S. HRG. 108–379

AMERICAN INDIAN PROBATE REFORM ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 550

TO AMEND INDIAN LAND CONSOLIDATION ACT TO IMPROVE PROVISIONS RELATING TO PROBATE OF TRUST AND RESTRICTED LAND

OCTOBER 15, 2003
WASHINGTON, DC

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AMERICAN INDIAN PROBATE REFORM ACT

WEDNESDAY, OCTOBER 15, 2003

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Building, the Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will be in session.

We have been notified that we have stacked roll calls votes at 10:40 a.m. Senator Inouye is probably not going to attend this morning, so I am going ahead and start the hearing. I need to tell everybody that because we have those stacked roll calls votes more than likely we will not be coming back unless you want to wait for several hours, and I do not think most people would want to do that. I have another conflict, as well.

So we are going to take all the testimony and ask everyone who is testifying to keep their statements down to about five minutes or so. Most of the questions that Senator Inouye and I have will be submitted in writing because of the very abbreviated time that we have in the hearing this morning.

This past May this committee held a hearing on S. 550, the American Indian Probate Reform Act of 2003. Yesterday, I introduced a complete substitute to S. 550 that is based on meetings and a dialog held across the Nation with many Indian tribes since the May 7 hearing. The goal of S. 550 and the substitute are the same—to stop the fractionation of Indian lands and to help reconsolidate those lands. We hope this can be done through a commonsense approach and commonsense changes to the rules governing Indian probate.

[Text of S. 550 follows:]

II

108TH CONGRESS
1ST SESSION

S. 550

To amend the Indian Land Consolidation Act to improve provisions relating to probate of trust and restricted land, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 6, 2003

Mr. CAMPBELL (for himself, Mr. INOUYE, and Mr. THOMAS) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To amend the Indian Land Consolidation Act to improve provisions relating to probate of trust and restricted land, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''American Indian Probate Reform Act of 2003''.

SEC. 2. FINDINGS.

Congress finds that—

(1) the Act of February 8, 1887 (commonly known as the ''Indian General Allotment Act'') (25

U.S.C. 331 et seq.), which authorized the allotment of Indian reservations, did not permit Indian allotment owners to provide for the testamentary disposition of the land that was allotted to them;

(2) that Act provided that allotments would descend according to State law of intestate succession based on the location of the allotment;

(3) the reliance of the Federal Government on the State law of intestate succession with respect to the descent of allotments has resulted in numerous problems affecting Indian tribes, members of Indian tribes, and the Federal Government, including—

(A) the increasingly fractionated ownership of trust and restricted land as that land is inherited by successive generations of owners as tenants in common;

(B) the application of different rules of intestate succession to each interest of a decedent in or to trust or restricted land if that land is located within the boundaries of more than 1 State, which application—

(i) makes probate planning unnecessarily difficult; and

(ii) impedes efforts to provide probate planning assistance or advice;

(C) the absence of a uniform general probate code for trust and restricted land, which makes it difficult for Indian tribes to work cooperatively to develop tribal probate codes; and

(D) the failure of Federal law to address or provide for many of the essential elements of general probate law, either directly or by reference, which—

(i) is unfair to the owners of trust and restricted land (and heirs and devisees of owners); and

(ii) makes probate planning more difficult; and

(4) a uniform Federal probate code would likely—

(A) reduce the number of fractionated interests in trust or restricted land;

(B) facilitate efforts to provide probate planning assistance and advice;

(C) facilitate intertribal efforts to produce tribal probate codes in accordance with section 206 of the Indian Land Consolidation Act (25 U.S.C. 2205); and

(D) provide essential elements of general probate law that are not applicable on the date

of enactment of this Act to interests in trust or restricted land.

SEC. 3. INDIAN PROBATE REFORM.

(a) TESTAMENTARY DISPOSITION.—Section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) is amended by striking subsection (a) and inserting the following:

''(a) TESTAMENTARY DISPOSITION.—

''(1) GENERAL DEVISE OF AN INTEREST IN TRUST OR RESTRICTED LAND.—

''(A) IN GENERAL.—Subject to any applicable Federal law relating to the devise or descent of trust or restricted land, or a tribal probate code enacted in accordance with section 206, the owner of an interest in trust or restricted land may devise such an interest to—

''(i) an Indian tribe with jurisdiction over the land; or

''(ii) any Indian in trust or restricted status (or as a passive trust interest as provided for in section 207A).

''(B) STATUS.—The devise of an interest in trust or restricted land to an Indian under subparagraph (A)(ii) shall not alter the status of such an interest as a trust or restricted in-

terest unless the testator provides that the interest is to be held as a passive trust interest.

"(2) DEVISE OF TRUST OR RESTRICTED LAND IN PASSIVE TRUST OR FEE.—

"(A) IN GENERAL.—Except as provided under any applicable Federal law, any interest in trust or restricted land that is not devised in accordance with paragraph (1) may be devised only—

"(i) as a life estate to any non-Indian person, with the remainder being devised only in accordance with clause (ii), subparagraph (C), or paragraph (1)(A);

"(ii) to the lineal descendant or heir of the first or second degree of the testator or, if the testator does not have an heir of the first or second degree or a lineal descendant, to any lineal descendant of an Indian grandparent of the testator, as a passive trust interest (referred to in this section as an 'eligible passive trust devisee'); or

"(iii) in fee in accordance with subparagraph (C).

"(B) PRESUMED DEVISE OF PASSIVE TRUST INTEREST.—Any devise to an eligible passive trust devisee, or any devise of a remainder interest from the devise of a life estate under subparagraph (A)(ii), that does not indicate whether the interest is devised as a passive trust interest or a fee interest shall be considered to devise a passive trust interest.

"(C) DEVISE OF A FEE INTEREST.—Subject to subparagraph (D), any interest in trust or restricted land that is not devised in accordance with paragraph (1), or devised to an eligible passive trust devisee in accordance with subparagraph (A), may be devised to a non-Indian in fee.

"(D) LIMITATION.—Any interest in trust or restricted land that is subject to section 4 of the Act of June 18, 1934 (25 U.S.C. 464), may be devised only in accordance with—

"(i) that section;

"(ii) subparagraph (A); or

"(iii) paragraph (1).

"(3) DEVISE OF A PASSIVE TRUST INTEREST.—

"(A) IN GENERAL.—The holder of an interest in trust or restricted land that is held as

a passive trust interest may devise the interest as a passive trust interest only to—

"(i)(I) any Indian; or

"(II) the Indian tribe that exercises jurisdiction over the interest;

"(ii) the lineal descendants, or heirs of the first or second degree, of the holder;

"(iii) any living descendant of the decedent from whom the holder acquired the interest by devise or descent; or

"(iv) any person that owns a preexisting interest or a passive trust interest in the same parcel of land, if the preexisting interest is held in trust or restricted status or in passive trust status.

"(B) INELIGIBLE DEVISEES AND INTESTATE SUCCESSION.—A passive trust interest that is devised to a person that is not eligible under subparagraph (A) or that is not disposed of by a valid will shall pass in accordance with the applicable law of intestate succession as provided for in subsection (b).".

