The American Indian Probate Reform Act:  
A Five-Year Review

Diane K. Lautt*

I. INTRODUCTION

On October 27, 2004, President George W. Bush signed into law the American Indian Probate Reform Act (“AIPRA”), instituting a sweeping reform of the Indian federal probate process.¹ Key among AIPRA’s purposes was the goal of reducing fractionation of Indian trust landownership.² The problem of trust land fractionation is best understood by an illustration of a forty-acre tract in South Dakota. The tract generates $1,080 of income per year and is valued at $8,000.³ A total of 439 individuals own undivided interests in the tract.⁴ Individuals do not necessarily own 1/439th of the land, but rather own varying proportions of the land.⁵ Now consider the financial ramifications of such ownership. One-third of the owners have an interest in the land that yields less than five cents per year in rent.⁶ The owner with the largest interest in the tract receives $82.85 per year and the owner with the smallest interest receives one cent every 177 years.⁷ If the land were sold for $8,000, the smallest interest holder would receive $0.000418.⁸ To keep all 439 owners straight and conduct the administrative management of this tract, the Bureau of Indian Affairs (“BIA”), which is part of the Department of Interior (“DOI”), spends approximately $17,560 per year.⁹ Add to that the fact that this illustration is based on 1980s dollar amounts and valuations, and

* B.A. 2006, Tabor College; J.D. Candidate 2012, Washburn University School of Law. I would like to thank Professor Myrl Duncan for his thoughtful review of drafts of this Note. I would also like to thank the staff at Legal Services of North Dakota for exposing me to the complexities of AIPRA wills. Finally, I am grateful for the support of my husband and parents.

⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id. Congress created the Bureau of Indian Affairs (“BIA”) in 1834 as part of the Department of War and later moved it to the Department of the Interior (“DOI”) in 1849. Robert McCarthy, The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians, 19 BYU J. Pub. L. 1, 4 (2004). Today, the BIA manages Indian lands and funds and employs approximately 10,000 people. Id. at 16.
the problem of fractionation becomes even more obvious.\textsuperscript{10} Although this situation is extreme, it aptly illustrates the often inefficient and nonsensical results of managing highly fractionated Indian trust land.

The continued fractionation of Indian land is the result of the failed Indian land policies of the nineteenth and twentieth centuries. To combat this problem in the twenty-first century, Congress passed AIPRA with the goal of halting further fractionation of Indian trust land. AIPRA’s impact extends beyond the confines of probate law and estate planning, as it can potentially affect the patterns of trust landownership for future generations. In order to fully realize the benefits of AIPRA and avoid its potential downfalls, Indian trust landowners, estate planning practitioners, and government employees who manage trust land must gain a firm understanding of the Act.\textsuperscript{11}

This Note provides a current perspective on the effectiveness of AIPRA, explores the challenges that it poses for Indian trust landowners, and proposes solutions for the future. Part II of this Note examines the history of the federal policy of allotment of Indian lands and also provides an overview of AIPRA’s most significant provisions.\textsuperscript{12} Part III examines the efforts made by various non-profit legal groups to provide estate planning services under AIPRA and considers whether, five years after its effective date, AIPRA has fulfilled its intended purpose.\textsuperscript{13} The main roadblock to realizing AIPRA’s potential to reduce fractionation of trust land is the uncertain nature of estate planning services. The goals of AIPRA cannot be fully accomplished without adequate funding to conduct training for attorneys and trust landowners, to establish and maintain law school clinical programs, and to place attorneys either physically or virtually with potential estate planning clients. AIPRA will only fulfill its intended purpose with properly funded estate planning initiatives in Indian country.

II. HISTORY AND BACKGROUND

Congress created a uniform federal probate code to govern Indian trust land holdings when it passed AIPRA in 2004.\textsuperscript{14} Congress intended that AIPRA would reduce fractionated interests in Indian trust land and facilitate efforts to improve access to estate planning services for tribal members.\textsuperscript{15} Before AIPRA, interest in trust land became further splintered with each generation that passed away without a will. Consider an interest in trust land equal to 1/89,000th: from a practical point of view, the administrative cost of

\textsuperscript{10} Hodel, 481 U.S. at 712–13. This illustration is quoted in the U.S. Supreme Court case Hodel v. Irving and is based on a forty-acre tract known as “Tract 1305” on the Sisseton-Wahpeton Lake Traverse Reservation in South Dakota. Id.; see infra Part II.B.ii.

\textsuperscript{11} See infra Part III.

\textsuperscript{12} See infra Part II.

\textsuperscript{13} See infra Part III.


\textsuperscript{15} Id. § 2, 118 Stat. at 1774.
managing this interest far exceeds the interest’s economic value. Additionally, when the interest holder died without a will, this minuscule interest would have been divided among the interest holder’s children. Assuming the interest would have been split between four children, four interests of $1/356,000$th would have been carved from the original interest of $1/89,000$th. Under AIPRA, on the other hand, when this interest holder dies without a will, the interest passes to only one child and is not further fractionated.  

AIPRA facilitates the education of trust landowners about fractionation. Today, if the interest holder makes a will, he is free to devise the interest to his four children. During an estate planning consultation with an attorney, however, the interest holder would receive information about the problem of fractionation. This information may lead the interest holder to decide not to further fractionate the $1/89,000$th interest, but instead to devise the interest to one person. On the other hand, the interest holder may be primarily concerned with passing down a piece of family heritage, and may not hesitate to further fractionate the interest. Under either scenario, AIPRA can only fully accomplish its purpose if trust interest holders have adequate access to estate planning services.

Understanding the significance of AIPRA first requires an examination of the historical background of the relationship between the federal government, Indian tribes, and Indian lands. In addition to providing a brief historical sketch, this Part also explains a number of AIPRA’s key provisions. The historical background and statutory review provide the necessary context for examining the extent to which AIPRA has fulfilled its purpose five years after its enactment.

A. Federal Policy of Forced Allotment: The Dawes Act

The tension between the federal government and Indian tribes over the control of land has a long and complex history. Prior to 1887, Indian policy generally focused on separating tribes from white settlers and, eventually, removing tribes to land west of the Mississippi River. As early as the eighteenth century, and continuing during the 1850s and 1860s, the federal government portioned land into reservations. The government shifted its policy decisions in the period from 1887 to 1934, however, to emphasize the

---

17. See infra Part II.A.
18. See infra Part II.D.
19. See infra Part IV.
20. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (Nell Jessup Newton, et al., eds., 2005). An attempt to capture all the intricacies of over 200 years of conflict is certainly outside the scope of this Note. Generally, all scholars identify the same distinct periods and events between historical shifts in federal Indian policy. See id.
22. See COHEN, supra note 20, § 1.03(6)(a).
goals of civilizing and assimilating Indians into white culture. 23

Officially named the General Allotment Act of 1887, the Dawes Act authorized the President to divide Indian reservation land into 160-acre parcels, or allotments, and assign each Indian family one allotment. 24 Land remaining after the distribution of the allotments became available to white settlers. 25 Through the Dawes Act, the federal government intended to push Indians toward farming and assimilate them into an agricultural way of life. 26 Instead, the amount of land held by Indians decreased over time through sale or lease, and the Indians stayed virtually isolated from the white settlers who farmed nearby. 27 The policy of allotment did not convert Indians to farmers, and as a result, a portion of the allotted land was not used productively but sold or leased to non-Indians. 28

The Dawes Act made the allotment process compulsory, meaning the federal government did not have to obtain consent from tribes before allotting reservation land to tribal members or negotiating the sale of any surplus land. 29 Land on 118 reservations was allotted under the Dawes Act from 1887 to 1934. 30

The Dawes Act created a trust relationship between the federal government and Indian allottees. 31 This relationship was a “bare trust” that did not create a fiduciary responsibility for the management of trust lands. 32 Instead, Congress created a fiduciary relationship through subsequent action

23. See id. §§ 1.03(6)(a), 1.04.
24. Leonard A. Carlson, Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming 3 (1981). The Dawes Act is named after Massachusetts Senator Henry L. Dawes, who sponsored the bill in Congress. Id. at 9. Each head of the family received one-quarter of a section, each single person older than eighteen years received one-eighth of a section, and each orphan under the age of eighteen received one-eighth of a section, and other single people under eighteen received one-sixteenth of a section. General Allotment Act of 1887, 24 Stat. 388, Ch. 119. Those receiving an allotment from the government were called “allottees.”

