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Estate Planning for Indian Land in Oklahoma: A Practitioner's Guide

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Estate Planning for Indian Land in Oklahoma: A Practitioner’s Guide

By Casey Ross-Petherick

Estate planning for individuals who own an interest in American Indian property requires navigation of a complex set of federal laws and regulations that apply specifically to interests in Indian land.¹ The rules that govern intestate succession, wills requisites and probate procedures for Indian land interests are vastly different than those for non-Indian land interests. This article provides foundational information on the Indian land base in Oklahoma, as well as an overview of the laws and regulations for wills and intestate succession that apply to Indian land interests.

INDIAN TERRITORY, ALLOTMENT AND OKLAHOMA STATEHOOD

Oklahoma is home to 38 federally recognized American Indian tribes. Prior to Oklahoma statehood, the majority of the state was comprised of Indian Reservations. A large portion of what is now the state of Oklahoma was designated as “Indian Territory,” and served as a settling place for tribes that were removed from their aboriginal homelands under the federal removal policy that spanned the early to mid 1800s. In advance of Oklahoma statehood, the federal government initiated policy aimed at assimilating American Indians into non-Indian society. The vehicle for accomplishing this goal was the General Allotment Act (also referred to as the Dawes Act).¹ Through the process of allotment, reservations were divided into several parcels of property. Some parcels were allotted to individual Indians, while others were opened up for non-Indian settlement.

The 38 federally recognized tribes in Oklahoma comprise a very diverse group of tribal governments. Each is unique in its customs, traditions, cultural aspects and linguistic origins. Similarly, each tribe has its own distinct legal history. Although many tribes share common threads throughout times past, it is important for attorneys working in tribal communities to understand that each tribal government has its own history of government-to-government negotiations, its own history of treaties and in many cases, its own list of unique federal statutes that do not apply to other tribes. As a result of this individualist approach employed by the federal government in crafting its American Indian policy, practitioners must understand the general rules of federal Indian law, but must also look for deviations that are tribe-specific.

INDIAN LANDS IN OKLAHOMA: DIFFERENT TYPES OF ALLOTMENTS

Much like the fabric of Oklahoma’s diverse tribal composition, the Indian land base within the state is unique in several aspects. The Gen-
eral Allotment Act and its amendments treated some tribes differently than others for a variety of policy reasons perceived by lawmakers at the time.

The general rule under the General Allotment Act was to allot individual parcels of property for Indian use, but rather than granting title in fee status, title was granted to the federal government as trustee. The corpus of the trust was the land, including surface interests, mineral interests and natural resource interests. The individual Indian allottee was a beneficiary of the trust. Under this trust or restricted land designation, all property transactions, including sales, leases and agreements for management of natural resources were overseen by the federal government, acting as trustee over the property.

One notable exception to this general rule of allotting land in trust or restricted status extended to the individual allottees of the Five Civilized Tribes (Five Tribes), which includes Cherokee Nation, Choctaw Nation, Chickasaw Nation, Muscogee (Creek) Nation and Seminole Nation. The Five Tribes were exempted from the General Allotment Act. Allotment of their lands was effected by an amendment to that act, known as the Curtis Act. Individuals members of the Five Civilized Tribes were allotted their lands in fee status, where title to the land was vested in the individual Indian, but where the federal government imposed restrictions on alienation. Similar in some aspects to trust land allotments, Five Tribes restricted property allotments were overseen by the federal government, which did retain approval authority for property transactions, but did not engage in management of the property as a trustee.

Another exception to the general rule of trust or restricted allotments extends to individual allottees of the Osage Nation. Federal law specific to Osage Indian land interests severed the mineral interests of the Osage Reservation from the surface rights in the real property, and reserved those mineral interests to the tribe. The federal government maintained oversight of individual Osage allotments, but engaged in management under a set of rules developed specifically for these unique allotments.

Still today, there are no less than these three general allotment types spanning present in Oklahoma Indian Country. A survey of the legal histories of landholding of each of the 38 federally recognized tribes in the state would, no doubt, reveal additional differences. However, in the interest of formulating a general foundation that can be used by a practitioner navigating these complexities, this article will focus on the laws and regulations that apply to the three types of allotments already identified: 1) trust or restricted property allotments 2) Five Tribes restricted property allotments and 3) Osage allotments.

