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The Department of the Interior's Tribal Probate Process: In Brief

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Introduction

The United States has a federal trust responsibility to *federally recognized tribes*, which includes a responsibility to manage certain tribal lands and assets.¹ The federal trust responsibility is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, “has charged itself with moral obligations of the highest responsibility and trust” toward tribes, and can include obligations to protect tribal treaty rights, lands, assets, and resources on behalf of tribes and tribal members.²

Tribal reservations are lands reserved for a tribe (or multiple tribes) under treaty, statute, or other agreement. Tribal reservations may include several types of tribal lands, such as trust, restricted fee, and privately owned (fee) lands. *Trust lands* are lands or interests in land owned by a tribe or individual tribal member that are held in trust by the federal government.³ The Department of the Interior’s (DOI’s) Bureau of Indian Affairs (BIA) is the federal government entity holding lands in trust.⁴ *Restricted fee lands* are lands restricted from being sold or transferred. Individual *allotments* can include trust land or restricted fee land.⁵ Individual tribal members or tribes may also privately own *fee land*, meaning they hold title to the land and the land is under their complete control.⁶

Historically, tribal ownership of reservation land was communal in nature.⁷ The General Allotment Act of 1887 sought to end this communal ownership by dividing reservations into parcels of 40 to 160 acres and allotting them to individual tribal members.⁸ When an allottee died, the allottee’s interest in the allotment was divided among his or her heirs but the land itself was not divided.⁹ Multiple individuals could own interests in the same parcel of land, and that interest could continue to divide—potentially exponentially—across generations. This effect is known as *fractionation*.¹⁰ As a result, there may be many landowners (sometimes hundreds) with claims to a single parcel of land, making it difficult to manage, use, or transfer that land.

¹ A federally recognized tribe is one that is generally eligible for the special programs and services provided by the United States to Indians because of their status as Indians. For more about federal recognition, see CRS Report R47414, *The 574 Federally Recognized Indian Tribes in the United States*, by Mainon A. Schwartz.

² *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942). For a general overview of the trust relationship, see *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

³ Department of the Interior (DOI), Bureau of Indian Affairs (BIA), “Benefits of Trust Land Acquisition (Fee to Trust)” at <https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition> (hereinafter BIA, “Benefits”).

⁴ *Ibid.*

⁵ For more information on tribal lands, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Mariel J. Murray.

⁶ BIA, “Benefits.”

⁷ U.S. Congress, Senate Committee on Indian Affairs, *American Indian Probate Reform Act of 2004*, report to accompany S. 1721, 108th Cong., 2nd sess., S.Rept. 108-264, 2004, p. 2. Hereinafter S.Rept. 108-264.

⁸ *Ibid.* See also Act of February 8, 1887, Ch. 119, §6, 24 Stat. 388 (General Allotment Act of 1887); 25 C.F.R. §§151.2(d), 152.1(e). In Alaska, the Alaska Native Allotment Act of May 17, 1906 (34 Stat. 197), permitted individual Alaska Natives to acquire title to up to 160 acres (0.65 km²) of land in a manner similar to other Native Americans.

⁹ See Act of June 25, 1910, 36 Stat. 855, as amended (authorizing an Indian allottee to bequest the allotments in a will, if the Secretary of the Interior approved the will prior to the expiration of the 25-year trust period). However, for some tribes, wills are in conflict with tribal religious beliefs (Diane K. Lutt, “The American Indian Probate Reform Act: A Five-Year Review,” *Washburn L.J.*, vol. 51 (Fall 2011), p. 9). Hereinafter Lutt, “Five-Year Review.”

¹⁰ For more on this phenomenon, see DOI, Land Buyback Program for Tribal Nations, “Fractionation,” at <https://www.doi.gov/buybackprogram/fractionation>.

