



California Indian Legal Services (CILS) Community Legal Education Self-Help Series

Bishop ♦ Escondido ♦ Eureka ♦ Sacramento

What is the American Indian Probate Reform Act?

► What's in this guide and how can it help me?

This guide provides information on the American Indian Probate Reform Act (also known as "AIPRA") and how that law affects Indian trust lands (or allotments). While this guide does not focus specifically on Estate Planning or Wills, it does provide important information for people who own trust lands (allottees) about Estate Planning for their property. For information on what happens when an Indian person passes away, please see our "Probate Process for Native Americans" handout.

⇒ **TIP:** This guide also explains the meaning of some legal terms used in AIPRA. These words appear in bold in the guide, and will be defined in the guide and at the end in a section called "Some Helpful Terms" that starts on page 6.

► Owning Trust Land Today

On June 20, 2006, the American Indian Probate Reform Act ("AIPRA") went into effect. AIPRA only applies to estates of persons who have passed away *after* June 20, 2006. AIPRA was needed because of the unique circumstances surrounding land ownership for Indian people.

► What does AIPRA attempt to do?

AIPRA is an attempt to overhaul the **probate** process for Indian trust property, with a goal of reversing the consequences of a process called "**fractionation**." Fractionation occurs when individual trust **allotments** have so many small interest owners that no single owner can effectively use the land. Simply put, it is the dilution of ownership over time. Small shares become even smaller with each generation and it becomes harder to get the consent among all the co-owners. Without consent many land use decisions are left unresolved. This lack of consent is difficult especially since federal regulations require a minimum percentage of co-owners to approve such things as permission for a home site (someone building a home on the land) or a lease for agriculture, grazing, or mining purposes. The more co-owners there are, the more difficult it can be to get the required consent. Congress tried numerous times before AIPRA to address this problem. However, those attempts were either unconstitutional or simply never became effective.



► **What is an undivided interest?**

Another factor in owning **trust** land is that the interest is usually an “**undivided interest**.” This means that the person owns part of the whole land but no particular segment. It is as if the co-owners shared a pie that has yet to be cut. Since they don’t know where their piece is, it is difficult to manage their share. For example, one co-owner can build a home on land, but without a residential lease or some other way to earmark their interest from the other co-owners, then the joint owners technically have a right to use and occupy the home! A co-owner can “**partition**” the land through the Bureau of Indian Affairs, which means to divide the land into identifiable parts. It is like sub-dividing on a smaller scale.

Because AIPRA looks toward consolidating and reducing fractionation, the provisions of the law, particularly those where **allottees** do not have a **Will** (where they die **intestate**), has consequences for the land as it passes to future generations.

► **What Is Probate?**

Literally translated, “**probate**” means to prove whether a Will is valid or not. Over time the term has come to include the process of administering a **decedent’s** estate and giving effect to their last wishes. The legal process includes taking an inventory of a decedent’s property and debt, settling any claims, and valuing the property which is then divided and passed on to their heirs. If the person had a Will, then the property is divided according to its written terms. There is no “oral” or spoken type of Will. It must be in writing. Without a Will, the property passes according to applicable law. For trust property owners, their estates may be subject to two different probate processes if they own both trust and non-trust property.

All non-trust property (for example, houses off reservation, cars, and furniture) must be probated through state or tribal court. Trust property (usually an **allotment** or an Individual Indian Money Account, or **IIM**) is handled by the Office of Hearings and Appeals (OHA), a federal agency.

AIPRA sets out the rules on how OHA probates trust property. Before AIPRA, trust property was probated under state law. AIPRA changed the rules for how trust property is passed to one’s heirs when the individual dies “**intestate**” (without a Will) or with a Will. For more information on the probate process, see our guide titled “Probate Process for Native Americans.”



✧ *What Happens if There is No Will?* ✧

If a trust property owner does not have a Will, his or her property will pass “**intestate**” and follow AIPRA’s probate rules. Intestate means the decedent did not have a Will or Last Testament. For interests that are greater than five (5%) percent of the parcel:

- If the property owner (the “**decedent**”) leaves a spouse, and there are children who are eligible heirs, the spouse receives a “**life estate**” in the property (meaning they can live on and use the land until their death) and one third of the decedent’s trust personalty (usually an IIM). The remaining personalty is split equally between the “**eligible heirs**”.
- If there are no children, the spouse receives a life estate in the land and all of the personalty.
- If there is no spouse, the eligible heirs receive all of the property in equal shares.

An “**eligible heir**” is a special term under AIPRA and includes:

- an Indian (a member of, or one eligible for, membership in a federally recognized tribe);
- a lineal descendant of the decedent within two degrees of consanguinity (or blood) to an Indian person; and
- those persons who already own an interest in the property.
- California has a unique definition: those persons who own trust land in the state. This is different because the law does not require them to be a member or eligible for membership in a federally recognized tribe. They only have to own an interest in trust land.

The “**remainder**” interest in the land (what is left after the person holding the life estate dies) passes to the surviving eligible children. If there are no surviving children, the interest passes in the following order: to the eligible surviving grandchildren, the surviving great-grandchildren, the parents, and finally to the siblings of the decedent. If there are no children or other eligible heirs, then the interest will pass to the tribe with jurisdiction over the land.