(b) NONTESTAMENTARY DISPOSITION.—Section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206)

is amended by striking subsection (b) and inserting the following:

"(b) NONTESTAMENTARY DISPOSITION.—

"(1) RULES OF DESCENT.—Subject to any applicable Federal law relating to the devise or descent of trust or restricted property, any interest in trust or restricted land that is not disposed of by a valid will—

"(A) shall descend according to a tribal probate code that is approved in accordance with section 206; or

"(B) in the case of an interest in trust or restricted land to which such a code does not apply, shall descend in accordance with—

"(i) paragraphs (2) through (7);

"(ii) section 207A; and

"(iii) other applicable Federal law.

"(2) NO APPLICABLE CODE.—An intestate interest to which a code described in paragraph (1) does not apply—

"(A) shall include—

"(i) an interest acquired by a decedent through devise or inheritance (referred to in this subsection as a 'devise or inheritance interest'); or

"(ii) an interest acquired by a decedent by any means other than devise or inheritance (referred to in this subsection as an 'acquired interest'), if—

"(I) the decedent—

"(aa) acquired additional undivided interest in the same parcel in which the interest is held, by a means other than devise or inheritance; or

"(bb) acquired land adjoining the parcel of land in which the interest is held; or

"(II) the parcel of land in which the interest is held includes the residence of the spouse of the decedent; and

"(B) shall descend as follows:

"(i) SURVIVING INDIAN SPOUSE.—

"(I) IN GENERAL.—If a decedent is survived by an Indian spouse, and the estate of the decedent includes 1 or more acquired interests, the spouse of the decedent shall receive all of the acquired interests.

"(II) DEVISE OR INHERITANCE INTERESTS.—If a decedent is survived by an Indian spouse, and the estate of the decedent includes 1 or more devise or inheritance interests—

"(aa) if the decedent is not survived by an Indian heir of the first or second degree, the spouse of the decedent shall receive all of the devise or inheritance interests; and

"(bb) if the decedent is survived by an Indian heir of the first or second degree, the devise or inheritance interest of the decedent shall descend in accordance with paragraph (3)(A).

"(ii) SURVIVING NON-INDIAN SPOUSE.—

"(I) IN GENERAL.—If a decedent is survived by a non-Indian spouse, and the estate of the decedent includes 1 or more acquired interests—

"(aa) the spouse of the decedent shall receive a life estate in each acquired interest; and

"(bb)(AA) if the decedent is survived by an Indian heir of the first or second degree, the remainder interests shall descend in accordance with paragraph (3)(A); and

"(BB) if the decedent is not survived by an Indian heir of the first or second degree, the remainder interest shall descend in accordance with paragraph (3)(C).

"(II) DEVISE OR INHERITANCE INTERESTS.—If the estate of a decedent described in subclause (I) includes 1 or more devise or inheritance interests—

"(aa) if the decedent is survived by an Indian heir of the first or second degree, the devise or inheritance interests shall de-

scend in accordance with paragraph (3)(A); and

"(bb) if the decedent is not survived by an Indian heir of the first or second degree, the devise or inheritance interests shall descend in accordance with paragraph (3)(C).

"(iii) NO SURVIVING SPOUSE.—If a decedent is not survived by a spouse, and the estate of the decedent includes 1 or more acquired interests or 1 or more devise or inheritance interests—

"(I) if the decedent is survived by an Indian heir of the first or second degree, the acquired interests or devise or inheritance interests shall descend in accordance with paragraph (3)(A); and

"(II) if the decedent is not survived by an Indian heir of the first or second degree, the acquired interests or devise or inheritance interests shall descend in accordance with paragraph (3)(C).

"(3) RULES GOVERNING DESCENT OF ESTATE.—

"(A) INDIAN HEIRS.—For the purpose of this section, an Indian heir of the first or second degree shall inherit in the following order:

"(i) To the Indian children of the decedent (or if 1 or more of those Indian children do not survive the decedent, the Indian children of the deceased child of the decedent, by right of representation) shall inherit in equal shares.

"(ii) If the decedent has no Indian children (or grandchildren that inherit by right of representation under clause (i)), to the Indian brothers and sisters of the decedent, in equal shares.

"(iii) If the decedent has no Indian brothers or sisters, to the Indian parent or parents of the decedent.

"(B) RIGHT OF REPRESENTATION.—In any case involving the determination of a right of representation—

"(i) each interest in trust land shall be equally divided into a number of shares that equals the sum obtained by adding—

"(I) the number of surviving heirs in the nearest degree of kinship; and

"(II) the number of deceased individuals in that same degree, if any, who left issue who survive the decedent;

"(ii) each surviving heir described in clause (i)(I) shall receive 1 share; and

"(iii)(I) each deceased individual described in clause (i)(II) shall receive 1 share; and

"(II) that share shall be divided equally among the surviving issue of the deceased person.

"(C) NO INDIAN HEIRS.—

"(i) DEFINITION OF COLLATERAL HEIR.—In this subparagraph, the term 'collateral heir' means an aunt, uncle, niece, nephew, or first cousin of a decedent.

"(ii) NO HEIRS.—If a decedent does not have an Indian heir of the first or second degree, an interest shall descend to any Indian collateral heir who is a co-

owner of an interest owned by the decedent.

"(iii) MULTIPLE COLLATERAL HEIRS.—If—

"(I) an Indian collateral heir owns an interest to which clause (ii) applies that is larger than the interest held by any other such collateral heir, the interest shall descend to the collateral heir that owns the largest undivided interest in the parcel; or

"(II) 2 or more collateral heirs own equal shares in an interest to which clause (ii) applies, the interest shall be divided equally among those collateral heirs.

"(iv) NO OWNERSHIP.—If none of the Indian collateral heirs of a decedent owns an interest to which clause (ii) applies, subject to clause (v), the interest shall descend to the Indian tribe that exercises jurisdiction over the parcel of trust or restricted land involved.

"(v) ACQUISITION OF INTEREST.—

"(I) IN GENERAL.—Notwithstanding clause (iv), an Indian co-owner of a parcel of trust or restricted land may acquire an interest that would otherwise descend under that clause by paying into the estate of the decedent, before the close of the probate of the estate, the fair market value of the interest in or to the land.

"(II) MULTIPLE CO-OWNERS.—If more than 1 Indian co-owner (including the Indian tribe referred to in clause (iv)) offers to pay for an interest described in subclause (I), the highest bidder shall acquire the interest.

"(4) SPECIAL RULE RELATING TO SURVIVAL.—In the case of intestate succession under this section, if an individual who fails to survive a decedent by at least 120 hours, as established by clear and convincing evidence—

"(A) the individual shall be deemed to have predeceased the decedent for the purpose of intestate succession; and

"(B) the heirs of the decedent shall be determined in accordance with this section.

"(5) PRETERMITTED SPOUSES AND CHILDREN.—

"(A) SPOUSES.—

"(i) IN GENERAL.—Except as provided in clause (ii), if the surviving spouse of a testator married the testator after the testator executed the will of the testator, the surviving spouse shall receive the intestate share in trust or restricted land that the spouse would have received if the testator had died intestate.

"(ii) EXCEPTION.—Clause (i) shall not apply to an interest in trust or restricted land in a case in which—

"(I) the will of a testator is executed before the date of enactment of this subparagraph;

"(II)(aa) the spouse of a testator is a non-Indian; and

"(bb) the testator devised the interests in trust or restricted land of the testator to 1 or more Indians;

"(III) it appears, based on an examination of the will or other evidence, that the will was made in contemplation of the marriage of the testator to the surviving spouse;

"(IV) the will expresses the intention that the will is to be effective notwithstanding any subsequent marriage; or

"(V)(aa) the testator provided for the spouse by a transfer of funds or property outside the will; and

"(bb) an intent that the transfer be in lieu of a testamentary provision is demonstrated by statements of the testator or through a reasonable inference based on the amount of the transfer or other evidence.