Although Congress ended the allotment policy through the Indian Reorganization Act of 1934 (48 Stat. 984), existing allotments without wills continued to fractionate. When a tribal member dies, DOI determines the estate distribution through its probate process.¹¹ If the member dies with a will, DOI will verify which heir/heirs the deceased tribal member (often known as the *decedent*) has chosen to transfer any trust or restricted fee land (including allotted lands). Without a will, DOI determines which heirs, devisees, or other persons or entities are entitled by law to inherit interest(s) of any trust or restricted lands in the decedent's estate. In some cases, there may be a significant number of persons or entities among whom the interest is divided. In this way, allotted lands can become increasingly fractionated over time, especially when passed between generations without a will.

For illustration purposes, imagine an owner of an allotment who died without a will, leaving behind four children. Each of those children might have inherited a one-fourth interest in that allotment. If each of those children also died without a will and had their estates similarly divided among four grandchildren, then in two generations the allotment would have become fractionated into sixteen interests. This does not mean that the original allotment would be divided into sixteen separate parcels but rather that sixteen different owners would have a property interest in the original allotment. This fractionation makes it difficult or even impossible for the land to be sold or improved without first getting approval from all interest holders, some of whom may have never set foot on the allotment.

Congress has sought to address fractionation by enacting laws governing DOI's probate process for tribal lands and assets.¹² The Indian Land Consolidation Act (ILCA) of 1983 first established some inheritance rules to limit fractionation during the probate process for property whose owner dies without a will—for example, by preventing tiny, fractionated interests in land from passing to heirs upon an individual Indian landowner's death.¹³ ILCA was amended several times to refine these rules until the American Indian Probate Reform Act of 2004 (AIPRA; P.L. 108-374) established that federal law governs the tribal probate process for tribal lands and trust assets.¹⁴ Congress found that the federal government's reliance on state laws of intestate succession (which generally involve a probate process) for tribal lands had “resulted in numerous problems affecting Indian tribes,” including “the increasingly fractionated ownership of trust and restricted lands.”¹⁵ Through AIPRA, Congress created a new federal probate code applicable to tribal lands, which aimed to reduce fractionation and encourage the development of tribal probate codes, among other goals.¹⁶ Generally, the federal probate code applies to the inheritance of trust or restricted land and trust funds unless the Secretary of the Interior (Secretary) has approved an applicable tribal probate code for the relevant reservation pursuant to the ILCA.¹⁷

¹¹ DOI's probate process determines “the applicable tribal, federal, or state law that affects the distribution” of a deceased person's estate, whether or not that person had a valid will. 25 C.F.R. §15.2.

¹² For example, the American Indian Probate Reform Act of 2004 (AIPRA; P.L. 108-374) was enacted “to address the ever-worsening administrative and economic problems associated with the phenomenon of fractionated ownership of Indian lands” (S.Rept. 108-264, p. 1).

¹³ P.L. 97-459, §207, provides that any interests representing 2% or less of a tract would escheat to the tribe instead of being inherited, unless such an interest had earned its owner at least \$100 in the preceding year.

¹⁴ P.L. 108-374. See, for example, Indian Land Consolidation Act (ILCA) Technical Amendments (P.L. 98-608) and ILCA Amendments of 2000 (P.L. 106-462).

¹⁵ AIPRA, §2(3)(A).

¹⁶ AIPRA, §2(4).

¹⁷ 25 U.S.C. §2205. See also S.Rept. 108-264. For a compendium of tribal codes, see the Native American Rights Fund's National Law Library, at <https://www.narf.org/nill/triballaw/index.html>.

Congress continues to express interest in reducing the fractionation of allotted lands, potentially through improving DOI's probate process.¹⁸ This report provides an overview of DOI's probate process and outlines DOI and congressional efforts to improve the probate process and provide estate planning.

DOI's Tribal Probate Process

DOI is charged with administering statutes, such as AIPRA, that govern tribal probate.¹⁹ After Congress enacted AIPRA in 2004, DOI issued implementing regulations and later amended them to improve the act's implementation. DOI's regulations define *probate* as "the legal process by which applicable tribal, federal, or state law that affects the distribution of a decedent's estate is applied" to

- determine the heirs;
- determine the validity of wills and determine devisees;
- determine whether claims against the estate will be paid from trust personalty; and
- order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive them.²⁰

Some of these terms will be defined in the following section.