Before the Dawes Act, the federal government negotiated treaties with many tribes. Douglas R. Nash & Cecelia E. Burke, The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act, 5 Seattle J. Soc. Just. 121, 125 (2006). One such tribe, for example, was the Nez Perce. Id. Consequently, tribal lands allotted prior to 1887 were done so under the authority of a treaty. Id. at 125–26. In 1885, a treaty with the Nez Perce reduced tribal land holdings from ten million acres to about seven million. Id. Then the federal government negotiated an additional treaty in 1863 when gold was found on Nez Perce land, which included land in present-day Washington, Idaho, and Oregon. Id. The 1863 treaty reduced tribal lands to only 785,000 acres. Id.; see also Royster, supra note 21, at 8.

26. Id. at 159–60.
27. Id.
28. Cohens, supra note 20, § 1.04; Royster, supra note 21, at 6.
29. Nash & Burke, supra note 24, at 125.
30. Cohens, supra note 20, § 16.03(2)(b). Allotted land was held in trust by the federal government. Although the origin and parameters of the federal trust responsibility can be traced to the Constitution, U.S. Supreme Court case law has further developed that responsibility. McCarthy, supra note 9, at 19. Management of the federal trust responsibility faces numerous challenges. The DOI identifies fractionation as the principal challenge to the modern trust duty. Dept. of the Interior, Comprehensive Trust Management Plan Appx. A (Mar. 28, 2003), available at http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf. Other challenges to the effective management of trust resources include the complexity of trust management and limited funding. Id.
32. Id.
requiring the federal government to manage Indian lands for the benefit of the Indians. Initially, Congress intended the allotted land to be held in trust by the government for twenty-five years. After the twenty-five year trust period, the allottee was to receive the patent in fee, which was to be fully alienable and without encumbrance. However, the initial trust period was extended indefinitely. The trust relationship, which is still in effect today, consists of the federal government as trustee, the Indian allottees as beneficiaries, and the Indian lands and funds as trust corpus. The trust relationship accordingly gives an injured beneficiary the right to sue the federal government for damages arising from a breach of the trust relationship.

Through several amendments to the Dawes Act, Congress attempted to address the growing “Indian problem” with the goal of releasing Indians from unnecessary government control and supervision. Congress first amended the Dawes Act in 1890 to permit Indians to lease their allotted land to non-Indians for agricultural use. By allowing Indians to lease their allotments, Congress tried to ensure that all farmland could be productive and not be rendered dormant by Indians not engaged in farming.

Congress further amended the Dawes Act in 1906 with the Burke Act, which authorized the sale of hundreds of thousands of acres of trust land to non-Indians. The Burke Act allowed the federal government to issue a patent-in-fee on certain allotments before the end of the twenty-five year trust period. An allottee who applied for fee status could be issued a fee patent...

33. Id.
34. COHEN, supra note 20, § 16.03(2)(b).
38. Id. at 226. Central to any discussion of federal trust management is Cobell v. Salazar, 573 F.3d 808, 810 (D.C. Cir. 2009), a fifteen-year Indian trust class-action lawsuit. In Cobell, beneficiaries of Individual Indian Money (“IIM”) trust accounts sued the federal government alleging a breach of fiduciary duty because the government did not supply an accounting of funds as required by federal statute. Id. at 809. The U.S. District Court for the District of Columbia approved a $3.4 billion settlement. Order Granting Final Approval to Settlement, Cobell, 573 F.3d. 808 (96-cv-1285 (TFH)). The settlement is a possible source of funding for future Indian estate planning projects, although the settlement agreement does not specifically allocate funds to these types of projects. A copy of the settlement and other information regarding the class-action lawsuit are available at www.indiantrust.com, the official website providing information about the settlement. A total of $1.412 billion is to go to the Accounting/Trust Fund Administrative Fund, $60 million to the Indian Education Scholarship Fund, and $1.9 billion to the Trust Land Consolidation Fund. Class Action Settlement Agreement at 26, 40, Cobell, 573 F.3d 808 (No. 08-5506), Nov. 17, 2010 Modification of Dec. 7, 2009 Class Action Settlement Agreement at 3, Cobell, 573 F.3d 808 (No. 08-5506). As of the time of this writing, a number of class members have filed motions to appeal the settlement, which may delay the disbursement of settlement funds. Associated Press, Appeals Planned in $3.4 Billion Indian Trust Settlement, BILLINGS GAZETTE, Sept. 1, 2011, available at http://www.indiantrust.com/appeals_planned.php.
43. Nash & Burke, supra note 24, at 126. A “patent-in-fee” means land owned outright. Such land is freely alienable and without any encumbrance. Id. at 125 n.18. Patent refers to the title deed used by the...
after being declared “competent” by the Commissioner of Indian Affairs. The issuance of fee status by the federal government severed the trust relationship, allowing the owner to sell the land. The land also became subject to property tax. The Burke Act posed numerous obstacles to allottees. In addition to plaguing the application process with misinformation and bias, the competency requirement also created a substantial backlog of applications. Moreover, during the early years of fee patents, all Indians of one-half or less Indian blood were automatically issued fee patents. As a result, many fee transfers occurred without the allottees’ knowledge. Unaware of the newly imposed tax liability, many new landowners lost their land in state tax foreclosure proceedings. Other owners quickly sold their land to non-Indians, who often swindled them out of the fair market value of the land.

Over 33,000 fee patents were issued between 1907 and 1934. Although there were 138 million acres of Indian trust land in 1887, that figure was reduced to 52 million acres by 1934. The loss of tribal land during the tenure of the Dawes and Burke Acts was immense. Additionally, the expanded role of the federal government in the management of Indian trust land paved the way for the era of “unwieldy bureaucracy” that followed.

---

44. McDonnell, supra note 39, at 89. To apply for fee status, the allottee had to fill out a questionnaire.  
45. Fee land is subject to taxes, alienation, and encumbrances. Indian trust land is not fee land because the federal government holds the land in trust for the interest holder. Id.  
46. The local superintendent of Indian Affairs then posted a notice of the application for thirty days and drafted a recommendation to the Commissioner of Indian Affairs. Id. The Commissioner of Indian Affairs decided whether to approve the application and determined whether the allottee was competent. Id. The Commissioner acted in large part based on the recommendation of the local superintendent of Indian Affairs. Id. The Commissioner sent approved applications to the Secretary of the Interior for final approval. Id.  
47. Id. at 126.  
48. Id. at 112.  
49. Nash & Burke, supra note 24, at 126–27. Approximately 100,000 allotments were sold after allottees were issued fee patents. Id.  
50. Id. at 126.  
51. Id. at 89.  
52. Carlson, supra note 24, at 51. For example, the Sisseton Sioux allotted 300,000 acres to members of the tribe and then sold 600,000 acres as surplus to the federal government. Parker, supra note 42, at 49. By 1909, two-thirds of the original allottees had sold their land. Id. Many of these sales were the result of white settlers taking advantage of Indians’ inexperience with formal land sales. Id. at 50. Consequently, many Indians sold their land below fair market value. Id. In extreme cases, fraudulent representation or murder was used to obtain allotments from Indians. Id.  
53. Id. at 121. The 86 million acre difference is attributed to 38 million acres ceded as surplus after allotment, 22 million acres surplus opened to white settlers, 23 million acres of fee-patented land sold, and 3.4 million acres of original allotments sold. Id.  
54. Id. at 122. In addition to the land lost during the tenure of the Dawes Act, between the 1940s and 1960s, significant Indian land was appropriated for flood control projects managed by the Army Corps of Engineers and the Bureau of Reclamation. Parker, supra note 42, at 60–61. For example, in order to build the Garrison Dam in North Dakota as part of the Missouri River Basin flood control project, approximately
The allotments made under the Dawes Act that did not receive fee status were generally passed down from generation to generation and further subdivided among multiple owners. Under the Act, when an allottee died intestate, state law determined the identity of the heirs, even though state courts did not have jurisdiction over Indian probate proceedings. Typically, the land was divided among the heirs as tenants in common, thereby compounding fractionation of trust land with the passing of each generation. This inheritance policy was structured on the assumption that the land was to be held in trust only for a period of twenty-five years, but in reality the trusts still exist and the effects of this policy can still be felt today. Eventually repealed in 1934, the Dawes Act is universally viewed as a failed attempt to deal with the “Indian problem.”