Under AIPRA’s intestate rules, there are other circumstances where trust land may pass to a tribe. AIPRA creates a “5 percent rule,” which applies a different rule to interests which are five percent or less of the entire parcel. This rule, also called the “**single heir rule**,” provides that the interest will pass:

- to the decedent’s oldest child or, if none, then
- to the oldest grandchild, then
- to the oldest great-grandchild or, if there are none, then
- to the tribe with jurisdiction. If there is no tribe, then
- the interest goes to the property’s other co-owners.

The reason is that with a 5 percent or less interest, the property is already fractionated. By passing the interest to only the oldest eligible heir, it avoids further fractionation, as fewer people will share in that interest.



In prior years, homes located on an allotment were considered **personal property** and not subject to probate by the federal government. Instead, passage of ownership was handled in state court. However, because of concerns regarding differing ownership (for example, one person could take the land, but another may be the owner of the home), AIPRA was originally drafted to include in the definition of “land” those permanent fixtures (homes, barns, etc.) are located on the property. AIPRA was recently amended to address this; however, the amendment still provides that such improvements will be probated with the land when there is no Will. As such, homes or other fixtures will pass with the land through an OHA probate.

✧ *What Happens if I Want A Will?* ✧

AIPRA is a “Will-friendly” law because its intestate provisions can profoundly affect an individual’s trust interests. The law creates an incentive for trust property owners to have a Will.

Having a Will allows an Indian person to control their trust estate. AIPRA expands the definition of eligible “**devises**” and actually allows property to be given (devised), in trust to any “**lineal descendant**” of the **testator** (the person making the will), even if the **devisee** is not a member of a federally recognized tribe.

AIPRA also adds to the definition of “Indian” those persons who own trust property in California, even if not members of federally recognized tribes. These persons generally own trust property off-reservation in California (often called “**public domain allotments**”). This allows persons who meet this definition and who are not members of federally recognized tribes to inherit trust property.

Both of these new provisions are major changes from the old law, which normally would remove from trust any property given to an Indian person who is not a member of a federally recognized tribe.

► ***Can I always pass my trust land interests in trust status?***

Trust property left to a person who is not an “**eligible devisee**” is passed as a life estate, with the remainder going to the decedent’s “eligible devisees.” If an allotment owner wishes to pass his or her trust property in **fee**, they can only do so to a person who is not eligible to receive the property in trust. For example, she could leave the property to a non-Indian, but not to her lineal descendant because that person is eligible to receive the property in trust, even if that person is not a member of a federally recognized tribe. **Trust personality** can be left to any person or entity; if passed to an Indian person, it will remain in trust.

► ***If I am leaving my interests to more than one person, how does that work?***



When a decedent leaves trust land to more than one person the new law “presumes” title to that land will be held by those people as “joint tenants with rights of survivorship.” A **joint tenancy** means that each joint owner will own an equal share in the land and have equal rights to any rents or royalties coming from the property. However, when one person dies, their share is passed to the other owners (also called **tenants**), until finally one person remains. Joint tenancy avoids fractionation as there will be only one person taking the interest at the end. However, a joint tenancy also means that those “tenants” cannot pass their interest to their heirs *unless* they are the “last man standing” and the other tenants have passed on. If the testator wishes to give separate shares to their heirs they must make that clear in the Will.

► ***If I leave my land, does that also include the homes or structures on it?***

Homes and other improvements on the land also considered part of the trust estate. In a Will, unless otherwise stated, the home will be probated and passed to the person receiving the land interest. This is a presumption in the law and can be overcome if the testator clearly expresses that they wish to give the land to one person and the home to another.

⇒ **TIP:** Because of these changes, trust property owners who already have a Will should have it reviewed to ensure it complies with the new law.

► ***What if I am a member of an unrecognized tribe in California?***

Even if you are not a member of a federally recognized tribe, you may still hold an interest in trust land, and you may also inherit interests in trusts lands. If you own an interest in an allotment (frequently these are Public Domain Allotments, which are not associated with a reservation or rancheria) in the State of California, you are considered an “Indian” under the law. This means that you can inherit lands from other people as an Indian under AIPRA. This also means that your children and grandchildren (examples of lineal descendants) can receive your land and it will stay in trust. Those people that do receive land in this way are then considered “Indian” for future Indian estate planning and probate issues.

► ***What is a Consolidation Agreement?***

AIPRA allows heirs and devisees to consolidate their interests at probate, either at an intestate proceeding or where there is a Will. “**Consolidation**” means that the heirs can give their interest to another person who also has an interest, thus consolidating the interest(s) into one person. Consolidating interests avoids fractionation because instead of multiple interest owners, only one person holds the interest.

► ***What is a Tribal Probate Code?***



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

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

✧ *Some Helpful Terms* ✧

Allotments are pieces of land given to an individual Indian person and which is held in trust by the federal government for the benefit of the person. Allotments typically are on a reservation, except for public domain allotments.

Allottee is a person who owns an interest in an allotment.

