

**TESTIMONY OF DOUGLAS NASH, DIRECTOR  
CENTER FOR INDIAN LAW AND POLICY  
INSTITUTE FOR INDIAN ESTATE PLANNING AND PROBATE  
SEATTLE UNIVERSITY SCHOOL OF LAW  
BEFORE THE  
UNITED STATE SENATE COMMITTEE ON INDIAN AFFAIRS  
ON THE AMERICAN INDIAN PROBATE REFORM ACT  
AUGUST 4, 2011**

The fractionated ownership of Indian allotments created by the General Allotment Act of 1887 (GAA) has been estimated to cost the Department of the Interior approximately \$432 million annually to manage.<sup>1</sup> These costs will continue to increase each year if decisive action is not taken to appropriate the funds authorized in the American Indian Probate Reform Act (AIPRA)<sup>2</sup> and to fully implement other components of the Act such as the pilot project for management of family trust assets (25 USC 2206(l)), the fractional interest buyback program (25 USC 2212) and the owner managed trust option (2220).

Over time, the system of allotments established by the GAA and subsequent intestate inheritance by multiple generations of descendants has resulted in the fractionated ownership of Indian lands. As original allottees died, their heirs received equal, undivided interests in the allottees' lands, and so it went for generations. As of 2005, there were four million owner interests in the 140,000 tracts of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly.<sup>3</sup> These four million interests will expand to eleven million interests by 2030 unless major changes are made to address the problem.<sup>4</sup>

The Department of the Interior is responsible for maintaining title records of all trust land interests and managing income derived from the leases of trust land interests. Income must be allocated among all of the owners of undivided interests in each allotment. In some instances, the common denominator required to make this calculation extends 26 digits.<sup>5</sup> Income is maintained in federal Individual Indian Money (IIM) accounts for the individual owners, regardless of the size of their interest. In 1987, for example, one allotment had 439 owners with the smallest heir receiving \$.01 every 177 years and receiving \$.000418 of the \$8,000.00

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<sup>1</sup> Majel Russell, *Historical Background to Fractionated Ownership of Indian Trust Lands*, Intertribal Monitoring Association Presentation PowerPoint, Northwest Regional Meeting, November 21, 2008

<sup>2</sup> 25 U.S.C. § 2206(f)

<sup>3</sup> Department of the Interior, Office of the Special Trustee for American Indians, Budget Justification FY 2005

<sup>4</sup> Testimony of David J. Hayes, Deputy Secretary of the Interior, before the Committee on Natural Resources, United States House of Representatives Hearing on the Proposed Settlement of Cobell v. Salazar, March 10, 2010.

<sup>5</sup> Testimony of Ross O. Swimmer, Special Trustee for American Indians, United States Department of the Interior, before the Committee on Resources, United States House of Representatives Hearing on S. 1721, The American Indian Probate Reform Act of 2004. June 23, 2004

appraised value if that heir's interest were sold<sup>6</sup>. Ross Swimmer testified that the BIA's administrative costs for this parcel were estimated at \$17,560 annually.<sup>7</sup> One can only imagine what those figures are today after 24 more years of fractionation.

Those are, admittedly, some of the extreme examples that exist. Nevertheless, it is not uncommon for allotments to have hundreds of owners of undivided interests. In order to fully assess the depth and breadth of the problem, it would be helpful to have current figures that show:

- The number of trust interests that currently exist;
- The range and average size of those interests;
- The rate at which these interests increase each year;
- The average number of interests per allotment; and
- The cost to administer each interest.
- Where the most fractionated allotments are located
- Where the least fractionated allotments are located

The probate of these fractionated trust assets is also an expensive function of the Department of the Interior. It was estimated that in 2008 an average probate cost approximately \$7,800, and approximately 3,500 Indian owners of trust assets die each year.<sup>8</sup>

Current and accurate figures on the cost of administering and probating trust interests can be compared to the cost of providing estate planning services to Indian land owners. It will be seen that estate planning is an effective way to avoid or reduce fractionation and that it is a cost-effective means of reducing the high and growing costs incurred by continued fractionation.

### **The American Indian Probate Reform Act**

To address fractionation, Congress amended the Indian Land Consolidation Act with the passage of AIPRA in 2004.<sup>9</sup> The Act did not take effect until June 20, 2006. AIPRA is an innovative piece of legislation which, if fully implemented, would greatly reduce fractionation and the costs and complications associated with it. It would not be a quick fix. Fractionation began with the General allotment act and has continued unabated over the past 124 years.