"(B) CHILDREN.—

"(i) IN GENERAL.—If a testator executed the will of the testator before the birth or adoption of 1 or more children of the testator, and the omission of the children from the will is a product of inadvertence rather than an intentional omission,

the children shall share in the intestate interests of the decedent in trust or restricted land as if the decedent had died intestate.

"(ii) ADOPTED HEIRS.—Any person recognized as an heir by virtue of adoption under the Act of July 8, 1940 (25 U.S.C. 372a), shall be treated as the child of a decedent under this subsection.

"(6) DIVORCE.—

"(A) SURVIVING SPOUSE.—

"(i) IN GENERAL.—An individual who is divorced from a decedent, or whose marriage to the decedent has been annulled, shall not be considered to be a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death of the decedent.

"(ii) SEPARATION.—A decree of separation that does not dissolve a marriage, and terminate the status of husband and wife, shall not be considered a divorce for the purpose of this subsection.

"(iii) NO EFFECT ON ADJUDICATIONS.—Nothing in clause (i) prevents an entity responsible for adjudicating an interest in trust or restricted land from giving effect to a property right settlement if 1 of the parties to the settlement dies before the issuance of a final decree dissolving the marriage of the parties to the property settlement.

"(B) EFFECT OF SUBSEQUENT DIVORCE ON A WILL OR DEVISE.—

"(i) IN GENERAL.—If, after executing a will, a testator is divorced or the marriage of the testator is annulled, on the effective date of the divorce or annulment, any disposition of interests in trust or restricted land made by the will to the former spouse of the testator shall be considered to be revoked unless the will expressly provides otherwise.

"(ii) PROPERTY.—Property that is prevented from passing to a former spouse of a decedent under clause (i) shall pass as if the former spouse failed to survive the decedent.

"(iii) PROVISIONS OF WILLS.—Any provision of a will that is considered to be revoked solely by operation of this subparagraph shall be revived by the remarriage of a testator to the former spouse of the testator.

"(7) NOTICE.—

"(A) IN GENERAL.—To the maximum extent practicable, the Secretary shall notify each owner of trust and restricted land of the provisions of this Act.

"(B) COMBINED NOTICES.—The notice under subparagraph (A) may, at the discretion of the Secretary, be provided with the notice required under section 207(g).".

(c) RULE OF CONSTRUCTION.—Section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) is amended by adding at the end the following:

"(h) APPLICABLE FEDERAL LAW.—

"(1) IN GENERAL.—For purpose of subsections (a) and (b), any reference to applicable Federal law includes—

"(A) Public Law 91–627 (84 Stat. 1874);

"(B) Public Law 92–377 (86 Stat. 530);

"(C) Public Law 92–443 (86 Stat. 744);

"(D) Public Law 96–274 (94 Stat. 537); and

"(E) Public Law 98–513 (98 Stat. 2411).

"(2) NO EFFECT ON LAWS.—Nothing in this section amends or otherwise affects any law described in paragraph (1), or any other Federal law, that provides for the devise and descent of any trust or restricted land located on a specific Indian reservation.".

(d) PASSIVE TRUST INTEREST STATUS FOR TRUST OR RESTRICTED LAND.—The Indian Land Consolidation Act is amended by inserting after section 207 (25 U.S.C. 2206) the following:

"SEC. 207A. PASSIVE TRUST INTEREST STATUS FOR TRUST OR RESTRICTED LAND.

"(a) PASSIVE TRUST INTEREST STATUS.—

"(1) IN GENERAL.—The owner of an interest in trust or restricted land may submit to the Secretary an application requesting that the interest be held in passive trust interest status.

"(2) AUTHORITY.—An application under paragraph (1) may authorize the Secretary to amend any existing lease or agreement with respect to the interest that is the subject of the application.

"(b) APPROVAL.—On the approval of an application by the Secretary under subsection (a), an interest in trust or restricted land covered by the application shall be held as a passive trust interest in accordance with this section.

"(c) REQUIREMENTS.—Except as provided in this section, an interest in trust or restricted land that is held as a passive trust interest under this section—

"(1) shall continue to be covered under any applicable tax-exempt status, and continue to be subject to any restrictions on alienation, until the interest is patented in fee;

"(2) may, without the approval of the Secretary, be—

"(A) leased for a period of not to exceed 25 years;

"(B) mortgaged in accordance with the Act of March 29, 1956 (25 U.S.C. 483a); or

"(C) sold or conveyed to—

"(i) an Indian;

"(ii) the Indian tribe that exercises jurisdiction over the interest; or

"(iii) a co-owner of an interest in the parcel of land in which the interest is held, if the co-owner owns a pre-existing trust,

restricted interest, or a passive trust interest in the parcel; and

"(3) may be subject to an ordinance or resolution enacted under subsection (d).

"(d) ORDINANCE OR RESOLUTION FOR REMOVAL OF STATUS.—

"(1) IN GENERAL.—The governing body of the Indian tribe that exercises jurisdiction over an interest in trust or restricted land that is held as a passive trust interest in accordance with this section may enact an ordinance or resolution to permit the owner of the interest to apply to the Secretary for the removal of the trust or restricted status of any portion of the land that is subject to the jurisdiction of the Indian tribe.

"(2) REVIEW BY SECRETARY.—The Secretary shall review, and may approve, an ordinance or resolution enacted by an Indian tribe in accordance with paragraph (1) if the Secretary determines that the ordinance or resolution—

"(A) is consistent with this Act; and

"(B) would not increase fractionated ownership of Indian land.

"(e) REVENUES OR ROYALTIES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), the Secretary shall not be responsible for the collection of or accounting for any lease revenues or royalties accruing to an interest held as a passive trust interest by any person under this section.

"(2) EXCEPTION.—Paragraph (1) shall not apply to an interest described in that paragraph if the Secretary approves an application to take the interest into active trust status on behalf of an Indian or an Indian tribe in accordance with regulations promulgated by the Secretary.

"(3) AUTHORITY OF SECRETARY.—Nothing in this subsection alters any authority or responsibility of the Secretary with respect to an interest in trust or restricted land held in active trust status (including an undivided interest included in the same parcel of land as an undivided passive trust interest).

"(f) JURISDICTION OVER PASSIVE TRUST INTEREST.—With respect to an interest in trust or restricted land that is devised or held as a passive trust interest under this section—

"(1) an Indian tribe that exercises jurisdiction over such an interest shall continue to exercise jurisdiction over the land that is held as a passive trust interest; and

"(2) any person holding, leasing, or otherwise using the land shall be considered to consent to the jurisdiction of the Indian tribe with respect to the use of the land (including any effects associated with any use of the land).

"(g) PROBATE OF PASSIVE TRUST INTERESTS.—

"(1) IN GENERAL.—An interest in trust or restricted land that is held as a passive trust interest under this section shall be subject to—

"(A) probate by the Secretary in accordance with this Act; and

"(B) all other laws applicable to the probate of trust or restricted land.

"(2) COMMENCEMENT OF PROBATE.—Any interested party may file an application to commence the probate of an interest in trust or restricted land held as a passive trust interest.

"(h) REGULATIONS.—The Secretary shall promulgate such regulations as are necessary to carry out this section.".

