



## Managing Indian land in a highly fractionated future

**A**s a result of the General Allotment Act of 1887 — also known as the Dawes Act — reservation land was divided up and allotted to individual tribal members. Thousands of individual Indians suddenly became landowners on more than 150 different reservations. When an allottee died, ownership was divided among the heirs, but the land itself was not physically divided. As a result, each Indian heir received an "undivided interest" in the land.

Fast forward multiple generations and the number of owners has grown exponentially. It is not unusual for a thousand individuals to have an undivided interest in a small piece of land. The math is almost incomprehensible, but the havoc wreaked by these policies is as plain as day: Allotment has been tragic for Indian families as the ability to use and profit from that land has diminished with increasing fractionation and subsequently the value to the family is reduced greatly.

What does this mean for individual Indian landowners and the communities where they live? What problems has it created? Are there potential solutions to those problems? These are the questions we set out to answer in this issue of the *Message Runner*.

### How did we get here?

Beginning with treaties in the 1850s and '60s, federal policy created a complex web of individual ownership of reservation land. Under the General Allotment Act, Indian landowners were also declared incompetent to handle their own affairs. This marked the beginning of the federal trust relationship and its all-powerful control over transactions involving Indian land. Since that time, additional layers of federal, state and tribal laws regarding the probate of trust and restricted fee land has led to a highly-fractionated state of ownership that includes both Indian and non-Indians on land titles.

### American Indian Probate Reform Act (AIPRA)

The most recent and significant attempt to stem the tide of fractionating land title was the American Indian Probate Reform Act (AIPRA) of 2004. The goal of AIPRA was to establish a more uniform way of transferring ownership of trust and restricted-fee land from one generation to the next. The federal rule provides definitions, designates eligible heirs and establishes exhaustive procedures in handling the probate of trust assets. It also stopped the application of state law to Indian trust probates, which halted massive loss of trust ownership of these interests to non-Indian spouses. AIPRA created the necessity for Indians to take more control over their land assets by writing a will.

Considerable portions of AIPRA are dedicated to describing what happens to trust assets when an owner dies without a will (known as 'intestate'). By allowing an estate to go through probate intestate, a federal administrative law judge working for the Office of Hearings and Appeals gets to interpret federal law in ways that have significant



*Enactment of the General Allotment Act of 1887, also known as the Dawes Act, marked the beginning of the federal trust relationship. The Act was named for its creator, Senator Henry Dawes of Massachusetts.*

negative effects on Indian families.

Since its inception in 2002, the Indian Land Tenure Foundation has supported estate planning as one of the most effective ways to stop the continued division of Indian land titles and ensure that Indian lands are controlled and managed by Indian people. ILTF-funded projects have led to thousands of Indian landowners receiving direct legal services and will writing assistance. Many more thousands, including elected tribal officials, landowners, attorneys and Indian land heirs have received training about AIPRA. These have been important steps forward, but there is so much more to be done.

### Exploring the alternatives

What if there were ways that Indian landowners could better exercise their ownership rights and more effectively manage their land? What if federal law made it possible for landowners to consider alternative ways to combat fractionation? Those questions were at the heart of a three-year ILTF pilot project focused on "Co-Owner Management Entities." A door was opened by federal law that allows for the development and recognition of legal entities such as private or family trusts, partnerships, corporations, or other organizations that would improve the management of highly-fractionated interests in trust or restricted lands.

ILTF spent three years meeting with families and groups of landowners on multiple reservations, describing the goal of the project and attempting to gauge the interest among Indian landowners in trying something new. The objective was to determine landowner priorities and then design tools and strategies that could help them use their trust assets more effectively.

It has become quite clear that the current environment for owning Indian land, and the myriad of problems it entails, is not working well for anyone, including the Federal government. Efficient, consolidated management of allotted land will enable landowners and tribal communities to take greater control of their future while reducing the administrative burden on the U.S. government.

On the following pages you will find an overview of creative new ways that Indian landowners can consider exercising their ownership rights, managing their land and engaging in more effective estate planning through "Co-Owner Management Entities." We hope Indian landowners will find this information valuable as they look for new opportunities to better manage their family's trust assets and stop further fractionation of their land title.



*Cris Stainbrook*

Cris Stainbrook, President  
Indian Land Tenure Foundation



# Fractionated title creates countless issues for landowners

There are four primary issues stemming from fractionation of ownership:

- Poor record keeping
- Lack of information on land transactions
- Difficulty for landowners in having their needs addressed during transactions
- Habitual underdevelopment of reservation land.

Mismanagement of records and trust assets by the U.S. government led to Cobell vs. Salazar, the landmark \$3.4 billion class-action lawsuit settled in 2009. The 16-year litigation and settlement, led by the late Elouise Cobell, addressed numerous violations by the federal government and brought about greater transparency of federal activities for allottees. The settlement allowed class members to be compensated for their claims against the government. The settlement, however, reflects only part of the long-term detrimental impact of fractional ownership and attempts to correct related issues.

Indian landowners often lack access to even the most basic information on land ownership and activities, and there has been no clear path to acquiring that information, either. Even with a common set of federal regulations, agencies and regional offices often do things in different ways making it difficult to determine where to go, who to ask, and what the process is for carrying out a land-related activity. When landowners do acquire the information they need, they often lack the training or education needed to interpret what it means.

Highly-fractionated ownership makes it challenging for landowners to have their opinions heard in a timely and direct way. The Department of the Interior (DOI), in exercising its trust responsibility, has to attempt contact with every owner affected by land transactions. If a landowner has moved, they may not receive adequate notice of a pending action. Even if they do receive timely notification, owners of trust or restricted-fee land often believe their opinion was ignored when an agreement is reached or denied against their stated preference.

### Obstacles landowners face

There are more than 250,000 individual landowners, who hold undivided interests in 93,500 allotted tracts of trust land on more than 150 reservations. Some parcels have hundreds of owners, many of whom pay little attention to activities taking place on their land, are not aware of their rights as a landowner, or live far away from the reservation where the land is located.

Individuals who hold undivided interests have to gain consent from a majority of the parcel's owners to do anything productive with the land. This makes it nearly impossible for any single owner to use the land for agriculture, to develop a business or build a house. It can be challenging, if not impossible, to obtain authorization from the holders of the majority of interests to approve the leases and rights-of-way necessary for projects to proceed. As a result, would-be developers lose patience and move on to other opportunities where they can recoup their investment more easily and with less government involvement. This leaves reservation communities less developed, with limited housing options and fewer businesses than elsewhere.