The Act encourages Indian land owners to have wills done with a carrot and stick approach. Without a will, AIPRA will define who inherits trust interests and how. With a will, an Indian land owner can pretty much designate who will receive those interests the primary limitation being whether a beneficiary will receive those interests in trust or not. Properly done, wills and estate planning and reduce and avoid fractionation and, in some cases, avoid probate. Under AIPRA, intestate interests that constitute less than 5% of the total allotment pass to one person –

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<sup>6</sup> *Id.* Swimmer citing *Hodel v. Irving*, 481 U.S. 704 (1987)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 25 U.S.C. §§ 2201 - 2201

the oldest eligible heir. 25 USC 2206(a)(2)(D)(iii). When an interest greater than 5% of the total allotment is part of an intestate estate, AIPRA fractionates that interest by giving it equally to surviving children who are eligible heirs and if none, then grandchildren and so on to other family members. These results can be avoided by the decedent having a will.

The drafters of AIPRA recognized that estate planning was a critical part of the solution and provided authorization for appropriations for estate planning to further reduce or stop fractionation.<sup>10</sup> Without that funding, the allotted land base will continue to fractionate over generations, creating millions of new interests that will require substantial management and add equally substantial costs to the Bureau of Indian Affairs budget. A comparison of the number of trust interests that existed as of June 20, 2006, the date AIPRA became effective, and the present, would likely show that fractionation continued at a steady pace because estate planning services have not been widely available due to lack of funding support.

### **The Institute for Indian Estate Planning and Probate**

The Institute for Indian Estate Planning and Probate (Institute) is part of the Center for Indian Law and Policy at Seattle University School of Law ([www.indianwills.org](http://www.indianwills.org)). The Institute was established in August, 2005, and, insofar as we know, is the only national, non-profit organization developing projects which deliver estate planning legal services to trust land owners and tribes nationally. With the mission of assisting Indian people, the Institute develops projects that provide free estate planning services to trust land owners; provides training to tribal members, governmental officials and the legal community on the provisions of AIPRA, estate planning and the probate process; and serves as a clearing house that provides information via our website and published materials. The Institute has been uniquely successful in achieving those goals.

In total, our projects have provided community education to over 24,000 Indian landowners, served over 4,200 clients, executed over 2,100 wills and 1,700 other estate planning documents and successfully reduced fractionation in approximately 87% of the estate plans. While significant, and we are proud of these results, they do not even scratch the surface of the need in Indian Country.

The Institute has had projects in Washington, Oregon, Idaho, Montana, South Dakota, Minnesota and New Mexico. These projects utilize personnel who are specially trained on AIPRA, Indian land history, and in counseling Indian clients on ways to reduce fractionation of their lands during their life time and with an estate plan. The free estate planning services include wills, durable powers of attorney, health care directives, assistance with gift deeds, and land sales to tribes. Our project models vary depending upon need and available funds. We have developed a number of successful project models using law student interns and paralegals; private and legal services attorneys. We have established pro bono projects, and at Seattle University School of Law, we created the first Indian Trust and Estates clinical course in the nation.

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<sup>10</sup> 25 U.S.C. § 2206(f)(4)

Early in our existence, private foundation funding was received to develop estate planning projects. The economic crisis caused those sources of funding for these projects to disappear. The only Institute projects now in operation are those funded by tribes. Tribes are expending scarce resources for these services even though tribes are consistent in asserting that these services are part of the federal trust obligation.

The estate planning services provided to Indian landowners under Institute projects include a will as the cornerstone of an estate plan. Clients are counseled on the options they have in devising their trust property in a way that will avoid further fractionation. These include leaving one interest per heir, leaving property to children as joint tenants with the right of survivorship, and leaving trust interests to one child and non-trust or personal property to another. They are also counseled on options that avoid the probate process altogether such as giving a gift deed and reserving a life estate for themselves or selling their interest and having the proceeds in their estate. Most Indian landowners are interested to learn of these options and frequently utilize them.

Estate planning for Indian land owners is not a simple process. In many instances, individuals own property that is subject to tribal, federal and state probate laws. The wills done must be valid in all of those jurisdictions when required. Institute project personnel are specifically trained in that regard. In some instances, documents such as health care directives must be done in accordance with state law when there are no on-reservation health care facilities available that can deal with serious and terminal health issues. Finally, the identification of individual trust interests adds an important dimension to estate planning. It often requires coordination with BIA realty and land title record offices.