SEC. 4. PARTITION OF INDIAN LAND.

Section 205 of the Indian Land Consolidation Act (25 U.S.C. 2204) is amended by adding at the end the following:

"(c) PARTITION.—

"(1) DEFINITIONS.—In this subsection:

"(A) ELIGIBLE INDIAN TRIBE.—The term 'eligible Indian tribe' means an Indian tribe that—

"(i) owns eligible land; and

"(ii) consents to partition of the eligible land.

"(B) ELIGIBLE LAND.—The term 'eligible land' means an undivided parcel of land that—

"(i) is located within the reservation of an Indian tribe; or

"(ii) is otherwise under the jurisdiction of an Indian tribe.

"(2) REQUIREMENTS.—Notwithstanding any other provision of law, in accordance with this subsection and subject to paragraphs (3), (4), and (5)—

"(A) an eligible Indian tribe may apply to the Secretary for the partition of a parcel of eligible land; and

"(B) the Secretary may commence a process for partitioning the eligible land under this subsection if—

"(i) the eligible Indian tribe meets the applicable ownership requirement under

subparagraph (A) or (B) of paragraph (3); or

"(ii) the Secretary determines that it is reasonable to believe that the partition of the eligible land owned would be in accordance with paragraph (3)(C).

"(3) TRIBAL OWNERSHIP.—A parcel of eligible land may be partitioned under this subsection if, with respect to the eligible Indian tribe involved—

"(A) the eligible Indian tribe owns 50 percent or more of the undivided interest in the parcel;

"(B) the eligible Indian tribe is the owner of the largest quantity of undivided interest in the parcel; or

"(C) the owners of undivided interests equal to at least 50 percent of the undivided interest in the parcel (including any undivided interest owned by the eligible Indian tribe) consent or do not object to the partition.

"(4) TRIBAL CONSENT.—A parcel of land that is located within the reservation of an Indian tribe or otherwise under the jurisdiction of an Indian tribe shall be partitioned under this subsection only if the Indian tribe does not object to the partition.

"(5) APPLICABILITY.—This subsection shall not apply to any parcel of land that is the bona fide residence of any person unless the person consents to the partition in writing.

"(6) PARTITION IN KIND.—

"(A) IN GENERAL.—The Secretary shall commence the partition process described in subparagraph (B) if—

"(i) an eligible Indian tribe applies to partition eligible land under this paragraph; and

"(ii)(I) the Secretary determines that the eligible Indian tribe meets the applicable ownership requirements of subparagraph (A) or (B) of paragraph (3); or

"(II) the Secretary determines that it is reasonable to believe that the partition would be in accordance with paragraph (3)(C).

"(B) PARTITION PROCESS.—In carrying out any partition under this paragraph, the Secretary shall—

"(i) provide, to each owner of any undivided interest in eligible land to be partitioned, through publication or other appro-

priate means, notice of the proposed partition;

"(ii) make available to any interested party a copy of any proposed partition plan submitted by an eligible Indian tribe or proposed by the Secretary; and

"(iii) review—

"(I) any proposed partition plan submitted by any owner of an undivided interest in the eligible land; and

"(II) any comments or objections concerning a partition, or any proposed plan of partition, submitted by any owner or any other interested party.

"(C) DETERMINATION NOT TO PARTITION.—If the Secretary determines that a parcel of eligible land cannot be partitioned in a manner that is fair and equitable to the owners of the eligible land, the Secretary shall inform each owner of the eligible land of—

"(i) the determination of the Secretary; and

"(ii) the right of the owner to appeal the determination.

"(D) PARTITION WITH CONSENT OF ELIGIBLE INDIAN TRIBE.—If the Secretary determines that a parcel of eligible land may be partitioned in a manner that is fair and equitable to the owners of the eligible land, and the applicable eligible Indian tribe meets the applicable ownership requirements under subparagraph (A) or (B) of paragraph (3), the Secretary shall—

"(i) approve a plan of partition;

"(ii) provide notice to the owners of the eligible land of the determination of the Secretary;

"(iii) make a copy of the plan of partition available to each owner of the eligible land; and

"(iv) inform each owner of the right to appeal the determination of the Secretary to partition the eligible land in accordance with the plan.

"(E) PARTITION WITH CONSENT; IMPLIED CONSENT.—If the Secretary determines that a parcel of eligible land may be partitioned in a manner that is fair and equitable to the owners of the eligible land, but the eligible Indian tribe

involved does not meet the applicable ownership requirements under subparagraph (A) or (B) of paragraph (3), the Secretary shall—

"(i)(I) make a plan of partition available to the owners of the parcel; and

"(II) inform the owners that the eligible land will be partitioned in accordance with the plan if the owners of 50 percent or more of undivided ownership interest in the eligible land—

"(aa) consent to the partition; or

"(bb) do not object to the partition by such date as may be established by the Secretary; and

"(ii)(I) if the owners of 50 percent or more of undivided ownership interest in the eligible land consent to the partition or do not object by a date established by the Secretary under clause (i)(II)(bb), inform the owners of the eligible land that—

"(aa) the plan for partition is final; and

"(bb) the owners have the right to appeal the determination of the

Secretary to partition the eligible land; or

"(II) if the owners of 50 percent or more of the undivided ownership interest in the eligible land object to the partition, inform the eligible Indian tribe of the objection.

"(F) SUCCESSIVE PARTITION PLANS.—In carrying out subparagraph (E) in accordance with paragraph (3)(C), the Secretary may, in accordance with subparagraph (E)—

"(i) approve 1 or more successive plans of partition; and

"(ii) make those plans available to the owners of the eligible land to be partitioned.

"(G) PLAN OF PARTITION.—A plan of partition approved by the Secretary in accordance with subparagraph (D) or (E)—

"(i) may determine that 1 or more of the undivided interests in a parcel of eligible land are not susceptible to a partition in kind;

"(ii) may provide for the sale or exchange of those undivided interests to—

"(I) 1 or more of the owners of undivided interests in the eligible land; or

"(II) the Secretary in accordance with section 213; and

"(iii) shall provide that the sale of any undivided interest referred to in clause (ii) shall be for not less than the fair market value of the interest.

"(7) PARTITION BY SALE.—

"(A) IN GENERAL.—The Secretary shall commence the partition process described in subparagraph (B) if—

"(i) an eligible Indian tribe applies to partition a parcel of eligible land under this subsection; and

"(ii)(I) the Secretary determines that the Indian tribe meets the applicable ownership requirements of subparagraph (A) or (B) of paragraph (3); or

"(II) the Secretary determines that it is reasonable to believe that the partition would be in accordance with paragraph (3)(C).

"(B) PARTITION PROCESS.—In carrying out any partition of eligible land under this paragraph, the Secretary—

"(i) shall conduct a preliminary appraisal of the eligible land;

"(ii) shall provide to the owners of the eligible land, through publication or other appropriate means—

"(I) notice of the application of the eligible Indian tribe to partition the eligible land; and

"(II) access to the preliminary appraisal conducted in accordance with clause (i);

"(iii) shall inform each owner of the eligible land of the right to submit to the Secretary comments relating to the preliminary appraisal;

"(iv) may, based on comments received under clause (iii), modify the preliminary appraisal or provide for the conduct of a new appraisal; and

"(v) shall—

"(I) issue a final appraisal for the eligible land;

"(II) provide to the owners of the eligible land and the appropriate Indian tribes access to the final appraisal; and

"(III) inform the Indian tribes of the right to appeal the final appraisal.