B. The Impact of Fractionation

1. The Indian Reorganization Act

In 1934, the Indian Reorganization Act (“IRA”) halted the further allotment of tribal lands. The IRA also indefinitely extended the initial twenty-five year trust period. The purpose of the IRA was to promote self-determination among tribes by allowing them to draft their own constitutions and govern themselves to a limited extent. The shift in Indian policy, which came in conjunction with President Franklin D. Roosevelt’s New Deal, aimed to encourage self-determination, economic development, and a revival of

---

55. MCDONNELL, supra note 39, at 121.
56. COHEN, supra note 20, § 16.05(2)(c)(i).
57. Hakansson, supra note 41, at 248–49. Even by 1920, some allotments had over fifty heirs. PARKER, supra note 42, at 52.
58. Hakansson, supra note 41, at 248–49.
60. COHEN, supra note 20, § 16.03(2)(c).
62. COHEN, supra note 20, § 1.05(2)(c)(i); see also David Urteago, Comment, A Mighty Pulverizing Engine? The American Indian Probate Reform Act and the Struggle for Group Rights, 2 EST. PLAN. & COMMUNITY PROP. L.J. 463, 479 (2010).
tribalism among Indians. The attitude behind this shift in policy was fueled by a growing “tolerance and respect for traditional aspects of Indian culture.”

The end of allotment did not stop the compounding effect of splintering interests in land being passed through intestacy from generation to generation. Congressional reports from the 1960s disclosed that about one-half of allotted lands were fractionated and at least one-fourth of those lands were owned by six or more people. Interests continued to fractionate because of unsuccessful policies regulating intestate and testate succession. In addition to extending the trust period, the IRA allowed an interest holder to devise trust land by will only to Indians, tribes with jurisdiction over the land, or non-Indian heirs or lineal descendants. This restriction bound only those tribes that adopted the IRA. Additionally, during this period the procedure for the probate and handling of Indian estates was muddled and tedious. When a tribal member died without a will, the IRA required an “examiner of inheritance” to apply tribal customs when dividing the inheritance, if such customs could be proven. Most often, state laws of intestate succession applied because few tribes had formally codified tribal customs. When a tribal member died with a will, confusion often abounded because the DOI regulations regarding the requirements for wills were vague and many of the provisions were not mandatory. Although a 1960 Senate Committee Report estimated that the examiner of inheritance approved ninety percent of Indian

63. Cohen, supra note 20, § 1.05. To achieve these goals, the federal government encouraged Indian tribes to organize themselves like modern business corporations. Id. Some tribes declined to adopt the Indian Reorganization Act (“IRA”). Id. Tribes that decided to accept the IRA could elect a tribal council and take other steps toward self-governance. Graham D. Taylor, The New Deal and American Indian Tribalism 28 (1980). Tribes that chose not to accept the IRA remained under direct federal government control. Id.

64. Cohen, supra note 20, § 1.05.

65. Hodel v. Irving, 481 U.S. 704, 708 (1987). The fractionation of land was already extreme during the 1930s. To illustrate this point, Nebraska Representative Edgar Howard stated: “It is in the case of the inherited allotments, however, that the administrative costs become incredible . . . . On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.” Id. (quoting 78 Cong. Rec. H11728 (1934)).


67. Cohen, supra note 20, § 16.05(2)(c)(iii). Initially, the sale of allotments was restricted to the tribe with jurisdiction over the land. Id. This restriction was lifted in 1948. Id.


69. See Ethel J. Williams, Too Little Land, Too Many Heirs—The Indian Heirship Land Problem, 46 Wash. L. Rev. 709, 722 (1971).

70. See id. The examiner of inheritance worked for the BIA and made final decisions regarding the approval or disapproval of wills and claims against the estate. Id. at 721–22. The examiner’s decisions were final but appealable to the Secretary of the Interior. Id. at 722.

71. Id.

72. See 25 C.F.R., § 15.28 (1970); Williams, supra note 69, at 724. For example, the only mandatory requirement for wills was that they not be oral. Williams, supra note 69, at 723. The requirement of witnesses was unclear, as were the requirements for mental competency and undue influence. Id.
wills, the uncertainty surrounding the elements of a satisfactory will created unnecessary confusion.\textsuperscript{73} Ultimately, the need to reform the Indian probate system came into focus as the problem of fractionation worsened with time.\textsuperscript{74}

2. The Indian Land Consolidation Act

Congress sought to ease the problem of fractionation of Indian trust lands with the Indian Land Consolidation Act of 1984 ("ILCA").\textsuperscript{75} ILCA attempted to simplify and accelerate the land consolidation process by mandating that interests of less than two percent of a parcel not earning $100 or more in the year immediately preceding probate escheat to the tribe upon the interest holder’s death.\textsuperscript{76} The escheat occurred regardless of whether the interest holder died with a will.\textsuperscript{77} ILCA, however, did not provide for payment to the owners of these interests.\textsuperscript{78} This provision proved problematic as successive U.S. Supreme Court cases found the escheat provision and its amendments to be an unconstitutional taking of property without just compensation.\textsuperscript{79}

In the first of the two cases, \textit{Hodel v. Irving},\textsuperscript{80} the allottees challenged ILCA, claiming that the escheat provision authorized an unconstitutional taking of property.\textsuperscript{81} The four estates in question contained forty-one interests that were subject to the escheat provision.\textsuperscript{82} Of the four estates, the first consisted of two interests with a combined value of $100; the second consisted of twenty-six interests with a combined value of $2,700; and the third and fourth consisted of thirteen interests with a combined value of $1,816.\textsuperscript{83} The Court recognized Congress’s intent to reduce fractionation through ILCA.\textsuperscript{84} It also noted that tribes would likely benefit from the productive use of consolidated land because owners of escheatable interest were typically members of a tribe.\textsuperscript{85} Nonetheless, the Court held the escheat provision unconstitutional because it did not compensate owners for the value

\textsuperscript{73} Williams, supra note 69, at 724.
\textsuperscript{74} Sledd, supra note 1, at 3–4. In 1934, Secretary of Indian Affairs John Collier testified to the U.S. House Committee on Indian Affairs about the economic effects of fractionation. Hakansson, supra note 41, at 249–50 (quoting \textit{Effects of Allotment: Hearings on H.R. 7902 Before the House Committee on Indian Affairs}, 73d Cong. 16–18 (1934) (Memorandum of John Collier, Secretary of Indian Affairs)). Secretary Collier foresaw that each year the ownership of Indian land would become further splintered and as a result, “Indians [would be] practically compelled to become absentee landlords with petty, and fast-dwindling estates, living upon the always diminishing pittances of lease money.” Id.
\textsuperscript{76} ILCA § 207.
\textsuperscript{77} Id.
\textsuperscript{78} Hodel, 481 U.S. at 709.
\textsuperscript{79} Babbitt v. Youpee, 519 U.S. 234, 237 (1997); Hodel, 481 U.S. at 717; see infra note 175.
\textsuperscript{80} 481 U.S. 704 (1987).
\textsuperscript{81} Hodel, 481 U.S. at 709–10.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 710.
\textsuperscript{84} Id. at 718.
\textsuperscript{85} Id. at 715–16.
of their land, nor did it allow owners to devise or pass their interests through intestate succession.\textsuperscript{86} The Court stated that while it may have been desirable to stop fractionation by prohibiting the further subdivision of lands, the escheat provision went “too far.”\textsuperscript{87}

As \textit{Hodel} progressed through the court system, Congress amended ILCA.\textsuperscript{88} The amended version extended the “look back” period from one year to five years, which was used to determine whether the income from the land was sufficiently low to qualify for the escheat provision.\textsuperscript{89} Congress also added a number of exceptions to the escheat provision, and allowed tribes that crafted their own regulations for curbing fractionation to avoid the escheat provision.\textsuperscript{90} The Court reviewed the amended version of ILCA in \textit{Babbitt v. Youpee}.\textsuperscript{91}

In \textit{Babbitt}, the decedent had devised several interests that had a combined value of $1,239.\textsuperscript{92} The decedent devised each interest to only one devisee, and in doing so did not further fractionate the interests.\textsuperscript{93} During the probate proceedings, an administrative law judge at the DOI determined that these interests qualified for the escheat provision of ILCA.\textsuperscript{94} The heirs of the decedent challenged the amended version of ILCA on grounds that the escheat provision authorized an unconstitutional taking of property.\textsuperscript{95} Following the logic of \textit{Hodel}, the Court also held ILCA’s amended escheat provision to be unconstitutional.\textsuperscript{96}

3. American Indian Probate Reform Act

Prior to AIPRA, Indians often did not have wills, and each generation’s interest in trust land passed through intestacy to the next generation.\textsuperscript{97} In a number of tribes, the act of creating a will conflicted with important tribal and religious beliefs and traditions.\textsuperscript{98} The widespread absence of estate planning among Indians caused land interests to become more fractionated with each generation, causing once undivided interests to be split among hundreds of