Regulations allow a BIA Agency Superintendent to make certain decisions with minimal input



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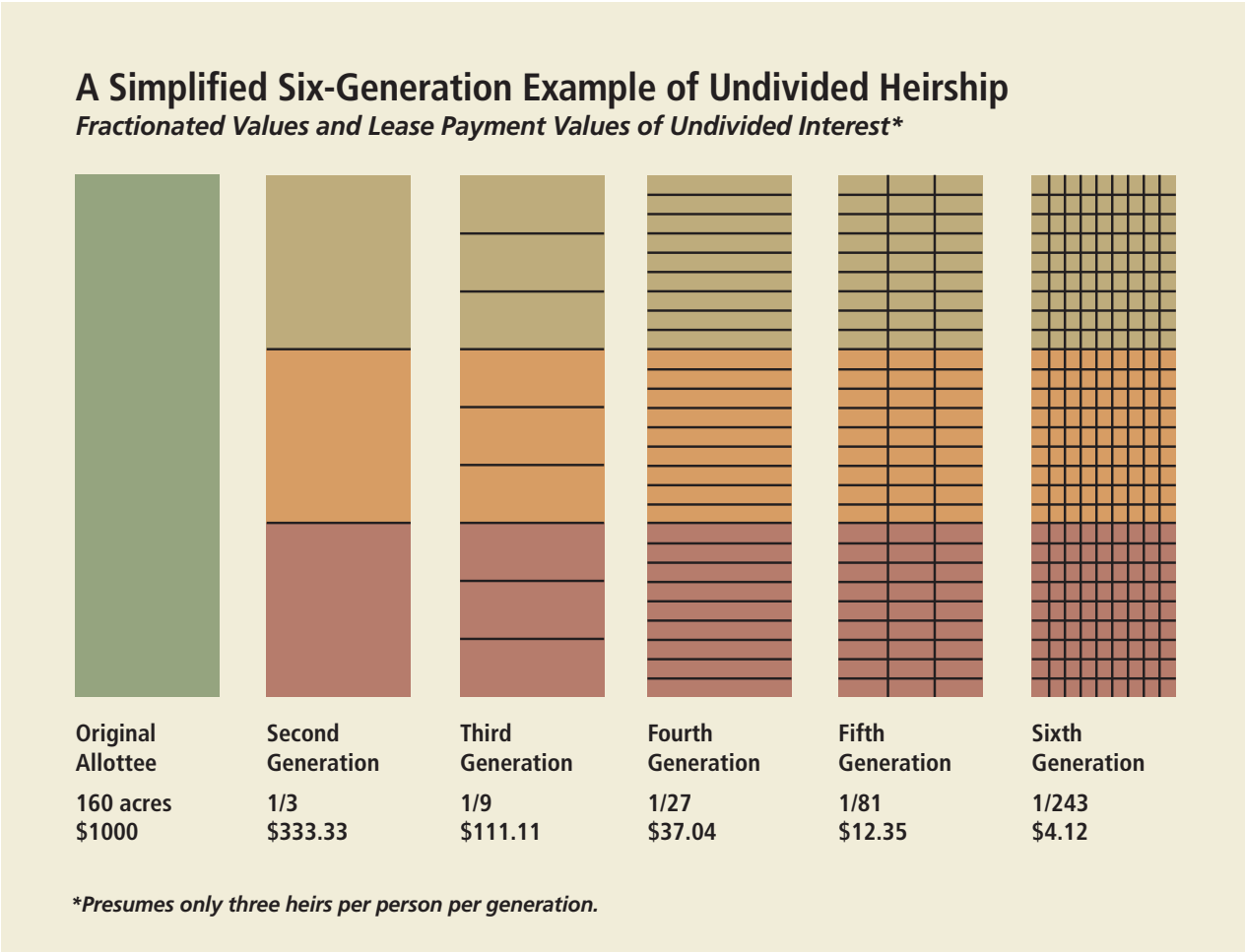
(e.g., leasing and permitting decisions for projects that will produce revenue) if they feel it is in the best interest of the allotment owners. If a project might be controversial – a pipeline permit, for example – the Superintendent may leave a parcel undeveloped rather than deal with potential political consequences. This accumulation of obstacles often leaves individual landowners frustrated and feeling powerless, even though there might be untapped wealth located on their land.

While the Land Buy-Back Program for Tribal Nations has dominated the conversation in Indian Country over the last five years, this approach to land consolidation is only one part of addressing the issue of highly fractionated ownership of Indian land. It is the American Indian Probate

Reform Act of 2004 (AIPRA) that has more day-to-day impact on individual allotment owners. AIPRA, which is an amendment to the Indian Land Consolidation Act of 1983, was designed to limit the continued fractionation of trust land ownership through the probate process. It changed the landscape related to inheritance of trust and restricted fee lands.

When a landowner has a will, their land is passed on to whomever they decide. If there is no will, it is up to a judge to make the decision. In that case, the Single Heir Rule or a Purchase at Probate may apply, which could prevent the landowner's intended heirs from receiving their interests.

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Fractionated ownership results from ownership interests being divided over and over when an owner of the interest dies without a will. These parcels can have hundreds, even thousands of owners.



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Active ownership is a game-changer

While thousands of passive Indian landowners have been negatively impacted by the realities of fractionation, many more active individuals are taking steps to decide what is going to happen to their land rather than let others make that determination. The first step toward boosting active ownership is to mobilize landowners. Active ownership requires the owners of fractional interests to learn about their land, the federal regulations that govern that land, as well as tribal laws. Active owners should be able to:

- List what is owned
- Describe agreements impacting their ownership
- Know who their fellow co-owners are
- Understand which heirs may inherit their land
- Produce a valid will or estate plan that includes succession planning

Federal policy allows co-owners to request in writing the names and addresses of other owners, the percentage of ownership held by each, and the location of the parcel. The process of obtaining this information can move very slowly, and landowners may need to push to have the data delivered in a timely fashion.

Many owners have found it difficult to be heard when a lease or right-of-way permit is being considered by the BIA. It helps to know who your fellow co-owners are, making it easier to come together around a single viewpoint. When there are more than 20 co-owners of a particular parcel, a simple majority (50.01%) is required to take action. When there are fewer owners, the required percentage rises (see accompanying info box). Whether there is positive support for a right of way, lease or other action, or a strong opinion against it, more people sharing the same opinion and expressing it to the BIA tends to get noticed.

Active ownership requires landowners to create a will and review all the assets and agreements within the estate. Having a will returns management power to individual Indian landowners, who can decide which heirs receive specific interests. At the same time, it helps slow the con-



Active ownership requires landowners to create a will and review all the assets and agreements within the estate. Having a will returns management power to individual Indian landowners.

tinued fractionation of title. An estate plan goes beyond just writing a will and there may be opportunities beyond wills to begin asserting management control over land interests. One of the potential options is Co-Owner Management.

Co-Owner Management Entities

AIPRA contains a little-noted section that allows the DOI to explore opportunities to have groups of co-owners use formal entities or organizations to manage their land collectively. These co-owner management entities would enable landowners to address common needs and goals, and combine their resources to create a unified voice. This will advance ownership and community goals, and enable landowners to launch a business, develop a farm or ranch, and build houses on their land.

Although co-owner management entities cannot replace or change the trust duties of the Secretary — preventing owners from doing certain direct

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“Landowners have found it difficult to be *heard*.”

AIPRA approval standards for land transactions

- If there are 5 or fewer owners of undivided interests in a parcel of allotted land, 90% of the landownership must give their approval
- For parcels with 5 to 9 owners, 80% of ownership approval is required
- For 10 to 19 owners it is 60% ownership approval
- If there are 20 or more owners, a majority (50% plus) is required.



5 or fewer	→	90%
5–9	→	80%
10–19	→	60%
20+	→	50%+





Options are available for Indian landowners to form co-owner management entities to manage land in more practical ways. This enables landowners to potentially combine resources to develop a farm or ranch, launch a business or build houses on their land.

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activities like leasing or mortgaging the land without federal approval — they will serve as a step forward toward developing a long-term strategy to update the federal trust responsibility.

The Secretary of the Interior has the authority to move forward with this option. Rules would need to be established to outline the criteria for these entities. This would include reporting requirements to inform landowners and the BIA, and create provisions for revoking or suspending the authority of any entity to engage in management activities.