In addition to developing projects that deliver estate planning services the Institute provides training and information on AIPRA and Indian estate planning to Indian land owners, tribal officials, attorneys and federal personnel and also reviews and assists tribes with tribal probate code development consistent with AIPRA provisions.

### **Current Institute Projects**

From its beginning, the Institute has operated a summer estate planning intern program. Originally funded by a foundation grant, this project is now totally funded by the tribes it serves. Second and third year law students, and sometimes law graduates, receive a week of intensive training on Indian land history, AIPRA, Indian will drafting, estate planning options, professional responsibility and the federal probate process at the School of Law. They then move to the reservation they will be serving to live and work full-time over the summer months. A full range of estate planning services is provided at no cost to tribal members. Each intern is supervised by an attorney licensed in the state where they are working. This year eight tribes in Montana, Oregon, Wisconsin and Washington had interns on their reservations. Preliminary statistics for this summer's program indicate that 92% of the wills done reduced or avoided further fractionation. This program is available to all tribes and it is expected to expand next year.

The Institute also provides year around estate planning services to one tribe's housing authority clients who are elderly or disabled.

This fall, the Institute will engage in a very unique estate planning project, providing estate planning services to the members of the Bristol Bay Native Association (BBNA). BBNA provides a wide range of services to its members who reside in 32 villages spread over an area the size of Iowa. With one exception, there are no roads leading to them and no roads leading to Dillingham, Alaska, which is where BBNA is headquartered. BBNA provided base funding for two years and is providing in-kind services as well along with Alaska Legal Services. Originally designed for a law extern, the services will be provided for the first four months by a recently graduated attorney under a fellowship. Beyond the logistical challenges this project poses, it provides a very special set of circumstances in that the allotments there are very recent so that there are many first generation owners. Over a period of time, this provides us with the opportunity to determine if the availability of estate planning services will avoid the problem of fractionation so rampant in the lower 48 states.

### **A New Project Model to Provide Estate Planning Services to Indian Country**

As noted, the services provided through Institute projects, while substantial, are far from meeting the needs that exist in Indian Country. Even the tribes receiving services under the summer intern program have needs that extend beyond the summer months. This led the Institute to consider how to effectively get estate planning services to Indian Country at a reasonable cost. The result is a model that utilizes teleconferencing technology to allow professional staff at the Institute to interact with Indian land owner clients at any tribal location. Surprising little is required - a room where confidentiality can be maintained, a computer with teleconference capability and a specially trained tribal staff person to operate the computer and help manage documents. An individual would need to do no more than enter the room, sit down and begin talking with the Institute staff person whose face appears on the screen. Information would be gathered, releases provided so that records of trust interests could be obtained, draft documents prepared and then reviewed in a second teleconference with the client after which the documents would be finalized and executed. The cost would be assessed on a per document basis. It is expected that this model will be in place on a reservation in the very near term. It too is available to all tribes.

Providing estate planning services to Indian land owners nationwide could be very complicated and costly. This model provides the most effective and cost efficient means of achieving that goal and fulfilling the federal government's trust obligation to individual Indian land owners.

### **Federal Funding of Indian Estate Planning Services**

In 2005, the Institute was the recipient of a one year, \$500,000 Bureau of Indian Affairs Pilot Project contract to determine if estate planning services were needed in Indian Country and, if so, whether they would reduce or avoid fractionation. The project was developed to provide services on reservations in South Dakota and select reservations in Washington. The results

clearly indicate that estate planning is a highly effective tool in reducing and eliminating fractionation.<sup>11</sup> In a short nine month contract cycle, the pilot project served more than 1,100 clients, and at the end of the contract, 586 individuals remained on a waitlist. A subsequent audit by the BIA concluded our estate planning project reduced fractionation of Indian lands; prevented the creation of 4,640 new interests; removed 679 interests from the probate process entirely; and that 83.5% of the wills executed reduced fractionation.<sup>12</sup>

Despite demonstrating that estate planning services were needed and that they were highly effective in reducing or avoiding further fractionation, requests for an extension of time to serve land owners on waitlists and for additional funding were denied. Since that time, there has been no further federal funding for the delivery of estate planning services to Indian Country despite repeated requests.