\textsuperscript{86} \textit{Id.} at 718.
\textsuperscript{87} \textit{Id.}
\textsuperscript{90} 25 U.S.C. § 2206(b)–(c) (1994). One exemption allowed the recipient of an interest otherwise subject to the escheat provision to receive the interest if the recipient owned another undivided interest in the same tract. 25 U.S.C. § 2206(b). This provision, however, only applied to interests devised by will and did not apply if the intended recipient was to receive the interest through the laws of intestacy. \textit{Id.}
\textsuperscript{91} 519 U.S. 234 (1997).
\textsuperscript{92} \textit{Id.} at 241.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 241–42.
\textsuperscript{95} \textit{Id.} at 242.
\textsuperscript{96} \textit{Id.} at 237.
\textsuperscript{97} Kristina L. McCulley, Comment, \textit{The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?}, 30 AM. INDIAN L. REV. 401, 408 (2005).
\textsuperscript{98} \textit{Id.} at 416–18. For example, some tribes believe writing a will invites death. \textit{Id.} at 417–18.
owners. Congress recognized that prior to AIPRA, “the reliance of the Federal Government on the State law of intestate succession with respect to the descent of allotments [d] resulted in numerous problems affecting Indian tribes, members of Indian tribes, and the Federal Government.” Congress concluded that a comprehensive federal uniform probate code would address these problems. The comprehensive reform would likely reduce the fractionation of interests in trust land, create access to estate planning services, encourage practices to prevent further fractionation, facilitate the creation of tribal probate codes, and fill in the gaps of federal probate law.

a. Legislative History of AIPRA

Previous attempts to reform the federal probate procedure failed in part because Congress did not consult with Indian tribes when drafting the early acts. Congress solicited input from tribes, however, during the drafting of AIPRA. Early versions of what would eventually become AIPRA took form in three separate bills, each introduced by Colorado Senator Benjamin Nighthorse Campbell. On October 27, 2004, President George W. Bush signed AIPRA into law, to be effective for decedents passing away on or after June 20, 2006. On December 2, 2008, Congress passed a series of technical amendments that fine-tuned the original Act. The DOI published federal regulations implementing AIPRA in November 2008.

Under AIPRA, the Secretary of the Interior has the authority to purchase interests in trust land from owners or heirs at the fair market value of the

100. American Indian Probate Reform Act of 2004, Pub. L. No.108-374. Congress further stated that on a practical level, the application of different rules of intestate succession to each interest of a decedent in or to trust or restricted land if that land is located within the boundaries of more than [one] State . . . makes probate planning unnecessarily difficult and . . . impedes efforts to provide probate planning assistance or advice.
101. Id. § 2(4).
102. Id. § 2(3).
104. Id.
land. The Congressional Budget Office (“CBO”) projected in 2005 that Congress would need to appropriate $750 million over six years to enable the Secretary of the Interior to purchase interests in trust land as provided for in the Act. The CBO further projected that over a five-year period, a total of $10 million would be needed to provide estate planning services to tribal members and assist tribes in developing their own probate codes. The CBO also anticipated that reducing the number of individual owners of trust land interests would in turn reduce the administrative costs of managing the land, although such savings would likely not be significant during the first five years following the bill’s enactment.

b. Explanation of AIPRA’s Provisions

AIPRA serves as the probate code for federal Indian trust property and applies to the estates of Indians who die on or after June 20, 2006. AIPRA governs the process of intestate succession and also affects how trust property passes when it is devised by will. A review of a number of key AIPRA provisions reveals its complexity and the potentially far-reaching effects it could have on those who own an interest in federal trust land.

i. The Five-Percent Rule

The size of an interest in tribal land is a determinative factor in the AIPRA intestate provisions. The five-percent rule, also known as the single-heir rule, works to stop the continued fractionation of small interests by mandating that interests not devised in a will pass to one heir instead of being divided among multiple heirs. This concept stems from the doctrine of primogeniture, a practice in which the firstborn inherits the entire estate.

110. Id. at 3. The Congressional Budget Office (“CBO”) estimated expenditures of over $400 million during the first five years of AIPRA in order for the Secretary of the Interior to purchase trust land under the Act. Id. at 1. The CBO estimated that state, local, and tribal governments would not incur any significant costs associated with AIPRA. Id. at 4.
111. Id. at 3.
112. Id. at 3–4.
113. Nash & Burke, supra note 24, at 132.
114. 25 U.S.C. § 2206(a)(2)(D)(iii) (2006). Similar statutory provisions to AIPRA’s five-percent rule had been introduced previously in Congress. For example, in 1969, Representative Wayne Aspinall introduced a bill allowing intestate trust interests to pass to one person in the following order of priority: (1) to the spouse of the decedent; (2) to the eldest descendent “living on the allotment at the time of decedent’s death,” or if not applicable, to the eldest descendant living on the reservation at time of decedent’s death; or (3) to the eldest descendant not living on the reservation. Williams, supra note 69, at 726 (citing H.R. 11113, 89th Cong. (1966)).
115. Sledd, supra note 1, at 14. Primogeniture is rooted in traditional English law and preserved land estates over the generations by passing all real property through intestacy to the eldest male heir. Claire Priest, Creating an American Property Law: Alienability and Its Limits in American History, 120 HARV. L. REV. 385, 399 (2006). The doctrine of primogeniture carried over somewhat to the American colonies during the 1700s, although it was completely abolished in all American states by 1800. Id. at 394. Some scholars explain the demise of primogeniture as a consequence of the decline of feudalism and the rise of private property; alternatively, other scholars explain that societies identified the doctrine as outdated and incompatible with a republican form of government. Id. at 392–95.
Specifically, the rule states that interests of less than five percent not devised by will pass in this order: (1) to the oldest surviving eligible child; (2) to the oldest surviving eligible grandchild; (3) to the oldest surviving eligible great-grandchild; or (4) if none of the above, to the tribe.\footnote{25 U.S.C. § 2201(9); 25 U.S.C. § 2206(a)(2)(D)(i), (iii). An “eligible heir” is defined as: any of a decedent’s children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are—(A) Indian; or (B) lineal descendants within 2 degrees of consanguinity of an Indian; or (C) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement[,] . . . another trust or restricted interest in such parcel from the decedent.} If a spouse survives the decedent and lives on the parcel at the time of the decedent’s death, the spouse receives a life estate with the remainder passing to the oldest single heir.\footnote{25 U.S.C. § 2206(a)(2)(D)(ii).} In contrast, trust interests of five percent or more pass intestate in the following order: (1) to the surviving spouse, who receives a life estate that passes equally to children (or grandchildren or great-grandchildren); (2) if there is no surviving spouse but surviving children or grandchildren, then to each child in equal shares; (3) if there is no surviving spouse and no surviving children or grandchildren, then to the decedent’s parents; (4) if the decedent is only survived by great-grandchildren, then to the great-grandchildren in equal shares; (5) if the decedent leaves no surviving spouse, child, grandchild, great-grandchild, or parents, then to the decedent’s sibling(s); or (6) if none of the above, to the tribe.\footnote{25 U.S.C. § 2206(c)(1). See infra note 151 for an example of devising language. A joint tenancy with right of survivorship is “a property interest held by two or more persons concurrently, with the survivor of them to take the entire interest.” POWELL, supra note 57, § 51.01[1].}

ii. Presumption of Joint Tenancy with Right of Survivorship

AIPRA also differs from traditional laws of intestacy because it creates a presumption that, unless explicit testamentary language provides otherwise, property is passed in a joint tenancy with right of survivorship, not through tenancy in common.\footnote{See POWELL, supra note 57, § 51.01[1]. For additional examples of how joint tenancy with right of survivorship operates in practice, see Montana State University Extension,Fact Sheet #12: Ways to avoid further fractionation of reservation land (March 2009), http://www.montana.edu/indianland/factsheets.html.} This presumption requires that tribal members educate themselves about fractionation in order to make informed decisions about how to devise their property. Practically, this presumption allows a landowner to devise equal shares to six people as joint tenants with right of survivorship and provides for the reconsolidation of the interests as each devisee dies. A presumption of joint tenants with right of survivorship prevents further fractionation of the interest.\footnote{For a comparison of the Uniform Probate Code and the Indian Land Consolidation Act, see Suzanne S. Schmid, Comment, Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?, 43 U. MIA M. L. REV. 739, 753–55 (1989).} This provision requires that the testator deliberately state his intention to devise trust land to multiple
devisees as tenants in common.121 The provision also increases the possibility that an estate planner will explain to a testator the difference between joint tenancy with right of survivorship and tenancy in common, thereby decreasing the likelihood that land will be further fractionated when the testator dies.

iii. Who Can Inherit an Interest in Trust Land?