In the pages that follow, the specifics of co-owner management entities are explored in more detail,

including various models and options that may be available to landowners. We'll look at potential obstacles landowners may face, as well as ways that families and other participants can work together to explore the various options.

**The role of ILTF**

ILTF's co-owner management project set out to determine what individual landowners wanted to see in a program described by the Act. The Foundation consulted with families and groups of co-owners throughout Indian Country who hold trust and restricted fee land. Their wishes ranged from simply ensuring that the land keeps its Indian status and stays in the family, to start-

ing a business that employs tribal members and generates income for landowners.

The options described in this edition of the Message Runner are not intended to replace the development process outlined in the law, nor provide a complete description of what the federal pilot project might look like. Rather, the goal is to provide enough insight to determine if these approaches might work for some groups of owners, and offer enough information for individuals to consider participating in the creation of a co-management entity.

We look forward to your feedback on the opportunities presented here.

## Dangers of dying without a will

### Single Heir Rule

- ▶ Only the oldest eligible heir receives the highly-fractionated land interests
- ▶ Younger siblings may end up without any Indian land.

### Purchase at Probate

Purchase at Probate is the acquisition of the interest of a deceased person during the probate process, rather than allowing the land to pass to heirs through a probate administrative ruling. The purchaser has to pay at least fair market value for the land. Heirs end up with the proceeds of purchase but not the land itself.

Dying without a will increases the landowner's exposure to Purchase at Probate.

- ▶ With a will landowners can make their specific wishes known
- ▶ Without a will, the tribe, co-owners and other eligible heirs in the same parcel have rights and can initiate a purchase-at-probate action.

Purchase at Probate increases the possibility that heirs will not receive the land.

- ▶ With interests greater than 5 percent, heirs can choose to grant or deny the request. If the heirs grant the request they also have the right to choose the purchaser if multiple requests are made.
- ▶ With interests of less than 5 percent (most interests), heirs can do nothing to stop a sale.



## AIPRA Solutions for landowners



**Will** — A will designates who will receive an individual landowner's trust, restricted fee, and off-reservation land, and can also designate who is to receive personal property.

**Gift Deed** — A document that immediately gives an individual's ownership to another. Gift deeds are often used with a life estate to permit using the land or receiving income while the person giving the deed is still alive.

**Co-Owner Management** — A form of management in which co-owners take action by working together through formal entities to find mutually beneficial solutions.



# Tribes often serve as consolidated managers of trust land

Consolidated management of trust and restricted fee land by tribes has been recognized by Congress and the Department of the Interior for more than 130 years. The tribe essentially acts as a form of group management by representing the views of its members through its elected representation. Tribes also create various management entities for specific purposes, such as housing and economic development. Here are some examples.

### Tribally-Designated Housing Entities

Tribes receive funding from the Department of Housing and Urban Development (HUD) and often create a Tribally-Designated Housing Entity (TDHE) to administer housing programs. Under federal law, TDHEs can determine the plan, design the house, and construct and maintain affordable housing in Native communities. Acting as a consolidated manager, these entities have full-time managers and staff who identify, gather and deploy resources to develop new housing and community infrastructure and meet the ongoing needs of residents.

### Tribal Land Enterprise

Under the Indian Reorganization Act of 1934 (IRA), a tribe can form a corporation to engage in business transactions. Some serve as independent economic development bodies while others own and manage trust and restricted-fee land. These 'Section 17' organizations have their own leadership (in some cases members of the tribal council) and often have paid staff who promote economic and community development.

One such organization is the Rosebud Sioux Tribal Land Enterprise (TLE), which was founded in 1934. Its purpose is to address fractionation of title in allotted lands resulting from probate, provide a plan to consolidate individual ownership interests in restricted fee land, and further economic development interests on the reservation.

TLE's strategies for land consolidation are designed to preserve the value of an individual's ownership equity. The organization enables owners to exchange their land ownership interests for interests in other land, or for certificates of interest directly in the organization. Land controlled by the tribe is used for economic development purposes, and income generated by TLE is used to support a long-term land-buying program.

### Allottee/Landowner Association

Landowner associations are a form of group management, as well. These collaborative organizations serve as a way to share information, discuss issues and develop a more unified strategy to benefit the community and landowners. Some are run exclusively by volunteers, while others have paid staff to advocate for important issues such as water rights.

### San Xavier Allottees Association

In 1971, a group of allottees on the San Xavier Indian Reservation in Arizona formed a cooperative to pool their lands and develop an economically viable farming operation. In 1975, they filed suit against the City of Tucson and the large agriculture and mining companies that were drawing water from the aquifer under the allottees' land. That resulted in Congress passing the Southern Arizona Water Rights Settlement Act in 1982, which granted 56,000 acre-feet of water annually to the cooperative.



*Tribally Designated Housing Entities (TDHE) are one example of how consolidated management of trust and restricted fee land has been permitted for more than 130 years.*

As a result of the settlement, the landowners created the San Xavier Allottees Association (SXAA). Its mission is to educate landowners about retaining and improving their lands and assist with land-related concerns such as environmental protection, water rights, housing, and economic development. The San Xavier Cooperative Association (SXCA) leases land from its owners and works with the local community to learn and teach how to grow, harvest, process and prepare traditional Sonoran desert foods. It also helps its members to profitably sell and distribute the food they produce.

### Numu Allottee Association — Burns Paiute Off-Reservation

The Numu Allottee Association (NAA) is a native nonprofit that addresses the needs of owners of undivided interest in trust allotments. These public domain allotments exist outside the general reservation structure because there isn't a tribe with exclusive legal jurisdiction, making it difficult to receive services from the BIA. The NAA provides support to its members by:

- Informing landowners about their rights, benefits, responsibilities, and the cultural heritage associated with their trust allotments
- Providing owners and their prospective heirs with a forum for communication and understanding among themselves and other interested groups and government entities related to the public domain allotments.
- Representing the collective best interests of all trust owners, fee owners, and prospective heirs regardless of their tribal affiliation on activities related to the allotments

### Keys to successful landowner associations

ILTF has provided grants in the past to communities in Idaho and North Dakota that were forming landowner associations among allotment own-

ers. Although these entities were unable to sustain themselves for more than three or four years beyond the grant-funding period, there were important lessons learned.

The most critical factor for the success of landowner associations is having an overriding purpose that attracts the involvement of more than just a handful of individuals. The momentum gained from engaging larger numbers of owners helps to bridge transitions between leaders or issues.

In addition, there has to be a realistic view of the investment of time and money needed to organize around the association's purpose. In the long term, the association may progress to the point where it is capable of generating grant funding or other forms of revenue. In the meantime, the initial investment needs to come from the landowners themselves if it is going to be successful in the future.

*“The most critical factor is having an overriding purpose.”*



# Managing undivided interests in a more practical way

The purpose of co-owner management entities is to enable owners of trust and restricted-fee land to better manage their undivided interests in ways that protect and exercise the rights of owning property. The owners retain the rights to use the land, collect rent, mortgage the property, and any other benefits they currently possess. However, co-owner management enables landowners to make decisions and take action in a more practical way.

Under a formal co-owner management structure, there is no need to gather signatures from every interest holder when it comes time to sign legal documents. Instead, designated members can act on behalf of the other landowners involved. This makes it much simpler to consolidate interests, or pass them on to heirs without going through a lengthy probate process.

