

## **Three Affiliated Tribes Probate Code Tribal Membership Information and Feedback**

The Mandan, Hidatsa and Arikara Nation Tribal Council has determined that feedback from the Tribal membership is essential to move toward finalization of the MHA Nation Probate Code. As the Fort Berthold Reservation lands are largely held in individual ownership by the heirs of allottees, the Council has identified key issues below for feedback.

### **American Indian Probate Reform Act.**

Without a MHA Nation Probate Code, all trust lands within the exterior boundaries will descend pursuant to the American Indian Probate Reform Act's (AIPRA) National Probate Code. The AIPRA became effective on June 20, 2006 and all probates involving Indian trust lands shall be distributed pursuant to AIPRA until the adoption of the MHA Nation Probate Code. AIPRA was drafted to limit the further fractionation of Indian trust lands that has occurred through the application of State laws to Indian trust land probates.

Following are provisions of the National Probate Code that apply when an Indian trust landowner dies without a will (intestate) and can only be amended through adoption of a Three Affiliated Tribes Probate Code.

1. Spousal Life Estate – 100 percent of a deceased landowner's interests in trust land and minerals shall pass to his/her spouse in a life estate without regard to waste and upon the death of the life estate holder, to the heirs of the deceased landowner. A surviving spouse, regardless of whether or not an enrolled member of the Tribe, shall not inherit a vested interest in trust land or minerals.
2. Life Estate Without Regard to Waste - allows the life estate holder to receive all bonus income and royalty income from leases of the trust land/minerals to the exclusion of the remaindermen (deceased landowner's heirs).
3. Single Heir Rule – if a deceased landowner has no surviving spouse, interests in trust land and minerals that are less than 5% of the total tract shall pass to the decedent's oldest child, if no surviving children then to the oldest grandchild, if no surviving grandchildren then to the oldest great-grandchild, if no surviving great-grandchild then to the Tribe. Surviving Parents and siblings cannot inherit interests that are less than 5% of the total tract.
4. Adopted Out Children – adopted out children will not inherit from their biological parents. The definition of child in the National Probate Code does not include biological children of the deceased that were adopted out.
5. Adopted Children – adopted children will inherit from their adoptive parents but only if a court order of adoption exists. Children adopted in a cultural adoption (without a valid court order) will not inherit from the adoptive parents.

6. Presumption of Death – the BIA will forward a package to probate the trust estate of an Indian landowner if the landowner is missing for a period of six years and the BIA has satisfied requirements to determine the whereabouts of the trust landowner without success.
7. Eligible Heirs – the decedent’s trust land and minerals can pass to unenrolled descendants of the decedent within two degrees of consanguinity (two generations from the decedent). AIPRA defines an “AIPRA” Indian to include persons who are not enrolled but are descendants of an enrolled member.

The TAT Tribal Council is developing a probate code that will allow avoidance or revision of the above provisions. However, before finalization of the code, the Council seeks Tribal membership input regarding the following:

### **SPOUSAL SHARE**

**Should an enrolled Tribal member spouse inherit the decedent’s interests or take only a life estate if the decedent passes without a will?**

- A life estate will allow the life estate holder to receive 100% of all bonuses and income from the trust land and minerals. Upon death of the life estate holder, the trust interests will pass to the heirs of the original owner of the trust lands. A life estate holder does not own the land/minerals and cannot make a will for distribution of the interests.
- If the enrolled member spouse inherits from the deceased spouse, they own the land/minerals and will receive benefits. Additionally, they will be able to dispose of the trust land/minerals by will.

Consider: An enrolled member marries another enrolled member and they are married for 30 years. They have built a home, raised a family and ranched on the husband’s trust land. Upon the death of the husband, should the wife inherit only a life estate or should she become a vested owner of her husband’s property?

### **SINGLE-HEIR RULE**

**Should all trust land/mineral interests that are less than 5% of a total tract pass to the oldest child, grand-child, great grand-child or Tribe if the decedent has no spouse and dies without a will or should the interests descend to other heirs?**

- Federal law requires that interests less than 5% of a total tract pass to a single heir to prevent further fractionation of the small tracts.
- However, the Tribe has the option to change the order of disposition of the less than 5% interests from the oldest child, grand-child or great-grandchild to either the youngest and to expand the categories to include the decedent’s siblings and parents.

Consider: A Tribal member who owns several less than 5% of the total tract interests that collectively generate over \$5000 per month, has no spouse or children, dies without a will. He does have one surviving parent and several siblings. Should either the surviving parent or siblings be eligible to inherit the less than 5% interests instead of the Tribe?

### **DEFINITION OF “CHILD”**

**Should enrolled or enrollable children who were adopted out be allowed to inherit from their biological parents?**

- If a child is removed by Child Protective Services, rights of natural parents terminated and the child is adopted out, should he/she be eligible to inherit from biological parents?
- If a child is voluntarily relinquished by a parent and adopted, should that child be eligible to inherit from biological parents?

Consider: A child was relinquished by a young mother at birth. The child is adopted out and mother goes on to marry and have a family. Her husband and family have no knowledge her relinquished child. She owns land/minerals; some of which are interests less than 5% of a total tract but all together have a sizeable income stream. Upon the mother's passing, (assume her husband predeceased her) should the adopted out child be eligible to take the less than 5% interests as the mother's oldest child?

Consider: A child resided with his father until age 8 when the CPS removed him and terminated his father's rights. The child was subsequently adopted by another family. Upon the father's passing, should the adopted out child be an eligible heir?

**Should adopted children be allowed to inherit only if the child was legally adopted in a court of law; thus excluding a cultural adoption?**

Consider: An enrolled tribal member was raised from birth by her grandparents and was solely supported throughout childhood by the grandparents although the grandparents did not legalize the adoption in a court of law. Should the 'culturally adopted' grandchild be allowed to inherit from the grandparents.

### **PRESUMPTION OF DEATH**

**How many years should pass before a person is legally presumed dead and his/her estate probated?**

- The National Probate Code presumes a missing/whereabouts unknown person dead after 6 years and his/her estate will be probated. The BIA must comply with list of required efforts to locate the missing person before presuming an Indian landowner is dead and forwarding the probate package to the Office of Hearings and Appeals to start the probate proceedings.

- AIPRA allows the Tribe to extend the period of time before presuming a person dead and commencing the probate of his/her estate.

Consider: A Tribal member has been missing for several years and his family has been unable to locate him after diligent searches. His minor children are in need of financial support but cannot access any funds in his IIM account (which is sizeable due to oil income). How many years should pass before the BIA should presume the person deceased and probate his estate to his heirs?

### **ELIGIBLE HEIRS**

The Tribal Council has been aware that a significant number of land and mineral owners are not enrolled members of the MHA Nation.

**Should eligible heirs be limited to enrolled members of the MHA Nation?**

**Should eligible heirs include unenrolled members that have one parent that is an enrolled MHA tribal member?**

**PUBLIC HEARING SCHEDULED  
SEPTEMBER 20, 2012 THURSDAY 6:00PM  
FOUR BEARS CASINO**