"(C) PURCHASE BY ELIGIBLE INDIAN TRIBE.—If an eligible Indian tribe enters into an agreement with the Secretary to pay fair market value for eligible land partitioned under this subsection, as determined by the final appraisal of the eligible land issued under subparagraph (B)(v)(I) (including any appraisal issued by the Secretary after an appeal by the Indian tribe under subparagraph (B)(v)(III)), and the eligible Indian tribe meets the applicable ownership requirements of subparagraph (A) or (B) of paragraph (3), the Secretary shall—

"(i) provide to each owner of the eligible land notice of the agreement; and

"(ii) inform the owners of the right to appeal the decision of the Secretary to enter into the agreement (including the right to appeal any final appraisal of the

parcel referred to in subparagraph (B)(v)(III)).

"(D) PARTITION WITH CONSENT; IMPLIED CONSENT.—

"(i) IN GENERAL.—If an eligible Indian tribe agrees to pay fair market value for eligible land partitioned under this subsection, as determined by the final appraisal of the eligible land issued under subparagraph (B)(v)(I) (including any appraisal issued by the Secretary after an appeal by the Indian tribe under subparagraph (B)(v)(III)), but does not meet the applicable ownership requirements of subparagraph (A) or (B) of paragraph (3), the Secretary shall—

"(I) provide to each owner of the undivided interest in the eligible land notice that the Indian tribe did not meet the requirements; and

"(II) inform the owners that the eligible land will be partitioned by sale unless the partition is opposed by the owners of 50 percent or more of the

undivided ownership interest in the eligible land.

"(ii) FAILURE TO OBJECT TO PARTITION.—If the owners of 50 percent or more of undivided ownership interest in or to a parcel of eligible land consent to the partition of the eligible land, or do not object to the partition by such date as may be established by the Secretary, the Secretary shall inform the owners of the eligible land of the right to appeal the determination of the Secretary to partition the eligible land (including the results of the final appraisal issued under subparagraph (B)(v)(I)).

"(iii) OBJECTION TO PARTITION.—If the owners of 50 percent or more of the undivided ownership interest in a parcel of eligible land object to the partition of the eligible land—

"(I) the Secretary shall notify the eligible Indian tribe of the objection; and

"(II) the eligible Indian tribe and the Secretary may agree to increase

the amount offered to purchase the undivided ownership interests in the eligible land.

"(8) ENFORCEMENT.—

"(A) IN GENERAL.—If, with respect to a parcel of eligible land, a partition in kind is approved under subparagraph (D) or (E) of paragraph (6), or a partition by sale is approved under paragraph (7)(C), and the owner of an interest in or to the eligible land fails to convey the interest to the Indian tribe, the Indian tribe or the United States may—

"(i) bring a civil action in the United States district court for the district in which the eligible land is located; and

"(ii) request the court to issue an appropriate order for the partition in kind, or partition by sale to the Indian tribe, of the eligible land.

"(B) FEDERAL ROLE.—With respect to any civil action brought under subparagraph (A)—

"(i) the United States—

"(I) shall receive notice of the civil action; and

"(II) may be a party to the civil action; and

"(ii) the civil action shall not be dismissed, and no relief requested shall be denied, on the ground that the civil action is against the United States or that the United States is an indispensable party.".

SEC. 5. ADDITIONAL AMENDMENTS.

(a) IN GENERAL.—The Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) is amended—

(1) in the second sentence of section 205(a) (25 U.S.C. 2204(a)), by striking "over 50 per centum of the undivided interests" and inserting "undivided interests equal to at least 50 percent of the undivided interest";

(2) in section 206 (25 U.S.C. 2205)—

(A) in subsection (a), by striking paragraph (3) and inserting the following:

"(3) TRIBAL PROBATE CODES.—Except as provided in any applicable Federal law, the Secretary shall not approve a tribal probate code, or an amendment to such a code, that prevents the devise of an interest in trust or restricted land to—

"(A) an Indian lineal descendant of the original allottee; or

"(B) an Indian who is not a member of the Indian tribe that exercises jurisdiction over such an interest, unless the code provides for—

"(i) the renouncing of interests to eligible devisees in accordance with the code;

"(ii) the opportunity for a devisee who is the spouse or lineal descendant of a testator to reserve a life estate; and

"(iii) payment of fair market value in the manner prescribed under subsection (c)(2)."; and

(B) in subsection (c)—

(i) in paragraph (1)—

(I) by striking the paragraph heading and inserting the following:

"(1) AUTHORITY.—

"(A) IN GENERAL.—";

(II) in the first sentence of subparagraph (A) (as designated by clause (i)), by striking "section 207(a)(6)(A) of this title" and inserting "section 207(a)(2)(A)(ii), 207(a)(2)(C), or 207(a)(3)"; and

(III) by striking the last sentence and inserting the following:

"(B) TRANSFER.—The Secretary shall transfer payments received under subparagraph (A) to any person or persons who would have received an interest in land if the interest had not been acquired by the Indian tribe in accordance with this paragraph."; and

(ii) in paragraph (2)—

(I) in subparagraph (A)—

(aa) by striking the subparagraph heading and all that follows through "Paragraph (1) shall apply" and inserting the following:

"(A) NONAPPLICABILITY TO CERTAIN INTERESTS.—

"(i) IN GENERAL.—Paragraph (1) shall not apply";

(bb) in clause (i) (as designated by item (a)), by striking "if, while" and inserting the following: "if—

"(I) while";

(cc) by striking the period at the end and inserting "; or"; and

(dd) by adding at the end the following:

"(II)(aa) the interest is part of a family farm that is devised to a member of the family of the decedent; and

"(bb) the devisee agrees that the Indian tribe that exercises jurisdiction over the land will have the opportunity to acquire the interest for fair market value if the interest is offered for sale to an entity that is not a member of the family of the owner of the land.

"(ii) RECORDING OF INTEREST.—On request by an Indian tribe described in clause (i)(II)(bb), a restriction relating to the acquisition by the Indian tribe of an interest in a family farm involved shall be recorded as part of the deed relating to the interest involved.

"(iii) MORTGAGE AND FORECLOSURE.—Nothing in clause (i)(II) prevents or limits the ability of an owner of land to which that clause applies to mortgage the land or limit the right of the en-

tity holding such a mortgage to foreclose or otherwise enforce such a mortgage agreement in accordance with applicable law.

"(iv) DEFINITION OF MEMBER OF THE FAMILY.—In this paragraph, the term 'member of the family', with respect to a decedent or landowner, means—

"(I) a lineal descendant of a decedent or landowner;

"(II) a lineal descendant of the grandparent of a decedent or landowner;

"(III) the spouse of a descendant or landowner described in subclause (I) or (II); and

"(IV) the spouse of a decedent or landowner."; and

(II) in subparagraph (B), by striking "subparagraph (A)" and all that follows through "207(a)(6)(B) of this title" and inserting "paragraph (1)";

(3) in section 207 (25 U.S.C. 2206)—

(A) in subsection (c)—

(i) by redesignating paragraph (3) as paragraph (4); and

(ii) by inserting after paragraph (2) the following:

''(3) ALIENATION OF JOINT TENANCY INTERESTS.—

''(A) IN GENERAL.—With respect to any interest held in joint tenancy in accordance with this subsection—

''(i) nothing in this subsection alters the ability of an owner of such an interest to convey a life estate in the undivided joint tenancy interest of the owner; and

''(ii) only the last remaining owner of such an interest may devise or convey more than a life estate in the interest.