When it comes time for the Department of the Interior to develop a co-owner management pilot project, the goal should be to create options for landowners to streamline the management of their land, not to shift federal trust responsibilities and administrative financial burdens to individual Indian people. The goal should be to improve efficiency and make it easier to launch income-generating activities on the land – harvesting timber, doing residential or commercial development, or leasing the property, for example. Yes, there will be costs incurred by co-owner management entities, but the potential long-term economic benefits should outweigh short-term expenses. The efficiencies also extend to the federal government and tribal land offices, where the time and administrative cost involved will be substantially reduced.

### Guiding the process

When ILTF assembled a working group for this co-owner management project, the goal was to create administrative tools that would enable Indian landowners to avoid the historic burdens imposed by the probate process and AIPRA. The idea was that Indian land should be treated more like non-Indian land in the eyes of the law. It won't be easy to reach these goals since it requires removing or significantly altering existing restrictions, regulations and statutory language at the Executive, Congressional and Tribal levels. Whatever tools are created need to be easily understood by the average landowner, flexible enough to fit many different types of situations, and practical enough that landowners will see the value of participating.



*The first step toward forming a co-owner management entity is for the landowners to meet to sort out their collective priorities and goals for the land...*

The project working group recommended that co-owner management entities should be able to:

- Protect the long-term value of the land
- Define the ownership/membership of the organization
- Determine management & distribution guidelines
- Represent owners as a single point of contact
- Negotiate leases and have the power to make contracts
- Receive income directly
- Remove administrative liability from the Secretary's Office
- Avoid probate
- Preserve the "Indian" status of the land
- Handle the termination/distribution process if and when the entity dissolves

### Determining what entity fits best

The first step toward forming a co-owner management entity is for the landowners to meet to sort out their collective priorities and goals. These priorities might relate to cultural protections, the

capacity to generate income, or the potential for residential or commercial use of the land. After that, the group needs to determine if the characteristics of the land in question support the achievement of those common goals. Once these answers are in place, an ownership group is better prepared to discuss what type of formal entity will work best for the group.

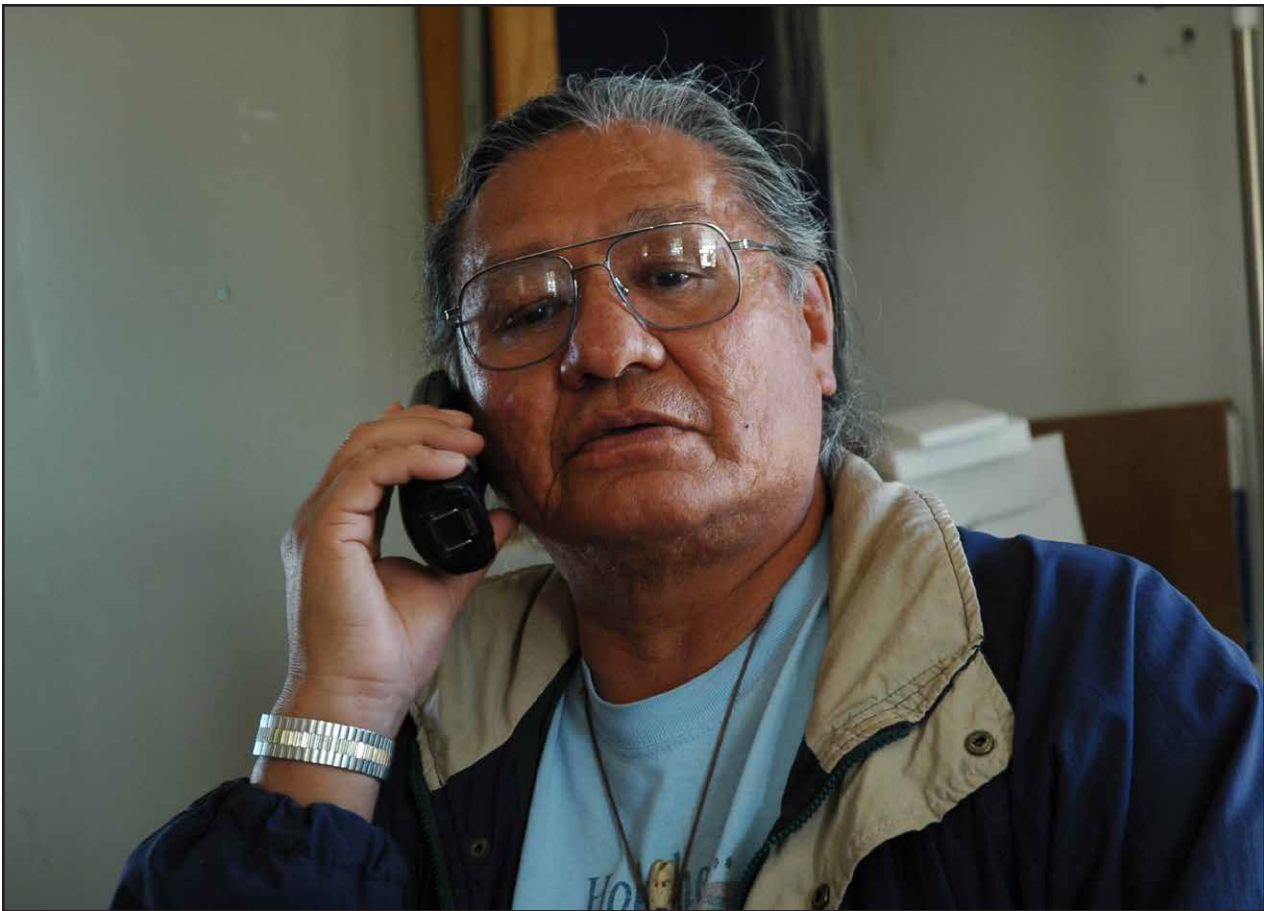
ILTF considered three levels of owner relationships to more easily navigate and describe co-owner groupings:

- Owners of a single allotted parcel (most common)
- Close family members (e.g., siblings or first cousins) with associated interests across the same several allotments. (second-most common)
- Owners in multiple adjoining allotments trying to do larger-scale business activity (largest and most complex situation)

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The simplest landowner relationship is the individual allotment. Allotments from the Dawes Act were usually between 40 and 320 acres. Today there are relatively few parcels with less than 10 owners of undivided interests. Ownership often includes siblings, cousins, other related people, and an occasional non-family member who somehow inherited an interest.

Then there is the situation where immediate family, including close cousins, own an undivided interest in their grandparents' land. Many original allotment owners were given multiple parcels of land to accommodate housing, hunting and other traditional needs. Additional land was often acquired by marriage. This created a dispersed pattern of ownership that may offer different opportunities for current owners.

The most challenging situation involves economic development across multiple parcels. Owners organizing for this purpose need to be aware of the potential complexities involved, including the need for outside professionals and significant financial resources if they are going to be

successful. We refer to this type of ownership as a 'private consolidation corporation.'

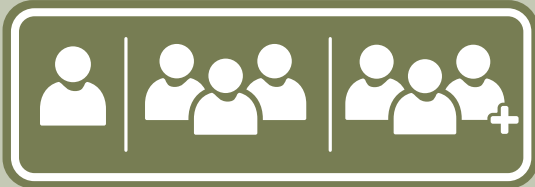
**Clarifying goals and objectives**

It is important from the outset for each owner to know who the other owners are, and what percentage of the land they each own. Group leaders will most likely share important information with other owners and work toward building consensus. The Indian Land Consolidation Act defines what constitutes a majority for voting purposes (see *AIPRA approval standards for land transactions* on page 3).