INDIAN LAND CONSOLIDATION

Several generations have come and gone since original Indian allottees were granted an interest in Indian land in the late 1800s and early 1900s. Until fairly recently, allotments descended through the general rules of intestate succession and probate that were applicable to non-Indian interests in the state where the Indian land interest was situated. That meant, if the Indian land interest was situated in Montana, then Montana state law applied. For Indian land interests in Oklahoma, Oklahoma state law applied. Indian land interests located in Oklahoma were probated through Oklahoma state courts. There was no uniformity in applicable law or forum for Indian land interests from state to state.

Another significant problem appeared with these original allotments, when the interests were distributed according to state law. The interests were becoming increasingly fractionated after being distributed through intestate succession from generation to generation. Congress tried, unsuccessfully, multiple times to pass legislation that would consolidate these Indian land interests.

AIPRA FOR TRUST OR RESTRICTED PROPERTY ALLOTMENTS

The most recent attempt at Congressional intervention to limit further fractionation of Indian land interests was the American Indian Probate Reform Act (AIPRA). AIPRA, which was passed in 2004, sets forth a uniform probate code for Indian land interests regardless of location. AIPRA also created a federal administrative forum for probating Indian land interest estates. AIPRA applies to Indian trust allotments, but not to Five Tribes restricted property allotments, nor to Osage property allotments.

AIPRA restricts the class of “eligible heirs” who are eligible to inherit an interest in Indian trust or restricted land in Indian status. The statute defines “eligible heir” to include any of the
decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood and parents who are A) Indian (the word 'Indian' is specifically defined in AIPRA); or B) lineal descendants within two degrees of consanguinity of an Indian or C) owners of a trust or restricted interest in the same parcel of Indian land being inherited from the decedent. There is no federally mandated blood quantum requirement for eligibility to inherit an interest in Indian trust or restricted land in Indian status, although a tribe may impose a blood quantum requirement for membership or citizenship purposes.

For testamentary dispositions AIPRA sets forth that a testator can devise his interest in trust or restricted Indian land to A) any lineal descendant of the testator; or B) any person who owns a pre-existing undivided trust or restricted interest in the same parcel of land; or C) the Indian tribe with jurisdiction over the interest in land; or D) any Indian.

If land descends to a person who is not an "eligible heir," or is devised to a person not recognized by 25 U.S.C. §2206(b), the transfer still occurs, but the land does not maintain its Indian trust or restricted status and becomes fee land.

Another interesting aspect of AIPRA, which seeks to curtail fractionation of trust and restricted Indian land interests is commonly known as "the 5 percent rule." For purposes of intestate succession, AIPRA differentiates between a decedent's interests in Indian land that amount to less than 5 percent of the entire undivided ownership of the parcel of land. For less than 5 percent interests, AIPRA limits the surviving spouse interest to a life estate for a very limited set of circumstances, but in all other circumstances, the land will descend to the decedent's oldest surviving child, so long as that child is an eligible heir. If there is no such surviving eligible heir child, then to the decedent's oldest eligible heir grandchild. If there is no such surviving eligible heir grandchild, then to the decedent's oldest eligible heir great-grandchild. If there are no surviving eligible heir children, grandchildren or great grandchildren of the decedent, the property descends to the Indian tribe with jurisdiction over the interest.

Another significant provision of AIPRA that is intended to limit fractionation is the presumption of joint tenancy status. AIPRA specifies "if a testator devises his trust or restricted interests in the same parcel of land to more than one person, in the absence of clear and express language in the devise stating that the interest is to pass to the devisees as tenants in common, the devise shall be presumed to create a joint tenancy with the right of survivorship.”

AIPRA REGULATIONS FOR TRUST OR RESTRICTED PROPERTY ALLOTMENTS

AIPRA authorized the secretary of interior to promulgate rules to carry out the provisions of the new federal law. The secretary completed the rules in 2008, and they can be found in Title 25, Part 15 of the Code of Federal Regulations. These regulations set forth the probate procedures for Indian trust or restricted interests that will be probated under AIPRA. Probates are initiated by the Bureau of Indian Affairs, and are completed at the Office of Hearings and Appeals, an administrative forum organized within the Department of Interior.