''(B) APPLICATION OF PROVISION.—This paragraph shall not apply—

''(i) to any conveyance, sale, or transfer that is part of an agreement referred to in subsection (e); or

''(ii) to a co-owner of a joint tenancy interest.''; and

(B) in subsection (g)(5), by striking ''this section'' and inserting ''subsections (a) and (b)'';

(4) in section 213 (25 U.S.C. 2212)—

(A) in subsection (a)(2), by striking ''(A) IN GENERAL.—'' and all that follows through ''the Secretary shall submit'' and inserting ''The Secretary shall submit'';

(B) in subsection (b), by striking paragraph (4) and inserting the following:

''(4) shall minimize the administrative costs associated with the land acquisition program through the use of policies and procedures designed to accommodate the voluntary sale of interests under the pilot program under this section, notwithstanding the existence of any otherwise applicable policy, procedure, or regulation, through the elimination of duplicate—

''(A) conveyance documents;

''(B) administrative proceedings; and

''(C) transactions.''; and

(C) in subsection (c)—

(i) in paragraph (1)—

(I) in subparagraph (A), by striking ''landowner upon payment'' and

all that follows and inserting the following: ''landowner—

''(i) on payment by the Indian landowner of the amount paid for the interest by the Secretary; or

''(ii) if—

''(I) the Indian referred to in this subparagraph provides assurances that the purchase price will be paid by pledging revenue from any source, including trust resources; and

''(II) the Secretary determines that the purchase price will be paid in a timely and efficient manner.''; and

(II) in subparagraph (B), by inserting before the period at the end the following: ''unless the interest is subject to a foreclosure of a mortgage in accordance with the Act of March 29, 1956 (25 U.S.C. 483a)''; and

(ii) in paragraph (3), by striking ''10 percent of more of the undivided interests'' and inserting ''an undivided interest'';

(5) in section 214 (25 U.S.C. 2213), by striking subsection (b) and inserting the following:

"(b) APPLICATION OF REVENUE FROM ACQUIRED INTERESTS TO LAND CONSOLIDATION PILOT PROGRAM.—

"(1) IN GENERAL.—The Secretary shall have a lien on any revenue accruing to an interest described in subsection (a) until the Secretary provides for the removal of the lien under paragraph (3) or (4).

"(2) REQUIREMENTS.—

"(A) IN GENERAL.—Until the Secretary removes a lien from an interest in land under paragraph (1)—

"(i) any lease, resource sale contract, right-of-way, or other document evidencing a transaction affecting the interest shall contain a clause providing that all revenue derived from the interest shall be paid to the Secretary; and

"(ii) any revenue derived from any interest acquired by the Secretary in accordance with section 213 shall be deposited in the fund created under section 216.

"(B) APPROVAL OF TRANSACTIONS.—Notwithstanding section 16 of the Act of June 18, 1934 (commonly known as the 'Indian Reorganization Act') (25 U.S.C. 476), or any other

provision of law, until the Secretary removes a lien from an interest in land under paragraph (1), the Secretary may approve a transaction covered under this section on behalf of an Indian tribe.

"(3) REMOVAL OF LIEN AFTER FINDINGS.—The Secretary may remove a lien referred to in paragraph (1) if the Secretary makes a finding that—

"(A) the costs of administering the interest from which revenue accrues under the lien will equal or exceed the projected revenues for the parcel of land involved;

"(B) in the discretion of the Secretary, it will take an unreasonable period of time for the parcel of land to generate revenue that equals the purchase price paid for the interest; or

"(C) a subsequent decrease in the value of land or commodities associated with the parcel of land make it likely that the interest will be unable to generate revenue that equals the purchase price paid for the interest in a reasonable time.

"(4) OTHER REMOVAL OF LIEN.—In accordance with regulations to be promulgated by the Sec-

retary, and in consultation with tribal governments and other entities described in section 213(b)(3), the Secretary shall periodically remove liens referred to in paragraph (1) from interests in land acquired by the Secretary.'';

(6) in section 216 (25 U.S.C. 2215)—

(A) in subsection (a), by striking paragraph (2) and inserting the following:

''(2) collect all revenues received from the lease, permit, or sale of resources from interests acquired under section 213 or paid by Indian landowners under section 213.''; and

(B) in subsection (b)—

(i) in paragraph (1)—

(I) in the matter preceding subparagraph (A), by striking ''Subject to paragraph (2), all'' and inserting ''All'';

(II) in subparagraph (A), by striking ''and'' at the end;

(III) in subparagraph (B), by striking the period at the end and inserting ''; and''; and

(IV) by adding at the end the following:

"(C) be used to acquire undivided interests on the reservation from which the income was derived."; and

(ii) by striking paragraph (2) and inserting the following:

"(2) USE OF FUNDS.—The Secretary may use the revenue deposited in the Acquisition Fund under paragraph (1) to acquire some or all of the undivided interests in any parcels of land in accordance with section 205.";

(7) in section 217 (25 U.S.C. 2216)—

(A) in subsection (e)(3), by striking "prospective applicants for the leasing, use, or consolidation of" and insert "any person that is leasing, using, or consolidating, or is applying to lease, use, or consolidate,"; and

(B) by striking subsection (f) and inserting the following:

"(f) PURCHASE OF LAND BY INDIAN TRIBE.—

"(1) IN GENERAL.—Except as provided in paragraph (2), before the Secretary approves an application to terminate the trust status or remove the restrictions on alienation from a parcel of trust or restricted land, the Indian tribe that exercises jurisdiction over the parcel shall have the opportunity—

"(A) to match any offer contained in the application; or

"(B) in a case in which there is no purchase price offered, to acquire the interest in the parcel by paying the fair market value of the interest.

"(2) EXCEPTION FOR FAMILY FARMS.—

"(A) IN GENERAL.—Paragraph (1) shall not apply to a parcel of trust or restricted land that is part of a family farm that is conveyed to a member of the family of a landowner (as defined in section 206(c)(2)(A)(iv)) if—

"(i) the interest is offered for sale to an entity that is not a member of the family of the landowner; and

"(ii) the Indian tribe that exercises jurisdiction over the land is afforded the opportunity to purchase the interest.

"(B) APPLICABILITY.—Section 206(c)(2)(A) shall apply with respect to the recording and mortgaging of any trust or restricted land referred to in subparagraph (A)."; and

(8) in section 219(b)(1)(A) (25 U.S.C. 2218(b)(1)(A)), by striking ''100'' and inserting ''90''.

(b) DEFINITION.—

(1) IN GENERAL.—Section 202 of the Indian Land Consolidation Act (25 U.S.C. 2201) is amended by striking paragraph (2) and inserting the following:

''(2) INDIAN.—

''(A) IN GENERAL.—The term 'Indian' means—

''(i) any person that is a member of any Indian tribe or is eligible to become a member of any Indian tribe;

''(ii) subject to subparagraph (B), any person that has been found to meet the definition of 'Indian' under any Federal law; and

''(iii) with respect to the ownership, devise, or descent of trust or restricted land in the State of California, any person that meets the definition of 'Indians of California' contained in the first section of the Act of May 18, 1928 (25 U.S.C. 651), until otherwise provided by Congress in ac-

cordance with section 809(b) of the Indian Health Care Improvement Act (25 U.S.C. 1679(b)).