Whether the goal is to stop a particular transaction (e.g., a pipeline) from occurring, support the development of a new business on tribal land, or simply preserve the land for future generations, uniting around a common goal will most likely drive co-owners to form and maintain a more formal management entity. What type of entity gets formed depends on the specific goals, land circumstances and the level of ownership that is consolidated through the entity.

There are a variety of co-owner management options that might become available. These are considered in more detail on the pages that follow.

Three levels of owner relationships



- Individual allotment**
- ▶ Relatives and other co-owners create a unified structure to manage their land
  - ▶ 50+ percent ownership = speaking with one voice, exercising control or veto power
  - ▶ Agree on how to use that piece of land (goals, land use, plans)
  - ▶ Define future membership in the management structure
- Family and co-owner consolidation**
- ▶ Preserve the family's connection to reservation lands
  - ▶ Likely cover multiple parcels to manage some or all undivided interests
  - ▶ May combine family resources to consolidate ownership
  - ▶ Create a platform to agree on goals, land use plans
- Private consolidation corporation**
- ▶ Co-owners create a unified structure to manage their land
  - ▶ 50+ percent ownership = speaking with one voice, exercising control or veto power
  - ▶ Ideal to assemble and consolidate land from more than one allotment in sufficient quantity to permit viable economic land uses
  - ▶ Management structure helps create more revenue for all owners
  - ▶ Greater potential for commercial development, larger economic-scale farming or ranching











**HOLD MEETINGS**

Landowners meet to determine how they can work together to manage the land.



**SET LAND USE GOALS**

Co-owners establish land use priorities and establish goals for the entity. Goals might be related to cultural protection of sensitive sites, income generation, or improved standards of living through residential or commercial uses of the land.



**SELECT ORGANIZING ENTITY**

Co-owner management entities vary in terms of complexity and effectiveness depending on the specifics of a particular situation. Landowners need to reach consensus on what entity makes the most sense for their group and circumstances.



**LEAST COMPLEX** —————→ **MOST COMPLEX**

Power of Attorney	Association	Cooperative	Trust	Tribal Charter Corporation	Federal Charter Corporation	Section 17 Charter
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**DEVELOP A PLAN**

A written plan should define activities, roles and relationships; establish management and accounting procedures, and identify financial and support resources. A plan doesn't need to include every step, but the more organized the planning process is, the more likely the co-owner entity will be a success.



**IMPLEMENT THE PLAN**

Take action! Implement the plan and begin adding value to the land and for the landowners.







Indian landowners will need to invest countless unpaid hours to successfully develop a co-owner management entity for trust or restricted-fee land. There is research to do, information to acquire, paperwork to deal with and meetings to plan and attend.

# Landowners need to invest time, knowledge, resources

Beginning the implementation process of a formal co-owner management entity for trust or restricted-fee land requires a significant investment by landowners in time, knowledge and financial resources. There is research to do, information to acquire, paperwork to deal with, and meetings to plan and attend. Landowners will need to invest countless unpaid hours to reach project goals. Depending on the final form the entity takes, they may get a return on their investment, either in the form of income or the satisfaction of using their land in the way they want.

### How to move ahead

Over the last three years, Indian Land Tenure Foundation's co-owner management project involved a number of families and groups of co-owners in different parts of Indian Country.

The Foundation often set the agenda for landowner meetings, and acted as a facilitator. Some well-organized groups used ILTF resources to host meetings and educate landowners about the issues involved. The goals, and timelines to meet those goals, were defined exclusively by each group of landowners. Over time, it became clear that the ultimate success of a co-owner management entity is dependent on the investment landowners are willing to make in their project.

These are the key steps in the process:

- 1. Identify and assemble stakeholders
- 2. Hold meetings
  - Get to know each other
  - Generate common goals
  - Evaluate whether to proceed or not
- 3. If the decision is to proceed, then:
  - Develop a plan
  - Implement the plan
- 4. Assemble the support systems for long-term sustainability

### Formal management is consistent

Successful organizations, including co-owner management entities, usually have systems in place to establish roles, guide decisions and communicate important information about their business activities to stakeholders. These systems are related to strategic development, planning, finances, operations, agreements among stakeholders and external partnerships. These are three of the most important systems for CMEs:

### ► A business plan defines its activities

One of the most important first steps is to write a strategic or business plan, a relatively short and simple document that describes how the organization intends to generate income, defines how members will interact with each other, and assigns roles and responsibilities.

### ► A formal entity defines its relationships

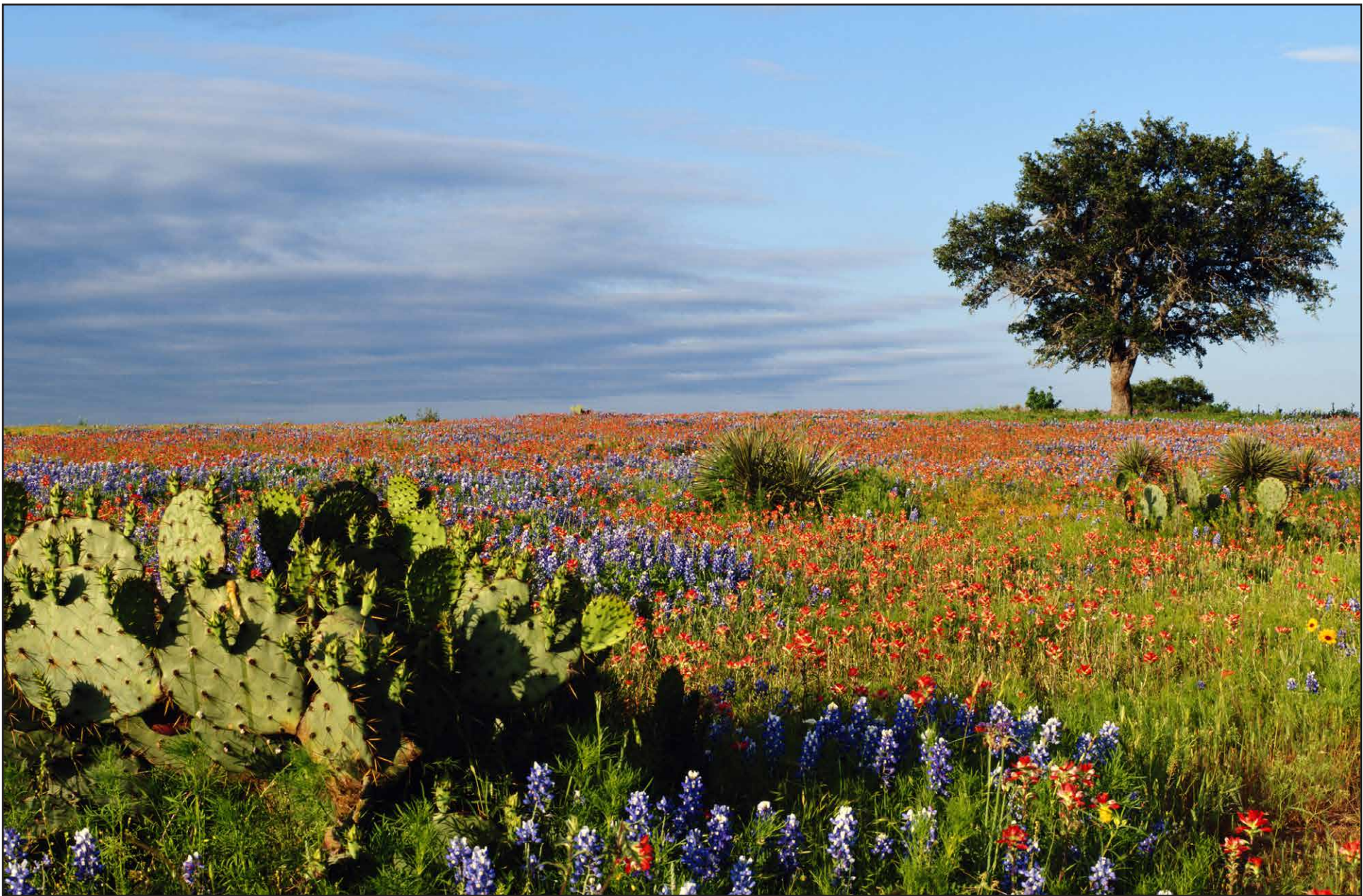
By creating a separate legal entity, landowners can more clearly define for stakeholders how the co-owner management organization functions. The charter and bylaws of an entity define the relationship among landowners and other members. These documents explain how information is shared, under what conditions decisions or commitments are made, what legal business the organization may transact, and what roles owners or members are responsible for. In addition, an 'operating agreement' can define what investment owners have made in the entity, what operating authority the owners and employees have, how profits are distributed, and what legal liability the organization has.