Trust Assets

DOI's probate regulations define key terms and contain procedures for conducting the probate process for the estate of a deceased tribal person with *trust assets*.²¹ DOI's probate regulations define various types of trust assets affected by the trust relationship based on the nature of the property as follows:²²

- *Trust property* refers to real or personal property, or an interest therein, the title to which is held in trust by the United States for the benefit of an individual Indian or tribe.²³ DOI's probate regulations do not define *real property*, although other BIA guidance defines it as "any land, buildings and other structures, fixtures, and improvements of any type located thereon."²⁴ BIA guidance also defines *personal property* as including "all equipment, materials and supplies, and museum objects" that is not incorporated into, or permanently affixed to, real property.²⁵

¹⁸ For example, the House Natural Resources Committee announced that it would hold a hearing on January 30, 2024, titled "Examining the Opportunities and Challenges of Land Consolidation in Indian Country."

¹⁹ *Fredericks v. United States Dep't of the Interior*, No. 20-CV-2458 (KBJ), 2021 WL 2778575, at *2 (D.D.C. July 2, 2021).

²⁰ 25 C.F.R. §15.2.

²¹ 25 C.F.R. Part 15 and 43 C.F.R. Part 30.

²² BIA, "Begin the Trust Asset Probate Process," at <https://www.bia.gov/service/begin-trust-asset-probate>. Hereinafter, BIA, "Begin."

²³ 25 C.F.R. §15.2.

²⁴ BIA, "Property Management, Personal and Real Property Inventory," *Indian Affairs Manual*, p. 5, at https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/23-iam-3_personal-real-property-inventory_signed_12.13.22_508.pdf. Hereinafter BIA, "Property Management."

²⁵ *Ibid.*

- *Restricted property* means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the consent of the Secretary.²⁶ For the purpose of probate proceedings, restricted property is treated as if it were trust property.²⁷
- *Trust personalty* (or trust funds) means all tangible personal property, funds, and securities of any kind that are held in trust in an Individual Indian Money (IIM) account or otherwise supervised by the Secretary.²⁸

Steps in the Probate Process

The following are the basic steps of DOI's tribal probate process:

1. Someone reports the death of an American Indian or Alaska Native who owns trust assets to the BIA.²⁹
2. BIA prepares a probate package containing information relating to the person's family history and property holdings for submission to an Administrative Law Judge, Indian Probate Judge, or Attorney Decision Maker (ADM) in the DOI Office of Hearings and Appeals (OHA).³⁰ Each judge has probate jurisdiction over an assigned geographic area.³¹
3. The judge or ADM conducts a probate hearing at a location convenient for the family members, frequently on the reservation.³²
4. The judge or ADM issues an initial decision directing the trust asset distribution among the eligible heirs or devisees.³³ A party who disagrees with the initial decision must seek rehearing from the judge before appealing to the OHA Interior Board of Indian Appeals.³⁴
5. The BIA Division of Land Titles and Records distributes any trust or restricted land, and the Bureau of Trust Funds Administration (BTFA)³⁵ distributes any

²⁶ *Alienation* is a legal term meaning conveyance or transfer of property to another—that is, a restriction on alienation means the property cannot be sold to someone else. In legal parlance, an encumbrance is a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage. (“Alienation” and “Encumbrance,” Black’s Law Dictionary (11th ed. 2019)). See also BIA, “Property Management,” p. 5.

²⁷ BIA, “Property Management,” p. 5.

²⁸ *Ibid.* See also 25 U.S.C. §2206(b)(3). The Bureau of Trust Funds Administration (BTFA) manages income derived from those lands in federal Individual Indian Money (IIM) accounts for individual owners (BTFA, “Individual Indian Money Accounts,” at <https://www.doi.gov/ost/iim-accounts>).

²⁹ BIA, “Begin.” The Metlakatla Indian Community of The Annette Island Reserve was historically the only federal Indian reservation (trust property) in Alaska. In 2022, DOI announced the approval of a land into trust acquisition for the Central Council of Tlingit and Haida Indian Tribes of Alaska (BIA, “Indian Affairs to Accept Land into Trust for Tlingit and Haida Indian Tribes of Alaska,” press release, November 17, 2022, at <https://www.bia.gov/news/indian-affairs-accept-land-trust-tingit-and-haida-indian-tribes-alaska>).