Assignments are not allotments and are lands held in trust for a tribe, not an individual. Tribes may offer members rights to use tribal lands, which are called assignments.

Consolidation is a legal process during the BIA probate where heirs or devisees can give their interests (if more than one person is getting an interest) into one person. This process avoids fractionating the property further as only one person will own the land.

Decedent is the person who died.

Devisee is a person who is named in a Will to take the decedent's property.

Eligible Devisee is a term in AIPRA that applies to persons eligible to receive property under a Will. AIPRA provides a list of persons who meet this definition.

Eligible Heir is a term in AIPRA that means a person eligible to receive property when there is no Will. AIPRA provides a list of persons who meets this definition.

Estate is all the property left by the decedent.

Fee refers to real property (land) and includes any improvements permanently on that land that are not held in trust. Title to fee land is owned in the same manner for Indian and non-Indian property owners. Fee land is not held in trust by the United States government. Fee land is sometimes called "taxable land," because you have to pay property tax on it.

Fractionation is where an allotment has multiple co-owners with small interests in the land.



Individual Indian Money Accounts (IIMS) are accounts held in trust by the Bureau of Indian Affairs and managed for individual Indians. The monies in these accounts usually come from the land in which the Indian person owns an interest, and are often from leases on the land (for agriculture, for example) or mining (oil and gas, most commonly).

Intestate means the person who passed away does not have a Will.

Joint Tenancy is a way for multiple people to own interests in the same piece of land. Under AIPRA, a joint tenancy is presumed if left to devisees in “equal shares.” All “tenants” or owners will have an equal share and rights to live on the land, but when one passes their interest goes to the remaining tenants. The last survivor will take the entire interest. Tenants cannot give away their interests.

Life Estate means a right of person to live on land or in a home until they pass away. They do not receive an interest in the land or the home.

Life Tenant is the person who receives a right to live on land or in a home because of a life estate.

Lineal Descendants are defined by AIPRA and include the decedent’s children, grandchildren and great-grandchildren. Siblings, nieces and nephews are not lineal descendants.

Partition means to divide out an allottee’s interest in a parcel of trust land so that there are clear boundaries to their interest. The partitioning process must be done through the Bureau of Indian Affairs.

Personal Property means the property of a decedent that is not land (or real property). Examples include a home on an allotment, cars, furniture, and mobile homes.

Probate means the legal process through which a decedent’s property (both trust and non-trust) are passed on to heirs or devisees. Trust lands are probated by the OHA, and non-trust lands through a state court.

Public Doman Allotments are those trust lands not located on a reservation.

Real property includes land, and anything permanently erected on or attached to the land (such as a house, or other building). It means the same thing as “real estate.”

Remainder is the interest in land or a home that passes to an eligible heir, or named devisee, after the life tenant has passed.

Single Heir Rule (also known as **the 5 Percent Rule**) is a provision in AIPRA that applies to interests in trust land that are less than 5% of the entire parcel and where there is no Will. The Rule requires the interest to pass to a single heir.

Tenants, in the probate and estate planning context, refers to the owners of interests in a joint tenancy or the life tenant in a life estate. It does not refer to a traditional landlord-



tenant relationship, such as when a person rents a home.

Testator is the person making a Will.

Trust lands are managed by the BIA and held in trust for the benefit of either an individual Indian (allotments) or the Tribe (tribal trust land). Trust lands cannot be bought or sold without consent of the government, nor can they be taxed or regulated by the state.

Trust Personalty is usually money held in an IIM account for an Indian person.

Undivided Interests are the most common form of land ownership for allottees and it means that the owner has an interest in the land, but that it is not “sub-divided.”

Will is a legal document that tells others how the decedent wants their estate distributed after their death. Wills can be in the decedent’s own handwriting, they can be typed, or they can be on a Statutory Will Form. Each style has special rules and requirements to make it a valid document. Wills for trust lands (often called an Indian Will) must follow additional rules.

Revised May 2020

Disclaimer

This information is intended to assist you with your legal problem. Each area of the law is complex and changing. Your case may have special factors that could affect the applicability of this information. CILS does not guarantee that this information is sufficient to resolve your legal problem. If you have any questions, you should seek the advice and counsel of an attorney.

CILS Community Legal Education Self-Help Series

The Community Legal Education Self-Help Series is a project of CILS. The Series’ mission is to expand access to legal resources that increase Indian self-sufficiency. This guide is part of our Community Legal Education Self-Help Series, providing Indians and Indian tribes with user-friendly information and self-help assistance pertaining to their legal status and rights. Community Legal Education Self-Help guides, and more information about CILS and California Indian issues, are available on our website at www.calindian.org.

California Indian Legal Services

Principal Office: 609 South Escondido Blvd., Escondido, CA 92025
Phone: (760) 746-8941, Fax: (760) 746-1815, email: contactCILS@calindian.org

Do you have a legal problem? For assistance, contact your local CILS office:

Bishop: (760) 873-3581, or toll-free at (800) 736-3582
Escondido: (760) 746-8941, or toll-free at (800) 743-8941
Eureka: (707) 443-8397, or toll-free at (800) 347-2402
Sacramento: (916) 978-0960, or toll-free at (800) 829-0284