### ► An accounting system keeps the finances in order

All successful organizations have a good accounting system that clearly and accurately records all financial transactions on a regular basis. It provides the necessary information to complete reports that must be submitted to various government agencies, including the Internal Revenue Service, and produces accurate financial reports for stakeholders.

*“It should only be as complex as necessary.”*





Motivations for developing a co-owner management entity vary greatly but one common goal is to protect lands for the long-term use and enjoyment of the community.

## Co-owner management can take many different forms

There are a variety of ways co-owners can move forward when forming an entity to better manage their land, and every form of management from the landowner association model or cooperative to a for-profit corporation is worth exploring. Determining which organizational model is the best fit for a given situation depends on a number of considerations, many of which are explored below.

Landowners need to go through a deliberate process to determine who is leading the effort to form a co-owner management entity, what their primary motivations are, what financial resources and key knowledge they bring to the project, and what other organizations can play important supportive roles.

**Leadership**

Leadership is critical in a project where decision-making authority and the responsibility for success are given to key representatives of the larger group. If the project is going to be successful long-term, it is important to determine who is driving the process and to ensure that it has broad support from multiple leaders. Is it the Tribe, one particular family, a group of landowners in a specific area, or an individual visionary? It might also be an external non-profit organization or for-profit business with a land conservation or economic development purpose.

**Stated goals**

What are the primary reasons driving the formation of a co-owner management entity? The answer to that question can definitely influence

who participates in the project. Motivations may include such issues as the desire to consolidate ownership and/or manage a particular piece of land, to promote agricultural products, or build shared infrastructure. Many groups will form for the purpose of protecting lands for the long-term use and enjoyment of the community, or stem from a desire to keep an attachment to the land without having to shoulder management responsibilities.

**Resources**

Determining what knowledge and financial resources are needed is an important step when forming a project strategy, a process that may suggest or eliminate some types of entities. Landowners need to be realistic about what resources are available to support their project. Issues up for discussion could include capital needs and how to address those (a grant, loan or equity investment, for example), or the desire for outside leadership or paid staff.

**Supportive organizations**

The overall goals and objectives for the formation of a co-owner management entity are likely to suggest what kinds of outside resources are needed to get started, and what types of external support are important to sustain the organization long-term. A small owner-operated entity may be limited in its ability to attract outside resources. A not-for-profit entity could be hampered in its ability to build lasting assets. Entities with tribally owned interests may have an advantage in assembling resources, but could put individual

landowners at a disadvantage. It is important to explore these factors up front.

Project leaders should research the different options available under tribal and state law. Formal organizations range from simple legal relationships to detailed structures with charters, rules and written agreements, but a co-owner management entity should only be as complex as necessary to reach project goals. It should offer co-owners a practical, flexible way to manage their land, as well as the potential to simplify the U.S. government's trust responsibilities over trust and restricted-fee lands.

Regardless of the type of entity chosen, landowners should be realistic about the amount of personal time and resources required to launch and maintain the entity if the project is going to be successful.

“Success is dependent on the investment landowners are willing to make.”



## Membership and Landowner Associations

A membership-driven association (including a landowner association) is formed to pursue a common goal or address an issue affecting multiple landowners. The association may have an income-based purpose or be a non-profit. It should have a board of directors or an executive committee that is responsible for ensuring that the assets and activities of the organization are managed in a way that enables the organization to accomplish its' stated purpose. Some associations hire paid staff to do the day-to-day work.

### What makes it different?

Forming an association offers organizers the ability to define its membership standards and attract key leaders who have the varied interests, skills and historical knowledge that are needed.



Membership meetings are held to share information and provide leadership through a democratic process involving the entire group. This approach serves as a means of discussing issues and acting with a more unified strategy to benefit the community and landowners, and offers opportunities for landowners to be involved in the process.

### Best Fit

- ▶ A group of landowners motivated by one or more critical issues
- ▶ An organization designed to educate, advocate and assemble resources on behalf of its members
- ▶ An organization to represent the owners' political interests
- ▶ An organization to operate a specific facility, such as a rodeo arena

### Advantages

- ▶ Less complicated and subject to less regulation than many non-profit corporations
- ▶ Increases capacity of individuals to manage complex organizations
- ▶ May improve knowledge of members to address community issues
- ▶ Works well in coordination with government or for-profit business entities

### Areas of Concern

- ▶ Does not directly build individual wealth
- ▶ Unless organized as a non-profit, cannot receive donations and certain grants

## Cooperatives

A cooperative association or "co-op" is a corporation formed under tribal or state law.

Co-ops may be formed as non-profit or for-profit organizations, but their purpose is to take action on one or more issues important to members. In a co-op, all members have equal votes, regardless of how much money they invested to capitalize the organization. Owners share in the profits of the cooperative in proportion to the extent to which they contribute to the cooperative. Even though members may earn unequal financial benefit, each member has only one vote on matters concerning the overall direction and management of the organization.

### What makes it different?

Co-ops are often formed as a way to develop income for their member owners. A cooperative is well-positioned to pool resources to



achieve economies of scale for purchasing and marketing. A co-op can have its own assets and many are formed to manage shared infrastructure. They can make management decisions to accomplish a stated purpose or advocate to Tribal or federal officials for policies that would benefit members. A co-op might also be formed to purchase and consolidate fractional interests in land, or to organize and consolidate grazing rights on multiple parcels of land. FYI, membership shares in a cooperative are eligible assets of an estate.

### Best Fit

- ▶ Agriculture, rural utilities or the arts
- ▶ Groups that want more equal management
- ▶ Groups purchasing and/or marketing their members' goods and services
- ▶ Groups sharing specialized equipment or facilities

### Advantages

- ▶ Builds wealth if the value of ownership shares increase
- ▶ Increases capability of individuals to manage complex organizations
- ▶ Eligible for specialized funding
- ▶ Eligible for no- or low-cost training

### Areas of Concern

- ▶ Complicated governance of the organization
- ▶ Requires substantial time commitment from owner-members
- ▶ Accounting for group revenue and individual contributions
- ▶ May complicate income tax situation of owner-members





## Non-profit organizations

A non-profit is a charitable corporation chartered under tribal or state law to accomplish one or more community goals. The organization is governed by a board of directors, who are elected according to the bylaws of the corporation. Board members are responsible for ensuring that the assets and activities of the organization are conducted to accomplish the non-profit's goals. Non-profits can hire staff and authorize them to acquire assets and make management decisions.