³⁰ DOI, “Indian Probate and Probate-Type Appeals,” at <https://www.doi.gov/oha/organization/ibia/Indian-Probate-and-Probate-Type-Appeals#bullet1>. Hereinafter DOI, “Indian Probate.” See also DOI, BIA, “Your Land, Your Decision—What Is a Probate?” at <https://www.bia.gov/bia/ots/dop/your-land#Q4>. Hereinafter BIA, “Your Land.”

³¹ DOI, “Indian Probate.”

³² *Ibid.*

³³ BIA, “Your Land.”

³⁴ DOI, “Indian Probate.”

³⁵ The American Indian Trust Fund Management Reform Act of 1994 (P.L. 103-412) established the Office of the Special Trustee for American Indians (OST) to oversee and coordinate DOI's implementation of trust-fund (continued...)

trust funds from the deceased person's IIM account to the eligible heirs or devisees listed in OHA's decision.³⁶

Timeliness of DOI's Tribal Probate Process

Depending on the complexity of the probate case, DOI's probate process can take several years.³⁷ In explaining the potentially lengthy time frame, DOI asserts that a probate case is "dependent on many factors that are outside of BIA and OHA's control including the cooperation of the family in providing documentation for the probate file."³⁸ BIA cooperates with decedent heirs to gather the required documents, such as death certificates, marriage licenses, and adoption decrees; this process reportedly may take months to complete.³⁹ There is no set time frame for the scheduling of hearings, and OHA sometimes returns probate packages to BIA for clarification or further documentation, which can delay the proceedings.⁴⁰ Although some commenters recommended that the DOI probate regulation establish a timeline for completion of the probate process, DOI declined to do so in the 2021 final probate rule.⁴¹ BIA estimated that heading into FY2024, it had a probate case backlog of more than 32,000 cases.⁴²

DOI's Attempts to Improve Probate Process Timeliness

In recent years, DOI has made regulatory changes to its probate process, including to improve timeliness. In 2016 and 2017, BIA hosted tribal listening and consultation sessions on DOI's probate process and accepted written comments.⁴³ In 2019, DOI identified issues related to the existing regulations and sought input on potential amendments through an advance notice of proposed rulemaking.⁴⁴ In the final rule issued in 2021, DOI asserted that the regulatory revisions allow OHA to adjudicate probate cases more efficiently by establishing an expedited process for small, funds-only estates; reorganizing the purchase-at-probate process so that estates may be closed more quickly; and specifying which reasons justify reopening of closed probate estates.⁴⁵ DOI stated that the revisions would provide certainty regarding how estates should be distributed

management reforms. In 2020, BIA created the Bureau of Trust Funds Administration (BTFA) to take over the trust management funds and functions of the OST. Appropriations laws have continued to provide funding to the OST (e.g., for FY2023, in P.L. 117-328, Division G), though BTFA utilizes that funding. The House FY2024 appropriations bill (H.R. 4821) proposed appropriating funds directly to BTFA, but the Senate FY2024 appropriations bill did not (S. 2605). This CRS report will refer to this office as BTFA.

³⁶ BIA, "Your Land."

³⁷ According to one source, the process can take as long as eight years. Lutt, "Five-Year Review," p. 16. See also Casey Ross, "Probate of American Indian Trust Property: The Lawyer's Role," 87 OKLA. B.J. 287 (2016), <https://heinonline.org/HOL/Page?handle=hein.barjournals/oklbajo2016&id=293&collection=barjournals> ("The administrative process at the Department of Interior has been designed to expedite the probate process for Indian trust property, but the backlog of probate administration sometimes means a probate will take years to finalize.").

³⁸ BIA, "Your Land."

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ DOI, BIA, "American Indian Probate Regulations," 86 *Federal Register* 72068, December 20, 2021, p. 72073 (hereinafter DOI, AIPRA Final Rule).