"(B) EXCLUSIONS.—The term 'Indian' does not include any person excluded from a definition described in subparagraph (A)(ii) by a regulation promulgated by the Secretary in a case in which the Secretary determines that the definition is not consistent with the purposes of this Act, unless the definition described in subparagraph (A)(ii) is contained in a law relating to—

"(i) agriculture;

"(ii) cultural resources;

"(iii) economic development;

"(iv) grazing;

"(v) housing;

"(vi) Indian schools;

"(vii) natural resources;

"(viii) any other program with benefits intended to run to Indian landowners; or

"(ix) any land-related program that takes effect after the date of enactment of this subparagraph.".

(2) APPLICABILITY.—Any exclusion referred to in the amendment made by paragraph (1) shall apply only to a decedent who dies after the date on which the Secretary of the Interior promulgates a regulation providing for the exclusion.

(c) MORTGAGES AND DEEDS OF TRUST.—The Act of March 29, 1956 (25 U.S.C. 483a), is amended in the first sentence of subsection (a) by inserting after ''any land'' the following: ''(including land owned by any person in passive trust status in accordance with section 207A of the Indian Land Consolidation Act)''.

(d) ISSUANCE OF PATENTS.—Section 5 of the Act of February 8, 1887 (25 U.S.C. 348), is amended by striking the second proviso and inserting the following: ''*Provided,* That the rules of intestate succession under the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act) shall apply to that land for which patents have been executed and delivered:''.

(e) TRANSFERS OF RESTRICTED INDIAN LAND.—Section 4 of the Act of June 18, 1934 (25 U.S.C. 464), is amended in the first proviso by striking '', in accordance with'' and all that follows through the colon and inserting ''in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code

approved under that Act or regulations promulgated under that Act):''.

SEC. 6. INHERITANCE OF CERTAIN TRUST OR RESTRICTED LAND.

(a) IN GENERAL.—Section 5 of Public Law 98–513 (98 Stat. 2413) is amended to read as follows:

''SEC. 5. INHERITANCE OF CERTAIN TRUST OR RESTRICTED LAND.

''(a) IN GENERAL.—Notwithstanding any other provision of this Act—

''(1) the owner of an interest in trust or restricted land within the reservation may not devise an interest (including a life estate under section 4) in the land that is less than 2.5 acres to more than 1 tribal member unless each tribal member already holds an interest in that land; and

''(2) any interest in trust or restricted land within the reservation that is less than 2.5 acres that would otherwise pass by intestate succession (including a life estate in the land under section 4), or that is devised to more than 1 tribal member that is not described in paragraph (1), shall revert to the Indian tribe, to be held in the name of the United States in trust for the Indian tribe.

''(b) NOTICE.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Indian Probate Reform Act of 2003, the Secretary shall provide notice to owners of trust or restricted land within the Lake Traverse Reservation of the provisions of this section by—

"(A) direct mail;

"(B) publication in the Federal Register; or

"(C) publication in local newspapers.

"(2) CERTIFICATION.—After providing notice under paragraph (1), the Secretary shall—

"(A) certify that the requirements of this subsection have been met; and

"(B) shall publish notice of that certification in the Federal Register.".

(b) APPLICABILITY.—This section and the amendment made by this section shall not apply with respect to the estate of any person who dies before the date that is 1 year after the date on which the Secretary makes the required certification under section 5(b) of Public Law 98–513 (98 Stat. 2413) (as amended by subsection (a)).

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall not apply to the estate of an individual who dies before the later of—

(1) the date that is 1 year after the date of enactment of this Act; or

(2) the date specified in section 207(g)(5) of the Indian Land Consolidation Act (25 U.S.C. 2206(g)(5)).

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The CHAIRMAN. As an aside, the Capitol Police have also notified us on two or three occasions that they have had complaints from some of the Senators who have offices right across the hall. When we leave today, please keep the noise down in the hall.

I will start with our first witness today, Wayne Nordwall, director of the Western Region for Bureau of Indian Affairs. Please come up and start, please.

STATEMENT OF WAYNE NORDWALL, DIRECTOR, WESTERN REGION FOR BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. NORDWALL. I am Wayne Nordwall, director of the Western Region for the Bureau of Indian Affairs [BIA].

Mr. Chairman, I would like to thank the committee for its continued interest in this matter. This is one of the most critical issues that faces the Department at this point. It also critically affects the lives and property of thousands of Indians throughout the country. We are very grateful that the committee has continued to work on this issue.

One of the things that we had hoped to do when we met in May was to have a set of recommendations ready to submit before the next hearing, but unfortunately because of the Bureau reorganization, Trust reform projects, and trying to comply with some of the *Cobell* issues, we have not done that. But we have worked with the committee, the Indian Land Working Group, and other people. I think we are moving forward on this thing.

We cannot emphasize how critical this issue really is. We have all talked for years about the exponential growth of fractionation. I think that is starting to begin to rear its ugly head more and more on a weekly and monthly basis. I do not have the graph with me, and I know you have seen it before, where if you start in 1887 and you go up to 1920, 1930, 1940, and 1950, this line showing the increase of fractionation is relatively flat until you get to the 1960's, 1970's, 1980's, and 1990's where it goes almost vertical.

We are at the point now where if we cannot correct this problem within a decade or less, it may overwhelm us and we will not be able to do anything with it. Our current computer systems are at their maximum limit. At this point, we are having to migrate our title data from the existing LRIS system over to TAAMs title. We are trying to put that in nationwide.

The system that pays out many of the allottees is called IRMS. That system is literally on the verge of collapse. It is an old mechanical system that was developed in the 1960's. The software is no longer supported. We have to develop another system. Of course, this whole fractionation issue is literally about ready to crush many of those systems. We have to do something relatively soon.

In our testimony we have a couple of examples of the problems that fractionation causes. I am just going to go through a couple of others just because I thought they were timely at this point to show this exponential growth.

In 1992, the General Accounting Office [GAO] did a profile of land ownership on 12 highly fractionated reservations. One of the findings that they found in here was that there were 80,000 discrete owners on this 12 reservations, yet there were over 1 million fractional interests involved. I think many times people do not understand how there can be so many fractions when there is such a small number of Indians. For instance, the reason this happens is one person may inherit a one two-thousandths interests from his

uncle, and then in a separate probate a one five-hundredths interests from an aunt. Then if the surface and the subsurface are split, then it causes even more problems with fractionation.

We did not have the exact software that they used in order to compile these numbers. We attempted to update this report about 6 months ago as part of the pilot project to see how we could make that a national program. We could not get a full 10-year span because of the court injunction. Some of our computer systems are still off-line. What we found was that the problem has increased on those reservations from 1992–2000, it grew by 40 percent on those 12 reservations. We have 1,400,000 fractional interests on those 12 reservations.

In 1992 we also had a probate study where we went out and tried to analyze the condition of the probate program. At that point we found that there were approximately 6,000 cases that were backlogged. We just did that same study again. Now there are over 18,000 cases. As you can see, this exponential growth is starting to grow.