OKLAHOMA STATE LAW FOR FIVE TRIBES RESTRICTED PROPERTY ALLOTMENTS

Each of the Five Tribes restricted allotments are specifically excepted from AIPRA. The history of laws affecting property interests of the Five Tribes is complicatedly rich. Around the time of the Curtis Act, each of the Five Tribes was communicating separately with the federal government for statutory language specific to the needs of their tribal territories. This individualized approach created a wide array of statutes that were precisely crafted for the limited set of circumstances presented by each individual tribe. Some statutes differentiated within a specific tribe's territory depending on whether the land was a homestead allotment or a surplus.
allotment. Other statutes applied to individual allottees who possessed a specific blood quantum of Five Tribes Indian blood, but not to individuals who possessed less Indian blood. 19

The 1947 Act 19 was the latest sweeping legislative action pertaining to Five Tribes restricted property allotments. This federal statute clarified that the applicable law for wills, intestate succession and probate for Five Tribes restricted property allotments is the law of the State of Oklahoma. The 1947 Act also clarified that the forum for probating or conveying these land interests is the Oklahoma District Courts. The 1947 Act also clarified the requirements for holding Five Tribes restricted property allotments in Indian status. One of the most significant differences between Five Tribes restricted property allotments and trust or restricted property allotments is the requirement for eligibility to own interests in Five Tribes restricted property allotments in Indian status. An individual must possess at least one-half degree of Indian blood of the Five Civilized Tribes to be eligible to hold Five Tribes restricted property in Indian status. This is particularly interesting, since none of the Five Tribes require at least one-half degree of Indian blood for their own membership or citizenship purposes.

Another significant imposition on Five Tribes restricted property allotments that is unique is the special requirement for full-blood will approvals. Pursuant to federal law, if a full-blood member of one of the Five Civilized Tribes writes a will that disinherits his parent, wife, spouse or children, the will is not valid unless acknowledged before and approved by a state court judge. There is no parallel requirement for such will approvals in any forum for full-blood members of non-Five Civilized tribes. This law is still applied, and will invalidations are issued for noncompliance.

FEDERAL REGULATIONS FOR FIVE TRIBES RESTRICTED PROPERTY ALLOTMENTS

Federal involvement in Five Tribes restricted property allotments is typically limited to oversight and approval rather than management as a trustee. However, the secretary of interior has promulgated regulations in Title 25, Part 16 of the Code of Federal Regulations that set forth the Department of Interior’s role in participating in probates of Five Tribes restricted property allotment probates in state court.

OSAGE ALLOTMENTS

Osage Allotments are unique, and cannot be categorized as trust or restricted Indian allotments under AIPRA, nor as Five Tribes restricted property allotments under other federal law. These property interests are very unique, due to the severing of mineral interests from surface interests and the common nature of ownership of the mineral interests by the tribe and its members. In fact, there are several statutes and federal regulations that apply only to Osage allotment interests. Oklahoma practitioners should recognize that these interests are unique, and should consult relevant federal and tribal law to best serve the needs of clients with interests in Osage allotments.

FEDERAL REGULATIONS FOR OSAGE ALLOTMENTS

The Secretary of Interior has promulgated regulations in Title 25, Part 17 of the Code of Federal Regulations that set forth the Department of Interior’s role in participating in probates of wills of Osage Indians. These regulations set forth procedural requirements and the process for appeals from superintendent decisions on wills of Osage Indians.

CONCLUSION

My advice for an Oklahoma practitioner working on any Indian land issue, particularly an Indian allotment estate planning case or an Indian allotment probate is as follows:

1) Remember that each tribe in Oklahoma is unique. You must engage in tribe-specific research before you embark on representation of clients with interests in Oklahoma Indian Country.

2) Understand that in Oklahoma, we have three distinct Indian land statuses, each with different applicable laws, regulations and forums. Determine what type of Indian land interest is implicated and apply the relevant rules.

3) When you are in doubt, ask an expert. Oklahoma is home to many of the finest Indian Law practitioners in the United States. Oklahoma practitioners should reach out for assistance and leverage the resources right here in our state.

1. “Indian Country” is defined at 18 U.S.C. 1151, and includes (generally) Reservations, dependent Indian communities and allotments.
12. See 25 C.F.R. 15
16. See also 58 O.S. §901.

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