⁴² General Services Administration, "2023 HISP CX Action Plan—Bureau of Indian Affairs," <https://www.performance.gov/cx/dashboard/actionplans/2023/2023-hisp-action-plan-doi-bia.pdf>.

⁴³ DOI, AIPRA Final Rule, p. 72068.

⁴⁴ DOI, BIA, "American Indian Probate Regulations," Advance Notice of Proposed Rulemaking, 84 *Federal Register* 58353-58356, October 31, 2019.

⁴⁵ DOI, AIPRA Final Rule.

when certain circumstances arise that are not addressed in the statute and would improve notification to interested parties by requiring posting of probate notices on a devoted OHA web page.⁴⁶

Bureau of Indian Affairs' Efforts to Improve Timeliness as a Designated High Impact Service Provider

The Bureau of Indian Affairs (BIA) has sought to improve the federal probate process as a White House-designated *High Impact Service Provider* (HISP). In December 2021, Executive Order 14058, "Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government," directed HISPs to improve customer service. HISPs were defined as federal entities "that provide ... or fund ... customer-facing services ... that have a high impact on the public, whether because of a large customer base or a critical effect on those served." The Office of Management and Budget designated BIA as an HISP, and BIA is currently working on the following improvements relating to probate process timeliness:

- **Developing a Probate Case Backlog Strategy.** BIA analyzed operational data to outline each region's share of the probate backlog to help prioritize the cases. In 2023, the BIA submitted 1,407 cases to the Office of Hearings and Appeals for adjudication.
- **Streamlining Trust Asset Distribution.** BIA is working with the Bureau of Trust Funds Administration to develop and implement a new module that would make it possible to distribute cash assets online to heirs and claimants. This is expected to more efficiently distribute cash assets.

Source: Executive Order 14058, "Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government," 86 *Federal Register* 71357-71366, December 16, 2021; General Services Administration, "2023 HISP CX Action Plan—Bureau of Indian Affairs," at <https://www.performance.gov/cx/dashboard/actionplans/2023/2023-hisp-action-plan-doi-bia.pdf>.

Post-AIPRA Congressional Action to Address Fractionation Through the Probate Process

Since AIPRA was enacted in 2004, bills have been introduced and enacted to improve the federal probate process in various ways. For example, Congress has sought to clarify terms and definitions or to make amendments promoting land consolidation in the federal probate process.⁴⁷ Congress also held oversight hearings on AIPRA implementation in which tribal members have urged the federal government to improve the timeliness of the federal probate process, particularly as it affects fractionation.⁴⁸

Congress has considered and enacted legislation to provide DOI with certain flexibilities to improve the timeliness of its probate process. For example, the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006 (P.L. 109-54), included a provision authorizing the DOI Secretary to appoint Indian probate judges without complying with the competitive service requirements in 25 U.S.C. §§51 and 53 "for the purpose of reducing the backlog of Indian probate cases."⁴⁹ In the Consolidated Appropriations Act, 2012 (P.L. 112-74), Congress extended that authority indefinitely.⁵⁰

⁴⁶ Ibid.

⁴⁷ See, for example, P.L. 109-157, Indian Land Probate Reform Technical Corrections Act of 2005; P.L. 109-221, Native American Technical Corrections Act of 2006.

⁴⁸ Statement of David Gipp, Vice President, Great Plains Region, National Congress of American Indians, in U.S. Congress, Senate Committee on Indian Affairs, *The American Indian Probate Reform Act: Empowering Indian Land Owners*, 112th Cong., 1st sess., August 4, 2011, S. Hrg. 112-431 (Washington: GPO, 2012), p. 11.

⁴⁹ P.L. 109-54, Title I, §108.

⁵⁰ P.L. 112-74, Division E, Title I, §111.

