional fractional interests in trust or restricted lands...”

Tribal Probate Codes

If a tribe does develop its own post – AIPRA probate code and obtains Secretary of Interior approval, the tribal code will be operative. However, that code still cannot be used to probate trust property. That probate remains the province of the BIA and cannot permit more than one heir to inherit a trust property interest of less than 5% if the decedent dies without a will. Section 2205 of the American Indian Probate Reform Act details what can and cannot be included in a tribal probate code. Rules of intestate succession and other items consistent with the Indian Land Consolidation Act are permissible inclusions.

TESTAMENTARY DECISIONS UNDER THE AMERICAN INDIAN PROBATE REFORM ACT

Trust Lands

Similar to the intestacy rules under the American Indian Probate Reform Act, tribal members can only leave their trust or restricted property interest to certain individuals in their wills if they wish to keep it in trust status. An eligible heir, that is, one who qualifies to inherit a restricted interest in land, may be:

- Any lineal descendent of the testator,
- Any person who owns a pre-existing undivided trust or restricted interest in the same parcel of land,
- The tribe with jurisdiction over the parcel, or
- Any Indian, which means,
 - any person who is a member of an Indian tribe, is eligible to become a member of an Indian tribe, or as an owner of a trust or restricted interest in land
 - Any person meeting the definition of Indian under the Indian Reorganization Act and the regulations promulgated thereunder.

Giving restricted property to any of the qualified beneficiaries described above allows it to remain in trust. A provision in the will that leaves property in trust to someone not qualified to take the land will fail. The Secretary of the Interior will then apply the American Indian Probate Reform Act's intestacy rules to determine an appropriate heir. That is, it will be just as though the decedent did not write a will at all concerning that particular property.

Will writers can leave a life estate to anyone they wish, so long as upon that person's death the property then goes to an eligible heir.

What if a person wants to leave trust property to someone not in trust but in fee? Or wants to leave it to someone who does not qualify to hold the property in trust status? Within certain parameters, the American Indian Probate Reform Act permits this. If the tribe is a non-Indian Reorganization Act tribe, a non-Indian may receive land in fee status from the will writer. It should be noted that if the person receiving under this will fits the definition of eligible heir, she or he cannot take the land in fee but must take it in trust.

For IRA tribes, in a situation where there are no eligible heirs, the land can be transferred in fee only if the nation's constitution or code specifically allows it. The constitutional or code provision that allows such transfers must be approved by the Secretary of the Interior in order to be effective.

If a tribal member leaves property to another in fee rather than trust, the tribe with jurisdiction over that parcel land has the opportunity to buy the interest. The American Indian Probate Reform Act allows the tribe to pay the Secretary of the Interior the fair market value as of the decedent's date of death and acquire the property with certain exceptions.

Trust Personalty

Trust personalty is defined in the American Indian Probate Reform Act as "all funds and securities of any kind which are held in trust in an Individual Indian Money Account or otherwise supervised by the Secretary." Trust personalty can be bequeathed to whomever a will writer wishes, regardless of whether the heir would qualify as "eligible." However, if the person receiving the personalty is indeed an eligible heir, then the funds retain trust status and the Secretary continues to maintain and manage them. If the person is not eligible, the Secretary transfers the funds directly over to the recipient.

The only obstacle to a testator devising his/her Individual Indian Money interests occurs if the tribe with jurisdiction over the testator has passed its own probate code. If a tribe has passed a probate code that sets eligibility requirements for Individual Indian Money accounts, these restrictions must be taken into account by Indians wishing to pass their interests to people who might not qualify as proper heirs. Such proposed gifts will fail.

For example, the Nez Perce probate code provides:

[O]nly persons enrolled or eligible for enrollment in a federally recognized Indian tribe or who otherwise meet the definition of "Indian" or "eligible heir" in the Indian Land Consolidation Act, as amended, shall take by intestate succession or by will any interest in the restricted or trust property of the deceased member of the Nez Perce tribe, or which consists of any interest in the rents, issues, or profits from an allotment or assignment of trust or restricted property within the Nez Perce Reservation. Section 10-1-12(a), Nez Perce Probate Ordinance effective May 29, 2007

If no will is written, a decedent's surviving spouse will inherit either:

- 100% of the trust personalty at the death of the account holder/spouse, if there are no descendants who are alive or in existence, or
- One-third of the Individual Indian Money account, while surviving children, grandchildren, or great-grandchildren would inherit the remainder of the account.