Under AIPRA, trust land may pass only to those who are determined to be “eligible heirs.” Being eligible to inherit trust land is not contingent solely on one’s status as an Indian: an “eligible heir” is defined as a decedent’s children, grandchildren, great-grandchildren, siblings, half-siblings by blood, and parents who are either (1) Indians; (2) lineal decedents of an Indian within two degrees of consanguinity;122 or (3) owners of the same parcel of land.123 AIPRA defines an “Indian” as a person who (1) is a member or is eligible to become a member of an Indian tribe or (2) owned trust land as of October 27, 2004, and is defined as an Indian under the IRA.124 To circumvent this restriction on who may inherit under AIPRA, interest holders often choose to leave a life estate interest to non-Indian parties, with the remainder to someone considered an Indian under AIPRA.

iv. Option to Purchase

AIPRA aims to consolidate interests by empowering certain parties to purchase fractionated interests in land. The first of the purchase options can

---

122. Consanguinity is “a legal term that describes the blood relationship or biological kinship among relatives.” Montana State University Extension, Fact Sheet #5: Who is eligible to inherit your trust lands and retain trust status? (March 2009), http://www.montana.edu/indianland/factsheets.html [hereinafter Fact Sheet #5].
123. 25 U.S.C. § 2201(9). If an eligible heir inherits land from the decedent, the land retains its trust status. Fact Sheet #5, supra note 122. If, however, an interest holder attempts to devise the interest to a non-Indian, the devise would fail in most cases and the property would descend per the laws of intestacy. Id. In certain circumstances a beneficiary may forfeit the land’s trust status and devise the land in fee status to a non-Indian. See 25 U.S.C. §§ 464, 2206(b)(2)(A)(i), (b)(2)(B). Only two types of interests, non-IRA land and IRA-land under the authority of a tribal constitution, may forfeit trust status by devise to a non-Indian. See id. If such a transaction were to occur, the fee portion of the partial interest would be subject to taxation, but it would not be partitioned from the rest of the allotment. Douglas Nash & Cecelia Burke, Passing Title to Tribal Land and Federal Probate of Native American Estates, 12–13 (Dec. 8, 2006), http://www.law.seattleu.edu/Documents/indian-institute/PastingTitletoTribalLands.pdf [hereinafter Passing Title]. In other words, it would create an undivided fee interest within the trust allotment. Id.
124. 25 U.S.C. § 2201(2)(A)–(B). Owners of trust land in California may also satisfy the AIPRA definition of an “Indian” if they own trust land in California and meet one of the other two requirements listed above. 25 U.S.C. § 2201(2)(C). The IRA defines an Indian as:

[All persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.]

be exercised at any time with proper consent: if the owners of at least fifty percent or more of the undivided interests in a parcel of trust land consent to the sale, the tribe with jurisdiction over the land may purchase the land at fair market value.\textsuperscript{125} An Indian who has owned an undivided interest in the tract and has had actual use and possession of the tract for at least three years before the time of the tribe’s offer can match the tribe’s offer and buy the tract instead.\textsuperscript{126} While this purchase option facilitates land consolidation, it may also result in the involuntary loss of land for minority interest holders who did not consent to the sale.\textsuperscript{127} A second purchase option arises during probate. This option allows the decedent’s estate to sell a parcel to an “eligible heir” as defined by AIPRA.\textsuperscript{128} Interests of less than five percent may be purchased without the consent of the heirs if the decedent died intestate.\textsuperscript{129}

v. Partition

Under state law, “partition” is the legal division of a parcel by co-owners.\textsuperscript{130} Under AIPRA, however, “partition” is the reconsolidation of all highly fractionated interests in a parcel to one co-owner with the consent of one-half of all the co-owners of the parcel.\textsuperscript{131} This practice essentially forces sale from one co-owner to another, similar to eminent domain.\textsuperscript{132} The Indian tribe with jurisdiction over the land that owns an interest in the parcel or any person owning an interest in the parcel who is eligible to purchase the parcel may submit a partition application to the Secretary of the Interior.\textsuperscript{133} The Secretary of the Interior must then give notice of the requested partition.\textsuperscript{134}

\begin{footnotes}
\footnotetext[125]{25 U.S.C. § 2204(a)(2). The fair market value of the land is determined at the time of decedent’s death. 25 U.S.C. § 2205(c)(1)(A).}
\footnotetext[126]{25 U.S.C. § 2204(b).}
\footnotetext[127]{Nash & Burke, supra note 29, at 146.}
\footnotetext[128]{25 U.S.C. § 2206(o). The purchase can only be made by: (A) Any other eligible heir taking an interest in the same parcel of land by intestate succession or the decedent’s other devisees of interests in the same parcel who are eligible to receive a devise . . . . (B) All persons who own undivided trust or restricted interests in the same parcel of land involved in the probate proceeding. The Indian tribe with jurisdiction over the interest, or the Secretary on behalf of such Indian tribe. (C) The Indian tribe with jurisdiction over the interest, or the Secretary on behalf of such Indian tribe.}
\footnotetext[129]{25 U.S.C. § 2206(o)(2).}
\footnotetext[130]{Passing Title, supra note 123, at 6.}
\footnotetext[131]{25 U.S.C. § 2201(6). “Highly fractionated” interests are those defined as: (1) having fifty to ninety-nine owners, none of whom hold more than a ten percent interest or (2) having one hundred or more owners. Id. Mineral interests can only be partitioned if they are partitioned along with the surface interest and have not previously been severed from the surface. 25 U.S.C. § 2204(c)(1).}
\footnotetext[132]{Passing Title, supra note 123, at 6. In eminent domain, the government has the power to take private property for a public use, as long as the owner of the property is justly compensated. U.S. Const. amend. V.}
\footnotetext[133]{25 U.S.C. § 2204(c)(2)(A).}
\footnotetext[134]{25 U.S.C. § 2204(c)(2)(F). The preferred method of notice is in writing, although notice by publication may be appropriate when the Secretary of the Interior is unable to serve written notice to interest holders. 25 U.S.C. § 2204(c)(2)(F)(1)(e)–(ii). The results of the appraisal may be contested per the conditions in 25 U.S.C. § 2204(c)(2)(G).}
\end{footnotes}
After the notice requirements are met and the applicant obtains an appraisal of the parcel, the parcel can be sold via a competitive bidding process for no less than the fair market value. Some view AIPRA’s current partition requirements as “too cumbersome,” as many specific conditions apply to who may bid on the parcel and who may match the highest bid. As a result, this provision is rarely used.

vi. Consolidation Agreements

Consolidation agreements provide a useful, voluntary way to reduce fractionation. While a probate case is pending, a decedent’s eligible heirs or devisees can voluntarily agree to consolidate interests in the decedent’s trust inventory. Land subject to a consolidation agreement cannot be purchased at probate. Accordingly, when a tribe seeks to make a forced purchase of property, families can agree to a consolidation plan in order to avoid the sale.

The AIPRA provisions described above regarding eligible heirs, intestate succession, and consolidation of interests represent only a portion of AIPRA’s requirements. Drafting wills that comply with AIPRA requires that attorneys and trust interest holders be well-versed in all of AIPRA’s complex provisions. In light of these complexities, the next Part will explore the challenges AIPRA faces as it moves beyond its infancy and into its formative years.

III. ANALYSIS

AIPRA promised a much needed reform of the federal Indian probate process. But has AIPRA delivered the anticipated reform? Has AIPRA helped reduce the compounding fractionation of interests in Indian trust land? AIPRA requires that the DOI provide estate planning assistance to the extent that Congress appropriates funds for that purpose. Funding for estate planning is a significant issue because a large number of Indian estate planning clients receive services from legal aid institutions and other non-

---

137. Empowering Indian Landowners, supra note 136, at 3.
139. 25 U.S.C. § 2206(j)(9)(A). A probate judge has broad discretion to approve a settlement agreement, as long as the following conditions are met: “(1) All parties to the agreement are advised as to all material facts; (2) All parties to the agreement understand the effect of the agreement on their rights; and (3) It is in the best interest of the parties to settle.” 43 C.F.R. § 30.150 (2011).
141. Empowering Indian Landowners, supra note 136, at 6.
142. 25 U.S.C. § 2206(f)(1)(B). This assistance may be provided directly to individuals by the DOI or through grants to Indian tribes, legal services organizations, and other nonprofits. 25 U.S.C. § 2206(f)(3).
profit groups. But do tribal members have access to estate planning services to navigate AIPRA’s more contentious provisions? Has the federal government delivered sufficient financial assistance to provide estate planning services to tribal members across the country? This Part will examine these questions in an effort to provide a five-year progress report of AIPRA.