### What makes it different?

So called 501(c)(3) non-profit corporations are usually charitable in nature, which means they are exempt from corporate income taxes. They can raise funds by receiving public and private grant money and donations from individuals and corporations. By structuring an organization as a



non-profit corporation, its directors, officers, and members are protected from personal liability for the corporation's debts and liabilities. Community members may lease land from the non-profit corporation for the purpose of conducting business on the land.

### Best Fit

- ▶ Preserving a cultural place or important areas
- ▶ Managing land with high conservation or recreational potential
- ▶ Land that is well-situated for development but not capable of producing a profit

### Advantages

- ▶ Can fundraise through grants and donations
- ▶ Can assemble and pool resources

- ▶ Increases capability of individuals to manage complex organizations
- ▶ Educates community members and facilitates discussion on important issues
- ▶ Can advocate for the community

### Areas of Concern

- ▶ May not produce enough revenue to maintain or improve the land
- ▶ May be more complex to operate than other types of entities
- ▶ Funding sources can be inconsistent

## For-profit enterprises

A for-profit enterprise is formed to generate profit and build wealth for its owners. There are three primary types of for-profit entities: sole proprietorships, partnerships and corporations. With the exception of sole proprietorships, most for-profits are formal business entities registered under tribal or state law, organizations that are separate entities from their owners.

### Types of For-Profit Enterprises

**Sole Proprietorship:** An individual who starts an unincorporated business by him/herself with the intention of making a profit is considered a sole proprietor. There is no meaningful legal distinction between a sole proprietor and the individual, but sole proprietorships can hire employees.

**Partnership:** A partnership is the relationship between two or more people who join together to carry on a trade or business, even if there is no formal partnership agreement. Each person contributes money, property, labor, or skill and expects to share in profits of the business. A partner owns an interest in the partnership. A partnership does not pay income tax on profits. Instead, the entity "passes through" any profits or losses to its partners who then include their



share of the partnership's income or loss on their personal tax return.

**Corporation:** One or more individuals can form a corporation in order to accomplish any legal purpose. In forming a corporation, shareholders exchange money, property, or both for stock. Corporations have a number of advantages. They can act in business matters in the same way as any individual, but owners have liability protection. Limited liability means that owners of the corporation are not personally responsible for legal judgments against the organization, or for corporate debts unless they have made a personal guarantee. A standard "C corporation" is considered by the Internal Revenue Service (IRS) as a separate taxpaying entity.

- ▶ Subchapter S Corporation: "S Corps" are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. This is similar to a partnership. Tribal governments are not eligible shareholders in an S Corp.
- ▶ Limited Liability Company (LLC): An LLC is a business structure that combines pass-through taxation of a partnership or sole

proprietorship with the limited liability of a corporation. Owners of an LLC are called 'members.' Most states do not restrict membership, meaning that individuals, corporations, tribes or other LLCs can all be owners.

### Best Fit

- ▶ A single owner or small group of owners with a strong commitment to work toward earning income and building long-term wealth
- ▶ Owners with sufficient cash resources to fund the creation of a for-profit entity

### Advantages

- ▶ Creates and builds individual wealth
- ▶ Bring in outside resources from investors
- ▶ Limits personal liability

### Areas of Concern

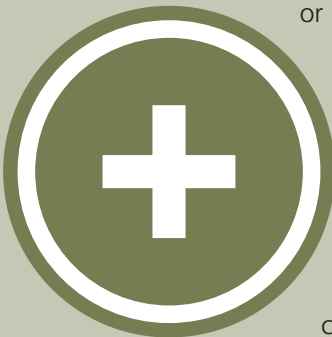
- ▶ Vulnerable to changes in management and leadership
- ▶ Limited access to public financial resources
- ▶ Works well only if a product or service can be developed that is useful to the community





## A few more choices

ILTF's co-owner management project researched and evaluated additional models that owners might use to achieve their land-use goals depending on the specific uses of the land involved. These include power of attorney, Section 17 federal charter or a specific model developed by the land-owners to meet their particular needs. This isn't intended to be a complete list of options.



- **Power of Attorney:** A power of attorney is written authorization to act on another person's behalf in business transactions or other legal matters. To be legally enforceable, a power of attorney must be signed and dated by the person handing over their rights, and some jurisdictions also require the document be witnessed or notarized. The agent's authority can

be restricted to a special purpose (limited) or be general in nature (make any or all decisions) or temporary (within a specified timeframe). These agreements are essentially personal service contracts, meaning that they automatically expire upon the death of either party. The principal may change or revoke a power of attorney as long as they are mentally competent to act. Landowners may choose to use a power of attorney to conduct banking transactions, manage property, contract for business services, or exercise shareholder (trust interest) rights. Using a POA for trust and restricted-fee land helps owners speak and act with one voice.

- **Section 17 (Federal Charter):** Congress created this business structure with Section 17 of the Indian Reorganization Act of 1934 (IRA). A Section 17 corporation

must be wholly owned by the tribe, but it exists separate and distinct from the tribal government. A Section 17 entity may have its own board, possess its own trust or restricted-fee land, and have its own assets, which limits exposure of tribal land to loss or liability. Section 17 organizations may issue tax-exempt debt instruments. It has been suggested that Section 17 be amended to allow tribal municipal subdivisions and tribal citizens to charter federally-recognized Indian organizations, complete with exemption from state jurisdiction for business conducted on Indian land.

- **"Your own idea":** ILTF recognizes that not all landowner needs are the same, nor is the legal environment the same across jurisdictions. It is inevitable that landowners will find additional models that may help them reach their goals.





# Addressing the legal issues of co-owner management

Co-owner management entities offer many possibilities for Indian landowners, but there are some legal issues that have to be addressed by tribes, the federal government and landowners to ensure that the needs of current and future landowners are met.

### The Tribal Role: Taking control

Tribes can adopt laws that recognize and regulate co-owner management entities operating within their borders. These regulations will help determine eligible categories of land ownership, including whether individuals involved need to be tribal members. By establishing the legal framework to help tribal members consolidate ownership and create new economic opportunities, the tribe will be supporting development of their reservation and building on their own economic and community development efforts.

### The Federal Role: Fiduciary Responsibility

The federal government has an important fiduciary role in the management of reservation lands. The Department of the Interior (DOI) holds land titles in trust for Indian landowners, meaning that co-owner management entities need to maintain the integrity of the trust land while owners enjoy the benefits of rent, development or normal use. The federal government also has a responsibility to enforce appropriate laws, including those created by tribes.

The DOI should take a leadership role on issues related to taxation of business activities by co-owner managed entities on Indian land. By working with the Internal Revenue Service (IRS) at the outset, DOI can help prevent confusion over what the tax implications will be for landowners. For example, a landowner conducting agricultural activities on their land is exempt from state income taxes, but a state-chartered corporation owned by those same Indians is required to pay state income taxes. Co-owner management entities are a new form of land management and it isn't clear how federal tax law would apply to tribally chartered corporations owned by tribal citizens.