Some tribal groups have recommended DOI reorganizations to improve the timeliness of the probate process. In one hearing, the National Congress of American Indians (NCAI), a national tribal organization, claimed that probate processing delays were caused by a lack of communication and organizational structure between BIA, BTFA, and the probate judges at the OHA.⁵¹ To address this issue, NCAI recommended that BTFA be dismantled and that its trust-fund management functions be integrated back into BIA.⁵²

DOI Estate Planning for Tribes

To further its purpose of reducing fractionation and avoiding the probate process, AIPRA also provided for federal assistance with tribal estate planning. Estate planning for tribal landowners is often complex. For example, individuals may own property that is subject to tribal, federal, and state probate laws, and any wills must be valid in all applicable jurisdictions to avoid probate (and potential fractionation).⁵³ Recognizing this complexity, AIPRA authorized the Secretary of the Interior to provide estate planning assistance to tribes.⁵⁴ Currently, BTFA's website states that fiduciary trust officers may answer questions about estate planning.⁵⁵

AIPRA also authorized DOI to provide noncompetitive grants to tribes, organizations that provide legal assistance services, and others to conduct estate planning services for tribes.⁵⁶ In 2005, BIA awarded funding to the Indian Land Tenure Foundation to establish an Estate Planning Services Pilot Project, which would provide community education and legal training on the AIPRA, as well as direct estate planning legal services to tribal landowners in selected regions.⁵⁷ The purpose of the pilot project was to determine whether there was a need for estate planning services and whether such services would reduce fractionation. According to the foundation, 83.5% of the wills drafted in the program reduced tribal land fractionation.⁵⁸ BTFA states that many of its offices have arrangements with legal service groups to help establish wills.⁵⁹

⁵¹ Ibid, p. 11.

⁵² Ibid.

⁵³ Testimony of Douglas Nash, Institute for Indian Estate Planning and Probate, in U.S. Congress, Senate Committee on Indian Affairs, *The American Indian Probate Reform Act: Empowering Indian Land Owners*, 112th Cong., 1st sess., August 4, 2011, S. Hrg. 112-431 (Washington: GPO, 2012), p. 4, <https://www.indian.senate.gov/wp-content/uploads/upload/files/Douglas-Nash-testimony.pdf> (hereinafter Testimony of Douglas Nash).

⁵⁴ 22 U.S.C. §2206(f)(2)(c) states that this estate planning is designed to “substantially reduce the quantity and complexity of Indian estates that pass intestate through the probate process, while protecting the rights and interests of Indian landowners.”

⁵⁵ BTFA, “Planning for the Future,” at <https://www.doi.gov/ost/planning-future>.

⁵⁶ 22 U.S.C. §2206(f)(3).

⁵⁷ Indian Land Tenure Foundation, *Final Report: Estate Planning Services Pilot of the American Indian Probate Reform Act Implementation Project*, January 2007, pp. 1 and 4, https://iltf.org/wp-content/uploads/2016/11/DOI_estate_planning_services_pilot_project_2007.pdf.

⁵⁸ Testimony of Douglas Nash, p. 6.

⁵⁹ Ibid.

Funding for DOI Probate and Estate Planning

Historically, both DOI and nongovernmental entities have asked for more federal funding for DOI's probate and estate planning programs to reduce fractionation.⁶⁰ In FY2024, DOI proposed increasing probate-process-related funding and realigning internal funding to improve probate processing. For example, BIA's FY2024 congressional budget request proposed increasing its probate budget by \$1.4 million to hire 12 additional staff and address the backlog.⁶¹ In addition, DOI proposed to increase OHA funding by \$1.2 million to support nine Judge Units and travel to probate hearings.⁶² BIA also requested to shift current OHA funding from BTFA to BIA. This transfer would reportedly align OHA's Probate Hearings Division function with BIA's Probate Real Estate function, allowing DOI "to more efficiently process probate cases ... by improving coordination between BIA and OHA."⁶³ The Senate Appropriations Committee stated in report language that it was considering this request.⁶⁴

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⁶⁰ See, for example, *Ibid.*

⁶¹ BIA FY2024 budget justifications, p. IA-ST-7.

⁶² *Ibid.*, p. IA-RES-3.

⁶³ *Ibid.*, p. IA-ST-7.

⁶⁴ S.Rept. 118-83, p. 60.