A. AIPRA’s Complexity Demands Competent Estate Planning Services

AIPRA’s complex technical provisions pose barriers to tribal members in need of estate planning services as well as attorneys and other professionals positioned to provide such services. Various AIPRA provisions, such as the five percent rule and the restriction on who can inherit trust land, necessitate that tribal members wishing to “put their affairs in order” consult an attorney who is well-versed in AIPRA. In order for Indians to take advantage of AIPRA, they must first have access to estate planning services designed to educate them about AIPRA and help them make informed decisions regarding the disposition of trust holdings. Furthermore, the professionals providing these services must have sufficient knowledge of the unique aspects of AIPRA to be able to navigate its distinct will-drafting requirements and avoid common pitfalls that jeopardize the effectiveness of an AIPRA will. Both tribal members and attorneys have a great responsibility to reduce fractionation.

1. The Challenges of Will Drafting

The complexity of AIPRA provisions and the lengthy probate process combine to make the drafting of Indian wills a crucial undertaking for those owning interests in trust land. Because the BIA stopped drafting wills for Indians upon the enactment of AIPRA, private lawyers and legal aid organizations must obtain the knowledge necessary to draft AIPRA wills. Private estate planning attorneys not otherwise practicing Indian law may be caught unaware of AIPRA’s provisions the first time they prepare an Indian will. It is common practice to prepare one will devising both Indian trust assets and all other assets, although the required granting language for trust property differs from the language devising other property. Further, estate planning attorneys commonly fail to include a self-proving clause in the will that meets AIPRA’s requirements. AIPRA, like many state probate

143. See Empowering Indian Landowners, supra note 136, at 2–3. Although private attorneys may engage Indian estate planning clients, many potential Indian estate planning clients do not have the financial resources to hire a private attorney. Id.
144. English, supra note 103, at 23–24.
145. See 25 U.S.C. § 2206(c)(1); infra note 151 and accompanying text.
codes, requires the will’s self-proving affidavit to be signed by the testator.\textsuperscript{147} This signature, however, is often omitted from Indian wills, thereby causing numerous problems during the probate process.\textsuperscript{148} Another common, much more egregious error made by estate planning practitioners is placing trust land into a living trust.\textsuperscript{149} Such a transaction is void, and any property placed into the trust must be distributed by the probate judge in a way that best accomplishes the decedent’s intent.\textsuperscript{150} Practitioners can easily avoid these types of errors by becoming familiar with the finer details of AIPRA.

Moreover, due to careless drafting omissions, AIPRA’s presumption that property passes through joint tenancy with right of survivorship may result in a misrepresentation of the decedent’s intent. For example, a court would interpret the phrase, “I give, devise, and bequeath to my sisters, Sue Thomas and Maria Thomas, my trust land,” to mean that Sue and Maria would receive the interest in trust land as joint tenants with right of survivorship. Leaving the trust land to the sisters as tenants in common would require explicit language to that effect.\textsuperscript{151} Practitioners often overlook AIPRA’s presumption of joint tenancy with right of survivorship because the presumption in most states is that land passes through tenancy in common.\textsuperscript{152}

2. The Challenges of Probate

The federal probate process is lengthy and involved. Depending on the complexity of the estate, the probate process takes four to eight years.\textsuperscript{153} Estimates place the average timeframe at eight years.\textsuperscript{154} The BIA and the Office of Hearings and Appeals (“OHA”), both located in the DOI, work together to complete the probate process.\textsuperscript{155} The process begins when someone notifies the BIA of the decedent’s death. Then the BIA compiles a probate package, which includes the death certificate, the will, names and addresses of potential heirs, an inventory of trust property, and other relevant information.\textsuperscript{156} The BIA then refers the probate package to the OHA, where an administrative law judge conducts hearings and decides how to distribute the estate.\textsuperscript{157} Once that determination is made, then the BIA and the Office of

\textsuperscript{147} 25 C.F.R. § 15.9 (2011); see also KAN. STAT. ANN. § 59-606 (2011); MONT. CODE ANN. § 72-2-524 (2011); N.D. CENT. CODE § 31.1-08-04 (2011); S.D. CODIFIED LAWS § 29A-2-504 (2011).
\textsuperscript{148} Interview with Robert S. Chester, supra note 146.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} For example, the following language explicitly provides for a tenancy in common: “I give, devise, and bequeath to my sisters, Sue Thomas and Maria Thomas, my trust land as tenants in common.”
\textsuperscript{152} See, e.g., KAN. STAT. ANN. § 58-501 (2005); Taylor v. Canterbury, 92 P.3d 961, 964 (Colo. 2004) (holding that tenancies in common are the favored and presumptive form of concurrent ownership of real property).
\textsuperscript{154} Id.
\textsuperscript{156} 25 C.F.R. §§ 15.101, 104.
\textsuperscript{157} James J. Yellowtail, The Federal Probate Process, INSTITUTE FOR INDIAN ESTATE PLANNING AND
the Special Trustee distribute the estate.\textsuperscript{158} To further complicate matters, only portions of the will that devise property or money held in trust are subject to probate at the federal level; portions of the will devising real or personal property not held in trust are subject to probate in state or tribal court.\textsuperscript{159}

Many factors contribute to the length of the probate process. First, the BIA must receive timely notice of the decedent’s death.\textsuperscript{160} As a result, the probate process might not even begin for several years after the death, leaving the status of the property in flux. Significant delays also occur during the BIA’s compiling of the probate package because it must acquire and verify numerous pieces of information about the decedent, the potential heirs, and the property.\textsuperscript{161} Not only do bureaucratic congestion and heavy caseloads clog the process, but the family of the decedent may not readily supply information if the probate process is expected to inflame existing family turmoil.\textsuperscript{162} Once the BIA compiles the necessary information, it sends it to OHA for adjudication, where every effort is made to hear the case on a “first-in, first-out” basis.\textsuperscript{163} A properly drafted will, combined with cooperation from all parties who have necessary information about the estate, can vastly reduce these delays.

3. Will AIPRA Be Challenged in the Courts?

One of the most prominent provisions of AIPRA, the single-heir rule, may in fact be the most inequitable.\textsuperscript{164} In order to further AIPRA’s goal of reducing fractionation, the single-heir rule, also known as the five-percent rule, authorizes only one child to inherit interests of less than five percent if the decedent dies intestate.\textsuperscript{165} In other words, the one child inherits to the exclusion of all other children. While one may argue that interest holders should make wills to express their wishes upon their death, such a statement does not acknowledge several important barriers to Indian estate planning services. The culture of certain tribes creates an aversion to wills, as many

\textsuperscript{158} English, supra note 103, at 20.
\textsuperscript{159} 25 C.F.R. §§ 15.101, .104–.105. For example, a copy of the decedent’s death certificate is required, as well as a copy of the decedent’s will and codicils, the decedent’s Social Security number, tribal enrollment number, names and addresses of all potential heirs and devisees, a list of creditors, any marriage licenses, divorce decrees, adoption papers, name change papers, and child or spousal support orders. 25 C.F.R. § 15.105.
\textsuperscript{160} Interview with Robert S. Chester, supra note 146.
\textsuperscript{161} Id. Any decision of the Office of Hearings and Appeals can be appealed to the Interior Board of Indian Appeals (“IBIA”). See 43 C.F.R. § 4.312 (2011).
\textsuperscript{162} Probate codes allow for the equitable distribution of property upon the decedent’s death. Nash & Burke, supra note 24, at 121. AIPRA, on the other hand, was drafted to promote land consolidation and reduce further fractionation of interests in trust land. Id.
tribes believe that writing a will invites death.\textsuperscript{166} On the other hand, some Indians intend to make wills, but do not live in areas where Indian estate planning services are readily available.\textsuperscript{167} Additionally, some people wait until their bodies and minds are in a rapid rate of decline to seek estate planning services. Unfortunately, this situation is shared by people of all races and cultures: people might delay settling their affairs for so long that they may lack the testamentary capacity to make a will or they might begin the estate planning process but die before executing a will.

A similar inequity arises for decedents owning interests of less than five percent who die without children, grandchildren, or great-grandchildren. Under AIPRA, these interests pass to the tribe, not to the parents or siblings of the decedent.\textsuperscript{168} Such a limited definition of an “heir” for interests of less than five percent is unfair and does not adequately balance the competing interests of reducing fractionation and providing family members the opportunity to inherit family interests.\textsuperscript{169} This limited definition is especially inequitable for minors, who likely do not have children of their own and are not able to make a will under AIPRA because they are not eighteen years of age.\textsuperscript{170} Interests of less than five percent held by minors who die without children ultimately pass to the tribe.\textsuperscript{171}

A certain level of animosity toward AIPRA has arisen among some Indians who view it as a paternalistic measure that adds yet another level of government control to their land.\textsuperscript{172} The force behind this resentment, however, is not likely to result in anything other than minor technical changes to AIPRA because tribes can circumvent most of AIPRA’s provisions by adopting their own tribal probate codes.\textsuperscript{173} To date, however, the DOI has approved only a few tribal probate codes, despite the fact that a number of tribes have submitted codes for approval.\textsuperscript{174} Even though some Indians

\textsuperscript{166} Interview with Robert S. Chester, supra note 146. The Blackfeet Tribe is one such tribe. \textit{Id.}

\textsuperscript{167} See supra Part III.A.