Note that the American Indian Probate Reform Act does not define spouse anywhere. Care should be taken to be clear about the will writer's intentions if property is being left to a tribal customary spouse; such a spouse has no rights under the American Indian Probate Reform Act intestacy language.

The divorce of the will writer from his or her spouse after the will is written revokes by operation of law any gift that was made in the will.

If the spouse is deliberately or specifically omitted from a will they still may be entitled to take property. AIPRA Section 2206(j) (2) (A) (iii) provides that such a spouse should be treated the same as if no will had been written. However this takes effect only if one of the following circumstances applies:

- The spouses were married for five years immediately preceding the death,
- the spouses have a surviving child,
- the surviving spouse made substantial payments toward either the purchase or improvement of the property, or
- the surviving spouse has a binding obligation to continue making loan payments on the property.

This clause will not apply if there is evidence that the will writer took care of the surviving spouse and any children under the age of 18 by transferring property outside of the will.

NON-TRUST REAL AND PERSONAL PROPERTY

The American Indian Probate Reform Act and the federal government do not usually control probate of non-trust real and personal property. State and tribal courts determine the devise of non-trust assets owned by Indians who live on or off the reservation. The individual's domicile plays a role as does the location of the property in determining whether a state court or tribal court has jurisdiction over the real estate and personal effects.

If a member of the tribe owns personal property on, and was domiciled on the reservation at death, any tribal probate laws that apply to the disposition of that property will determine who inherits. However, if the tribe has not established its own probate code, the tribal courts will apply state law in determining ultimate ownership. If the tribe does not have a probate code, then state court will probate on-reservation non-trust property. Thus tribal probate codes are important for additional reasons other than their potential interaction with the American Indian Probate Reform Act.

The disposition of an Indian decedent's non-trust **real property** depends on its location: if it is in Indian Country, tribal courts decide who inherits; if it is located outside Indian Country and within a state, then the state court decides the heirs according to state law.

Ideally then, any will should be written so as to be valid in all three jurisdictions: tribal, state and federal.

Forced Sales

The American Indian Probate Reform Act contains provisions which allow a co-owner (whether an individual or the tribe) to purchase at probate a decedent's undivided interests in allotted land if no will was written. If the decedent owned less than 5% of the allotment, the tribe or a co-owner may purchase without anyone's consent, unless a spouse or heir is actually residing on the parcel. The sale must be for no less than the property's fair market value and made to one of the statutory list of potential eligible purchasers. If the ownership interest of 5% or greater, then permission from the heirs is required before a sale to the co-owners or the tribe can take place.

If a decedent does write a will, then the sale described above is stopped.

Should a decedent leave trust or restricted property to a non-Indian, the tribe with jurisdiction over that land has the authority to step in and purchase it for fair market value. There are some limited exceptions to this ability, such as if the land is part of the family farm.

The American Indian Probate Reform Act also provides that the tribe can purchase all of the interests in a tract if it obtains the consent of 50% or more of the co-owners of the undivided interests in that tract.

This provision (Section 2204(a)(1)) relates to purchase as part of a land consolidation plan rather than to purchase a probate.

Reading BIA Reports

An individual's BIA – prepared Individual Indian Money (IIM) or Individual Interests (property) report will detail the fractionated real property interests owned by that individual as well as the income received from those interests. The property report will list the original owner of any allotment, as well as the total number of acres it contains. It also lists the percentage of ownership vested in the current owner. These details are helpful in working with will writers, who may want to leave specific allotments to specific heirs (a good way to slow fractionation) or need to determine how the allotments should be shared. A review of the property report is good place to start these discussions.