In addition to periodic and repeated communications with the BIA about funding for Indian estate planning, I appeared before the U.S. House of Representative' Committee on Appropriations, Subcommittee on Interior, Environmental and Related Agencies in 2009 and 2010 to request assistance in providing full funding to implement AIPRA. The Conference Report on H.R. 2996, the Department of the Interior and Related Agencies Appropriation Act for 2010, directed the BIA to utilize funds that were included in the Office of Indian Programs account and the Indian Land Consolidation account for estate planning assistance as provided for under Section 207(f) of the Indian Land Consolidation Act (25 U.S.C. 2206(f)). This section of AIPRA authorizes the Secretary to enter into contracts with non-profit entities to provide estate planning and probate services to owners of fractionated interests in allotments. Over several months, we attempted to work with the Department to determine how the available funds would be used to carry out the implementation of AIPRA, but had no success. To our knowledge, the BIA did not initiate any effort to enter into contracts with non-profit entities to provide estate planning and probate services in 2010.

We noted that the Department's budget request for 2011 reports that the [BIA] "is actively engaged in implementing" AIPRA, including the provision of probate services.<sup>13</sup> The request for 2011 was for more than \$13 million and includes 159 FTE. Virtually all of the funds and FTE appear to be directed at coordination with the Office of Hearings and Appeals in probate proceedings. In addition, the 2011 budget request includes \$1 million for 5 new FTE to implement AIPRA and the Indian Land Consolidation Act. The BIA proposed to use these funds and FTE to provide:

"educational information regarding the authorized provisions within AIPRA, information on lifetime transfers such as consolidation agreements through gifts, exchanges and family trusts, through probates and forced sales. It will also include information to tribes on monetization and in writing probate codes. This

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<sup>11</sup> Supplemental Audit Report under Task Order SEA-0004443 under AIPRA FY 2006 AIPRA Implementation Project, Phase II, Estate Planning Services Auditor, September 15, 2007

<sup>12</sup> *Id.*

<sup>13</sup> Budget Request for the Bureau of Indian Affairs for 2011 at IA-RES-7.

will be accomplished by creation and dissemination of brochures (in English and native languages), partnering with tribal colleges and tribal organizations, conducting community meetings and via public news sources such as local newspapers, radio and the internet.”<sup>14</sup>

The BIA also planned to use the funds and FTEs to:

“pursue partnerships with Indian organizations, various Indian land clinics, private attorneys, and legal aid groups to further research cost effective actions regarding estate planning. The initial push is to help more landowners complete estate planning and will drafting.”<sup>15</sup>

That initial push did not materialize. The Department’s proposed budget plans will not meet the needs of Indian Country nor will it reduce fractionation or probates and, consequently, will not reduce administrative costs. The 2011 BIA budget request does not provide any detail on what level of funding may be directed toward estate planning and will drafting. Insofar as we know, there were no funds directed toward those activities. With all due respect, we do not believe that there is a need for research regarding estate planning and will drafting. It has been seven years since AIPRA’s enactment and there is an acute and urgent need for action to fully implement its provisions. Through our various projects, we already know the most cost effective means of providing estate planning services to Indian clients. We know that face-to-face consultations are necessary with clients for effective estate planning. We know that with informed counsel, clients will often choose plans that avoid fractionation and even probate. We know that Indian people often need wills that are valid under tribal and state as well as federal law, and we provide that service. We agree that education is important. That is why our programs have reached over 24,000 Indian land owners in the last five years and our website is designed to provide information specifically to Indian land owners, tribal leaders and attorneys.

Thus, even when directed by the House Subcommittee, the Bureau of Indian Affairs has not moved one step closer to providing estate planning services to Indian land owners.

## **Conclusion**

For each interest that estate planning reconsolidates or removes from the probate process entirely through gift deed or tribal sale, the government will save money. Costs will continue to increase with the exponential growth of fractionation. The Department has had six years to implement AIPRA, but has made little progress in reducing fractionation and has failed to seek the necessary funds to implement the estate planning services which have proven to be so effective in reducing fractionation. We think that it is imperative that the Committee insist that the Department fully implement AIPRA, including efforts to ensure that funding is available to tribes to assist their citizens who own interests in allotments to obtain the necessary estate planning services in order to reduce fractionation. Six years ago the Committee and Congress

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<sup>14</sup> Id. at IA-ILC-3 and 4.

<sup>15</sup> Id. at 4. (Emphasis Added)

identified the problem and developed an effective solution. It is time for the Department and the Congress to take the next step and provide the necessary resources. The status quo will simply mean more fractionation and greater federal expenditures year after year for the indefinite future.

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