\textsuperscript{169} Interview with Robert S. Chester, supra note 146.

\textsuperscript{170} See 25 C.F.R. § 15.3 (2011). The federal regulations provide that: “[a]ny person 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust or restricted land or trust personalty, may dispose of trust or restricted land or trust personalty by will.” \textit{Id.}


\textsuperscript{172} Telephone Interview with Erica Wolf, Managing Attorney, Indian Estate Planning Projects (Aug. 23, 2011) [hereinafter Interview with Erica Wolf]; see also Urteago, supra note 62, at 483. Critics of AIPRA view the 2008 technical amendments as somewhat softening AIPRA’s paternalistic provisions. Urteago, supra note 64, at 483.

\textsuperscript{173} Interview with Erica Wolf, supra note 172; see 25 C.F.R. § 18.104. The tribal probate code cannot govern the descent and devise of trust personal property, such as the IIM account; the provisions of AIPRA will always apply to trust personalty. 25 C.F.R. § 18.104. See generally 25 C.F.R. § 18.101–12.

AIPRA: A Five Year Review

dislike certain AIPRA provisions, no one has yet made a meritorious constitutional challenge to AIPRA. Overall, the technical provisions of the Act provide much-needed reform to the Indian probate system and reduce fractionation. In reality, the primary obstacle to the reform promised by AIPRA is not the structure of the statute itself but the absence of adequate estate planning services.

B. Estate Planning Services: The Crucial Component of AIPRA’s Success

The federal government funded Indian estate planning services through a pilot project in 2005, but since that time it has failed to provide additional funding for those services. Although tribes with available financial resources have funded estate planning initiatives from their own coffers, many tribes do not have the means to provide these services to their members. As a result, tribal members remain uninformed about AIPRA and the problem of fractionation. Although the intestacy provisions of AIPRA provide that small interests will not become further fractionated if tribal members pass away without a will, the provisions also permit further fractionation because they divide interests larger than five percent among all eligible heirs.

175. In Hodel v. Irving, 481 U.S. 704 (1987), the Supreme Court held that the escheat provision in the Indian Land Consolidation Act (“ILCA”) was an unconstitutional taking of a decedent’s property without just compensation. 481 U.S. at 717; see supra Part II.A.i.b. Critics of AIPRA may question the constitutionality of its forced sale provision. See Jered T. Davidson, Comment, This Land is Your Land, This Land is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation, 35 AM. INDIAN L. REV. 575, 594 (2011). However, a forced sale under AIPRA requires fair market value compensation, and the forced sale can be avoided entirely by entering into a consolidation agreement. See Passing Title, supra note 123, at 12. Because AIPRA requires the compensation of the interest owner and adds the condition of an appraisal and an option for consolidation, it is not likely that the arguments in Hodel would support a constitutional challenge to this provision. Interview with Erica Wolf, supra note 172. AIPRA has sparked rumblings of potential constitutional challenges to provisions that limit the potential list of heirs, such as the five percent rule. Id. Currently, however, no such formal challenge has been made. Those who are frustrated by or unaware of AIPRA rules question the constitutionality of certain provisions, although these allegations generally lack legal merit. For example, a mother whose son died without a spouse or any lineal descendants attempted to challenge the five-percent rule because her son’s interests of less than five percent in trust land passed to his tribe. Est. of Roland Dean DeRoche, 53 Interior Dec. 114, 114 (IBIA 2011). The appeal went to the IBIA. Id. The mother argued that her son was unaware of the need to make a will and did not know that AIPRA would provide for those interests to go to the tribe. Id. at 115. Ultimately, the IBIA dismissed the case for lack of jurisdiction because it does not have jurisdiction to consider constitutional challenges to federal statutes. Id. at 115.

176. American Indian Probate Reform Act: Hearing Before the S. Comm. on Indian Affairs, 112th Cong., 5–6 (2011) (statement of Douglas Nash, Director of the Center for Indian Law and Policy, Institute for Indian Estate Planning and Probate, Seattle University School of Law) [hereinafter Statement of Douglas Nash]. The DOI has provided funding to pursue educational activities related to AIPRA, but is not currently funding direct estate planning and will drafting activities. Id. at 6–7. For example, the extension offices of the University of Idaho and Montana State University partnered to secure a grant from the U.S. Department of Agriculture Risk Management Agency to provide educational programs on AIPRA to tribal members and leaders throughout the region. University of Idaho Extension, Extension Educates Tribal Members About Estate Planning Issues, IMPACT (2009), available at http://www.extension.uidaho.edu/impacts/Pdf_09/2-09mbischoff-tribal.pdf (last visited Jan. 11, 2012). Personnel from both universities worked with tribal attorneys and agencies to teach seminars on AIPRA to encourage tribal members to seek private estate planning services. Id. Additionally, the universities published a series of fact sheets that explain a number of AIPRA’s key provisions, and numerous local newspapers and newsletters published informational articles. Id. The fact sheets are available online at http://www.montana.edu/indianland/factsheets.html.

177. Interview with Erica Wolf, supra note 172.

178. See McCulley, supra note 97, at 418.
only way tribal members can ensure that their interest will not be further fractionated upon their death is to draft a will to that effect.

Given the importance of will drafting and other estate planning services, the best justification for providing funding for these services is that such expenditures, over time, actually reduce the government’s administrative costs of managing trust land.\(^{179}\) If a decedent devises an interest in land to one person, the overall cost of administration, not including probate, stays constant because the number of owners would not increase. If, however, a decedent dies intestate, the law will divide interests of greater than five percent among the decedent’s children, and the administrative burden will increase.\(^{180}\) For example, if the decedent has six children, the administrative burden of managing that interest will increase by five times. In short, securing funding for will-drafting may in part pay for itself over time. Avoiding further fractionation not only reduces administrative costs but allows trust land to be used productively, a task that becomes more difficult with each additional owner.\(^{181}\)

In 2005, the Institute for Indian Estate Planning and Probate at Seattle University School of Law (“Institute”) received a DOI pilot project contract to provide free estate planning services to members of tribes in the Pacific Coast and Dakota Plains regions.\(^{182}\) The BIA provided $500,000 for the project.\(^{183}\) Through the pilot project, the Institute attempted to determine whether Indians in these geographic areas needed estate planning services and whether such services would successfully avoid or reduce further fractionation of trust land.\(^{184}\) During the nine-month project, the Institute researched land interests and drafted durable powers of attorney, wills, consolidation agreements, and gift deed applications for over 1,200 clients.\(^{185}\) Additionally, 586 people were on a waiting list for services when the pilot project ended.\(^{186}\)

The BIA audited the project and found that 83.5 percent of wills drafted during the project avoided or reduced fractionation.\(^{187}\) A total of 679 interests were transferred by inter vivos documents, including sales to tribes, gift deeds, and consolidation agreements, and 100 percent of those transactions stopped fractionation by transferring the interests either to a

\(^{179}\) Statement of Douglas Nash, supra note 176, at 1.


\(^{181}\) Interview with Erica Wolf, supra note 172.

\(^{182}\) Email from Erica L. Wolf, Managing Attorney for Indian Estate Planning Projects, The Center for Indian Law and Policy, to author (July 18, 2011, 15:33 CDT) [hereinafter Email from Erica L. Wolf] (on file with author). What was once known as The Institute for Indian Estate Planning and Probate has been replaced with the Center for Indian Law and Policy at the Seattle University School of Law. CILP Staff, SEATTLE UNIVERSITY SCHOOL OF LAW CENTER FOR INDIAN LAW AND POLICY, http://www.law.seattleu.edu/Centers_and_Institutes/Center_for_Indian_Law_and_Policy/CILP_Staff.xml (last visited Jan.11, 2012).

\(^{183}\) Statement of Douglas Nash, supra note 176, at 5.

\(^{184}\) Email from Erica L. Wolf, supra note 182.

\(^{185}\) Id.

\(^{186}\) Id.

\(^{187}\) Id.
single individual or multiple stake-holders through joint tenancy with right of survivorship. The project prevented the creation of 4,640 new interests under AIPRA’s rules of intestate succession. These results strengthen the assertion that halting fractionation in trust land also halts the corresponding administrative burden required to manage the fractionated interests. Promoting efficiency in landownership and administrative process can lessen the current problem of fractionation. Such preventive measures, however, have failed to attract the necessary additional federal funding. As a result, the operative power of AIPRA is limited almost exclusively to those tribal members who are within the reach of existing Indian estate planning services like the Institute’s.