| ---- TRACT ID | | TITLE | | LAND AREA | | RESOURCES | | -----DATE OF LAST----- | | |
|---|-----|--------------|---------------|------------|------------------|----------------------------|-------------------|------------------------|------------------|--------|
| LAC | PFX | NUMBER | SFX | SAN XAVIER | | Both (Mineral and Surface) | | EXAM DATE | VERIFY DATE | |
| 611 | 103 | SOUTHWEST | | | | | | | | |
| GAYATANO GUH-C-GAH-LD ** ORIGINAL ALLOTTEE** | | | | | | | | | | |
| | SEC | TOWNSHIP | RANGE | COUNTY | ST | MERIDIAN | LEGAL DESCRIPTION | SECTION ACRES | CUMULATIVE ACRES | |
| | 24 | 016.00S | 012.00E | PIMA | Az Gila and Salt | River | W SW | 80.000 | 80.000 | |
| | | | | | | | | TOTAL SECTION ACRES | 80.000 | 80.000 |
| --OWNER -- | --- | DOCUMENT --- | NAME IN WHICH | | AGGREGATE SHARE | | AGGREGATE | | | |
| TYF | OT | INT | CLS | TYP | NUMBER | FIRST ACQUIRED | FRACTIONACQUIRED | CONVERTED TO | DECIMAL | |
| I | T | T | 12 | JO | P000036072 | _____ | 13 504 | LCD 13 504 | .0257936508 | |

In the section of the sample property report above, the parcel described as LAC 611, number 103 is listed, and the report provides information including:

- ✓ The name of the original allottee (Gayatano Guh-C-Gah-Ld)
- ✓ The location by section, township, range and county of the parcel
- ✓ The aggregate number of acres in the allotment (80)
- ✓ The fractionated interest 13/504ths and the aggregate decimal representing ownership (.0257936508), or 2.5%.

If the tribe you are working with has a map of its allotted lands, the location of an individual's parcels is helpful to the will writer. Not all individuals who come into have a will written know the exact location or the extent of their property.

OFFICE OF TRUST FUNDS MANAGEMENT

IF YOU HAVE ANY QUESTIONS
 PLEASE CALL 888.673.6836
 TRUST BENEFICIARY CALL CENTER
 HOURS OF OPERATION
 MONDAY-FRIDAY: 7:00 A.M. -- 5:00 P.M. (MT)
 SATURDAY: 8:00 A.M. – NOON (MT)

INDIVIDUAL INDIAN MONIES
 Statement of Account

<Name, Address, Tucson, AZ 85734>

ACCOUNT OF: _____

TRANSACTION ACTIVITY FOR ACCOUNTING PERIOD: 11/01/12 THROUGH 1/31/13

| DATE | TRANSACTION DESCRIPTION | CASH |
|----------|--|-------|
| | Beginning Balances | 0.00 |
| 12/21/12 | CASH RECEIPT COPPER CT12T900049 408146 LEASE NUMBER: 611MN00956399 23 08311595 LESSEE: ASARCO INCORPORATED\ TRACT ID: 611 103 INVOICE # 501813 PAYMENT DUE: 12/30/2012 OWNERSHIP: 0.003472222 | 3.73 |
| 12/21/12 | CASH RECEIPT COPPER CT12T900049 408146 LEASE NUMBER: 611MN00956399 23 08311595 LESSEE: ASARCO INCORPORATED\ TRACT ID: 611 102 INVOICE # 501813 PAYMENT DUE: 12/30/2012 OWNERSHIP: 0.003472222 | 26.33 |
| 12/21/12 | CASH RECEIPT COPPER CT12T900049 408146 LEASE NUMBER: 611MN00956399 23 08311595 LESSEE: ASARCO INCORPORATED\ TRACT ID: 611 103 INVOICE # 501813 PAYMENT DUE: 12/30/2012 OWNERSHIP: 0.003472222 | 12.12 |
| 12/21/12 | CASH RECEIPT COPPER CT12T900049 408146 LEASE NUMBER: 611MN00956399 23 08311595 LESSEE: ASARCO INCORPORATED\ TRACT ID: 611 102 INVOICE # 501813 PAYMENT DUE: 12/30/2012 OWNERSHIP: 0.003472222 | 36.36 |
| 12/21/12 | CASH DISBURSEMENT PAID TO BANK OF AMERICA, PHOENIX, AZ DEPOSITED TO CHECKING | 33.59 |

An Individual Indian Monies account statement shows any lease or other income activity related to an allotment. In the section of the sample property report above, parcel 611, tracts 102 and 103 are leased to Asarco Incorporated, a large copper mining company. The decimal expressing the allottees interest is shown again as is the income that was received for the quarter listed. This information can also be factored into a will writer's decision-making.