### The Landowner's Role

Indian landowners need to play a major role in the success of co-owner management entities. Owners should expect to assume limited liability and establish local rules in order to gain greater autonomy over their land. While some of the rules will be required by tribal and federal law, it is critical for landowners to adopt bylaws or other agreements that help them achieve their administrative goals. Entities will also need to develop financial controls as well as procedures to report on activities to co-owners and the Bureau of Indian Affairs (BIA).

In order for the Secretary of the Interior to uphold the federal government's trust responsibility, the ILTF working group suggested that each entity be able to meet the following standards:



*The Department of the Interior has a shared responsibility with tribal government and Indian landowners to manage the legal obstacles involved in modernizing the trust relationship for individual allotments.*

- ▶ Use a formal, written statement of consent to transfer management authority
- ▶ Develop documentation describing governance structure and related processes
- ▶ Develop documentation explicitly listing authority and limitations, if any
- ▶ Create a schedule and description of reports to owners, including financial accounting, and the BIA
- ▶ Mandate estate planning
- ▶ Create other documentation to fit specific land use activities

### A Shared Role: Working with Indians, tribes, and the federal government

Co-owner management of fractional trust and restricted-fee interests can resolve a long list of hurdles for the effective and beneficial use of Indian land, including better communication among landowners, more economic development, and improved efficiency in managing trust assets. Legislative and administrative changes to leasing, ownership, taxation and probate, as well as modernization of the trust relationship, are needed to facilitate effective allotment land use.

There are examples of existing legislation that are similar in form to what might be required in the case of co-owner management entities. For example, the Indian Tribal Energy Development and Self-Determination Act (2005) facilitates direct tribal action on Tribal Energy Resource Agreements (TERA). It provides tribes with the option to enter into energy-related business agreements and leases without further review and approval by the Secretary of the Interior.

Congress followed a similar blueprint when it passed the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act in 2014, which empowers tribes to develop and implement their own leasing regulations for business, agriculture, residential and recreational purposes without Secretarial approval.

These examples illustrate how the DOI has given tribes more control over their land and the activities that occur on that land. Co-owner management represents an even greater opportunity to update the trust relationship for individual allotments and provide landowners with similar autonomy.

## Trust modernization in practice

A delicate balance of administrative authority needs to be negotiated between the government and landowners.

- ▶ Power to contract with others
- ▶ Ability to negotiate their own leases
- ▶ Right to provide direct payment
- ▶ Right to do their own financial accounting
- ▶ Ability to manage permanent improvements





# Working with families, other co-owners is challenging

It can be difficult working with co-owners, especially if those owners are also close family. That is one of the primary challenges of forming a co-owner management entity to manage fractional interests in trust and restricted land. There is tremendous value for co-owners in addressing potential management issues and developing shared goals from the beginning so that those involved can reach their objective of building houses, collecting lease income, preserving an inheritance or any number of other desirable outcomes.

Studies of estate and business planning illustrate that success is more achievable when groups of people agree at the outset how they will address the inevitable issues and disagreements that arise along the way. Here are several key areas to consider before launching a co-owner management entity:

- **Communication** — Good communication is crucial for success. It ensures that engaged owners are kept informed, and provides important information to help with making decisions. Poor communication can lead to hard feelings and missed opportunities.
- **Equity and fairness** — Fractionated ownership patterns are often unequal. One owner may have 2 percent while another has 10 percent. Some owners may put substantial amounts of labor or management time into the entity while others may invest financial resources.

The group needs to determine how those investments will be valued.

- **Financial management** — For the sake of fairness and clarity, co-owners should determine in advance how to distribute profits that are produced by the co-owner management entity. For example, if person A invested \$5,000, person B put in \$4,000 and person C invested \$1,000, the profits might be distributed on a 50-40-10% basis, but there are many different ways to do it. These options should be considered and decisions made and the plan for distributions can be included in a co-owner agreement.
- **Conflict resolution** — Each landowner is unique, with their own goals and vision for the land. Conflict is inevitable, and how it gets resolved will go a long way toward determining the success and longevity of the entity. Compromise, competition, collaboration, or avoidance can each lead to very different outcomes. A healthy understanding of how to work through conflict will serve landowners well.
- **Exit strategies** — When all else fails, some partners will want to go their own way. Co-owner management entities need to have a plan in place to determine how the entity will continue should any landowners want to exit. There also needs to be a dissolution plan in place at the beginning in case all parties want to end the relationship.



Family members and other co-owners need to work together to ensure the land is preserved for future generations.

## Glossary

**American Indian Probate Reform Act (AIPRA)**  
AIPRA is an amendment to the Indian Land Consolidation Act that provides a comprehensive and standardized approach to the probate of trust assets and is designed to limit the fractionation of title to Indian lands during probate.

**Co-owner management**  
The use of formal organizations or entities to manage land for a collective goal.

**Co-owner management entity**  
Supports the preservation, maintenance and revitalization of Native culture and traditions.

**Eligible heirs**  
Defined by statute to include a federally-recognized Indian; lineal descendants within two generations of an Indian; or other owners of trust or restricted-fee interests in the same parcel.

**Estate Planning**  
A strategic approach to transitioning trust assets from an owner to an eligible heir.

**Fiduciary responsibility**  
Also referred to as a trust responsibility, this encompasses the federal government owing a duty of care in knowing the facts of the situation, accounting for all funds involved in transactions, loyalty to place the landowner’s priorities above all others, and disclosure of material facts that are known or should be known.

**Highly-fractionated ownership**  
A statutory term defined by either a) 100 or more co-owners, or b) 50 or more but less than 100 co-owners with no one owner holding greater than 10 percent ownership.

**Trust and restricted-fee interest**  
An ownership share of the whole parcel of land held by the United States in trust or restricted status for an Indian.

**Undivided interest**  
A partial ownership interest by two or more people in the same property, whether the interest of each is equal or unequal.

## Message Runner

- ILTF first published the *Message Runner* in 2002 to provide Indian people and others with much-needed information about Indian land tenure issues. Previous volumes include:
- Vol. 1** — "Restoring Indian Lands." Major issues surrounding Indian land tenure along with solutions and strategies.
  - Vol. 2** — A primer on Indian estate planning and probate, including the 2004 American Indian Probate Reform Act (AIPRA).
  - Vol. 3** — "Rights-of-Way." History of rights-of-way in Indian Country, including a helpful how-to section for landowners and tribes.
  - Vol. 4** — "From Removal to Recovery: Land Ownership in Indian Country," an historical account of Indian land ownership from pre-contact to today.
  - Vol. 5** — "Cutting through the Red Tape: An Indian Landowner’s Guide to Reading and Processing Federal Forms."
  - Vol. 6** — "Native Land Law: Can Native American People Find Justice in the U.S. Legal System?"
  - Vol. 7** — "Now hiring! Exploring career opportunities in tribal land."
  - Vol. 8** — "Appraisals are at the heart of federal trust responsibility."

To learn more about the *Message Runner*, visit [www.iltf.org/resources/publications](http://www.iltf.org/resources/publications). To order copies, email [info@iltf.org](mailto:info@iltf.org) or call (651)766-8999.



The Indian Land Tenure Foundation (ILTF) is a national, community-based organization focused on American Indian land recovery and management. ILTF’s primary aim is to ensure that all reservation and important off-reservation lands are owned and managed by Indian people and Indian nations.

As a community foundation, ILTF relies on funding from private foundations and donations from Indian nations, corporations and individuals to support its programming in Indian Country. Please consider making a donation to the Indian Land Tenure Foundation today.

To learn more about our work and programs, and to make a donation, visit our website at: [www.iltf.org](http://www.iltf.org)

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