A cumulative review of all Institute projects since 2005 shows that it provided estate planning information and education to over 24,000 Indian landowners. Of those receiving information about AIPRA, approximately 4,000 tribal members became clients of the Institute, resulting in the execution of over 2,000 wills and the preparation of over 1,600 other estate planning documents. In total, between 75 and 100 percent of these estate plans successfully reduced or avoided further fractionation. The statistics from this project strongly suggest a correlation between estate planning services and a reduction in further fractionation of interests in trust land.

Because of the rural and isolated nature of some Indian reservations, estate planning professionals must use creative measures to provide services to their clients. For example, teleconferencing is an efficient way to connect with clients in under-served areas. Teleconferencing allows tribal members to confidentially consult with attorneys without the burden of travel. Although teleconferencing can connect a client with a faraway attorney, potential clients may be skeptical of such an arrangement because of the personal and confidential nature of the meeting. The level of trust needed

---

188. Id.
189. Id.
190. One proposed solution to the fractionation problem is to add yet another level to the administrative burden of managing trust land. See generally Davidson, supra note 175, at 603. Davidson proposes a Model Dormant Tribal Fractional Interests Act, modeled after dormant mineral acts, as a means to consolidate fractionated Indian trust land. Id. at 609–12. The goal of this act is to maximize the economic productivity of the land. Id. at 618.
191. Interview with Erica Wolf, supra note 172.
192. Id. The Center supervises a summer internship program for law students, who provide estate planning services to tribal members in Washington, Oregon, Idaho, and Montana. Indian Estate Planning Intern Program, SEATTLE UNIVERSITY SCHOOL OF LAW CENTER FOR INDIAN LAW AND POLICY, http://www.law.seattleu.edu/Centers_and_Institutes/Center_for_Indian_Law_and_Policy/Programs/Summer_Internship_Program.xml (last visited Jan. 11, 2012). Seattle University School of Law also created an Indian Wills Clinic in 2006. Indian Wills Clinic, SEATTLE UNIVERSITY SCHOOL OF LAW CENTER FOR INDIAN LAW AND POLICY, http://www.law.seattleu.edu/Centers_and_Institutes/Center_for_Indian_Law_and_Policy/Programs/Indian_Wills_Clinic.xml (last visited Jan. 11, 2012) [hereinafter SEATTLE UNIVERSITY SCHOOL OF LAW].
193. Email from Erica L. Wolf, supra note 182.
194. Id.
to build a solid attorney-client relationship may be more difficult, if not impossible, to replicate via teleconferencing.\footnote{197}

In an extremely remote area in Alaska, the Institute has just launched a unique project that serves members of the Bristol Bay Native Association.\footnote{198} In this area of rural Alaska, many allotments are held by first generation owners.\footnote{199} The Institute has secured funding through a law school fellowship for a two-year project during which the fellow will provide estate planning services to area tribes.\footnote{200} Upon completion of the project, the Institute will evaluate whether the availability of estate planning services in the Bristol Bay region resulted in a lower frequency of fractionation in relation to the fractionation of the rest of the country.\footnote{201} Over time, these types of innovative approaches will expand the reach of Indian estate planning services.\footnote{202}

Although Congress’s failure to provide adequate federal funding for estate planning services has resulted in a disappointing setback to the implementation of AIPRA, the lack of federal funding has been counteracted in part by law school sponsored outreach programs and clinics. The opportunity for law schools to provide Indian estate planning services is vast, especially for schools located in close proximity to reservations. However, only two law schools in the country currently offer Indian wills clinical programs: Seattle University School of Law and Oklahoma City University School of Law ("OCU").\footnote{203} Seattle University School of Law established its Indian Wills Clinic in 2006 in connection with the DOI pilot project described above.\footnote{204} The Oklahoma Bar Foundation initially funded the OCU Law Clinic in 2009 with a $20,000 gift, and anonymous donations of $250,000 have sustained the program.\footnote{205} Such clinical programs are desirable to law schools because they provide students the opportunity to develop transactional skills, including effective drafting and client interview techniques.

\footnote{197}{Id.}
\footnote{198}{Id. The tribes that make up the Bristol Bay Native Association live in thirty-two villages located in an area about the size of the state of Iowa. \textit{Id.} The overwhelming majority of these villages are not accessible by road. \textit{Id.}}
\footnote{199}{Id.}
\footnote{200}{Id.}
\footnote{201}{Id.}
\footnote{202}{In addition to law school clinical programs, certain legal services groups also provide estate planning services at no cost to qualifying tribal members. These groups include Legal Services of North Dakota, Oklahoma Indian Legal Services, and Dakota Plains Legal Services, among others.}
\footnote{203}{American Indian Wills Clinic, OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW, http://law.okcu.edu/index.php/academics/clinical-programs/american-indian-wills-clinic/ (last visited Jan. 11, 2012) [hereinafter OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW]; SEATTLE UNIVERSITY SCHOOL OF LAW, supra note 192. Students working in the OCU law clinic complete an average of thirty to forty wills per semester. Telephone Interview with Lori Harless, Projects Coordinator, Oklahoma City University School of Law, Native American Resource Center, American Indian Wills Clinic (Oct. 18, 2011) [hereinafter Interview with Lori Harless].}
\footnote{204}{See supra notes 182–202 and accompanying text; SEATTLE UNIVERSITY SCHOOL OF LAW, supra note 192.}
\footnote{205}{OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW, supra note 192. Current available funding for the OCU clinic is estimated to last for the next three to four semesters. Interview with Lori Harless, supra note 203.}
Additionally, clinics that provide estate planning services to Indians under AIPRA can reach populations that are typically underrepresented in the legal system, a central goal shared by most clinical programs.

Tribes in northeast Kansas have asked Washburn University School of Law to consider adding an Indian wills program to its existing clinic. The Office of the Special Trustee for American Indians ("OST") in partnership with the regional BIA office in Horton, Kansas, has provided approximately ten educational AIPRA outreach events to the four tribes located in northeast Kansas since the implementation of AIPRA. These agencies also encourage tribal members to find AIPRA-savvy attorneys to prepare their wills. However, the absence of free will drafting services in this region creates a void that the Washburn Law Clinic could fill through a clinical program that would provide no-cost services to those who qualify under certain income guidelines. Plans to add an Indian wills component to the Washburn Law Clinic are still under consideration by the school. If Washburn implements a new clinical program, clinic faculty must perform the substantial tasks of learning the complexities of AIPRA and training students on the technical nuances of the law so that the students may in turn competently draft wills for clients.

Even though various organizations currently provide estate planning services, the absence of adequate federal funding poses a real challenge to the effectiveness of AIPRA and its central goal of reducing fractionation. This lack of funding places the burden of providing services on groups such as Legal Services and law school clinical programs, both of which have limited resources to reach those in need of estate planning services. AIPRA is no longer a "new" law; Congress passed AIPRA seven years ago, and it became effective five years ago. The best practices for providing estate planning services have already been determined during the initial years of AIPRA, and a direct correlation between estate planning services and the reduction of fractionation is evident. These facts leave the lack of funding as the only significant barrier between tribal members and estate planning service providers.

---

207. Email from Ron D. Graham, Fiduciary Trust Officer, Office of the Special Tr. For Am. Indians, Horton, Kan., to author (Dec. 27, 2011 14:21 CDT). The OST and BIA are sister agencies within the DOI, and both have a presence at the Horton Agency in Horton, Kansas. Id. The OST and BIA encourage tribal members to find AIPRA-savvy attorneys to prepare Indian wills, although they are unable to provide referrals. Id.
208. Id.
209. Interview with Curtis Waugh and Aliza Organick, supra note 206.
210. See supra note 194 and accompanying text.
IV. CONCLUSION

The main roadblock to realizing AIPRA’s potential is the uncertain nature of estate planning services in Indian country. Estate planning services are essential to the success of AIPRA, and without federal funding for such services, many tribes must rely on the initiative of state legal services organizations, tribal-funded programs, or law school clinical programs. In the absence of these types of programs, tribal members are left without the resources to navigate AIPRA’s complexities. It is important that tribal members fully understand the implications of AIPRA’s provisions, some of which are unique in the realm of estate planning, in order for tribal members to actively participate in halting the further fractionation of trust land. While some of AIPRA’s technical provisions are controversial, the Act provides an effective framework that can, in theory, serve as an immensely powerful tool to correct the failed federal policies of the last two centuries. AIPRA cannot accomplish its goals, however, without sufficient funding for tribal estate planning services.

212. See supra Part III.A.iii.
213. See Nash & Burke, supra note 29, at 123.