I called the Rocky Mountain region before I left Phoenix and asked them if they could send me an example of some of the problems they are having. They have a Turtle Mountain public domain allotment which is located off reservation. It is 80 acres. It is worth about $10,000. It is leased every year for $240. Right now there are 60 pending probates on that allotment. The average cost of a probate is $3,000. That is $180,000 worth of probate on that one alone. There are 11 dower interest holders, six life estates, 35 interests of passed into fee. Once they go into fee we lose control. We have no idea who the actual owners are at this point. There are 558 trust interests. Even if we just figure the average cost of $150 per account to maintain those, that is $83,000 just to maintain the accounts on those 558 interests. When you add in the probate, you can see the administrative costs far exceed the value of the land. This is becoming a more frequent problem all through Indian country.

We are still off the internet. I think sometimes people tend to forget that. They send stuff and it bounces back. We did not get the revisions to S. 550 until last night. I have not had a chance to look at them. As soon as I get back we will submit detailed comments on S. 550.

The CHAIRMAN. I would appreciate that.

Mr. NORDWALL. One of the things that we were concerned about in the original S. 550 is that it dealt solely with probate. At this point there are issues that have arisen in the implication of the 2000 amendments that require more than just addressing probate. I think one of the things that was in the original bill was a provision that said at the end of 3 years the Secretary of the Interior is supposed to submit amendments to correct any problems that have been identified. That was taken out because everybody figured the Secretary had that authority anyway. It has been three years. There are several things that the Department is focusing on.

I will just go through some of the ideas that we have discussed. We have a draft that we have been working with the committee members and with the Indian Land Working Group. We have looked at the California Indian Legal Services draft. Everybody has

spent time working on this. We do have a draft floating around within the Department with some ideas. I will just go through some of the ideas that are in there. Hopefully, once we look at S. 550, rather than perhaps submit a Departmental revision, we will just modify S. 550. It seems that many of the things that we were concerned about are now addressed in this bill.

The CHAIRMAN. We will address any further comments you have when you give us those recommendations.

Mr. NORDWALL. Fine. The first thing is that we agree that there needs to be a definition of highly fractionated land. At this point, because of the problems, we need to address them differently than some of the ones that are less fractionated. We have to expand the Secretary's partition authority. At present, the existing statute authorizes the Secretary to partition only if it is in the best interest of the Indians. That has always been construed to mean economic best interests.

In other words, if you have an 80-acre grazing allotment in North Dakota, and there are 80 owners, you cannot divide it and give each one an acre because that acre has no separate utility. There is no way in or out. It has no value.

What we want to do is to allow partition-in-kind. If someone has a home site, you can partition it out and try to deal with that and create a usable unit for each person and not be focused on finance.

We also may want to consider is partition by sale. If you wind up with an allotment with 400 owners, and 30 of them decide they just want to sell and get out of it, right now it is almost impossible to do that. We want to set up a procedure to where they can, in effect, go in and petition the Secretary and ultimately may be have a review by the Courts in order to sell these things to either co-owners, third parties, or to the tribes.

The other thing which was in S. 550, and is critical, is to create a uniform Federal probate code. The existing reliance on 50 States is just not working, especially as these things get more complex, and especially as more people wind up inheriting land on different reservations in different States. We have more and more circumstances where that happens.

Under our proposal, one of the big criticisms of the old provisions is that it had very limited ability for people to devise property to their wives and children. The 2000 amendments have the same problem. They limit who you can will your property to. That ended up sending a shock wave through Indian country with a lot of people coming in wanting to convert their land to fee so they could will their property to their non-Indian spouses and children.

What we have proposed is that in this probate code that there be very liberal provisions for people who write wills. In teste is a different issue. If somebody does not write a will, then we think there has to be a limited class. We just cannot have it open-ended so that it keeps fractionating indefinitely.

One of the other things that we think is critical is that we have to have the ability to purchase these fractional interests during the probate process. There are four or five special acts that relate to particular tribes, where during the probate process the tribe can go in and in lieu of that land going to that owner, they can pony up the money and take that land themselves. We think the Secretary

and the tribe should both have that authority. Again, the details of how that would work are things we still need to work out.

Another critical issue is to come up with an expedited probate process, particularly on small money estates. Right now we have hundreds and hundreds of accounts that are less than one dollar, and yet we still wind up having to probate them through the normal probate process which costs thousands of dollars. We want to come up with some sort of an in-house administrative procedure to deal with these highly fractionated small estates and not have a full-blown probate hearing.

One of the other issues that was discussed at length in the 2000 amendments and in the original act in 1984 was giving the tribes the authority to probate these estates in tribal court. They currently do not do that. They can draft a probate code but it has to be probated by the Secretary. Again, one of the issues that we are considering is allowing the tribes to probate in tribal court. One of the big problems again, of course, is: What do you do in those circumstances where a person owns land on multiple reservations? Who has primary jurisdiction? Will there be a split? We do not want people to have to go through multiple probates.

We want to have the Secretary to perhaps have greater authority under the land acquisition program. At present, whenever we purchase land under the acquisition program, it automatically goes to the tribe. In addition to the fractionation, we have checkerboarding where we have fee land, we have trust land, and we have tribal land. We think that perhaps we should be able to sit down with the tribes, help them work on a consolidation plan, and for those interests that are within that consolidation area, to convey those to the tribes as we do under the existing statute, but if they are outside, sell them to co-owners or something else to consolidate those interests.

Finally is the whole issue of whereabouts unknown and unclaimed property. Again, we have thousands of accounts with just pennies in them that we cannot locate the owner. Every State in the Union has an unclaimed property statute where if there is no activity in that account for a certain amount of time, it goes into a fund. You post a notice in a local newspaper. Every year you see these things come out. Then after a certain number of years it just goes to the State fund. In this case, we propose it go into the land acquisition fund.

The bottomline is that we have made much progress. The committee has put much work into this effort. We appreciate that. Again, we want to emphasize how critical it is that we try to come up with a solution. One of the things that we are concerned about and we are working with everyone to try to fix as much as possible is to water the bill down, to be blunt.

The history of this initiative since the 1920's and 1930's is that every time Congress attempts to put real teeth in the bill, there are complaints in Indian country. Then it gets watered down to the point where it is diluted and has no effect. I do not think we have another opportunity to fix this problem. Given the fractionation, if we do not fix it at this point, within 8 or 10 years, this is going to become de facto communal land. On any given day, no one is

going to know who owns the property. There will be hundreds of estates in probate on any given day. We have to fix it.

There will be some hard decisions that have to be made. Everybody will not be happy. Any time you draw up a set of standards, draw a line, or set criteria, somebody is on the wrong side. We realize that. What we think we have to do is that we have to focus on the 99 percent of the problem. We may not be able to address the problems of the 1 percent. But it has to be fixed. Otherwise, the system is just going to collapse.

I will be glad to answer any questions, Mr. Chairman. I would like to submit my written testimony for the record.

The CHAIRMAN. Without objection, your testimony will be placed in the record in its entirety.

[Prepared statement of Wayne Nordwall appears in appendix.]

The CHAIRMAN. Thank you, Wayne. If you would get back to the committee as soon as you have recommendations for us, I would certainly appreciate it.

Mr. NORDWALL. I have to go to Nashville to work on some *Cobell* issues, but we will fax a copy of the bill back to our Committee and start getting some comments for you.

The CHAIRMAN. Thank you.

I will submit questions to you in writing.

We will now go to the next panel which consist of Fred Matt, chairman, Confederated Salish and Kootenai Tribes, Pablo, MT; Maurice Lyons, chairman, Morongo Band of Mission Indians, Banning, CA; Lisa Oshiro, directing attorney, California Indian Legal Services, Washington, DC; and Austin Nunez, chairman, Indian Land Working Group, Albuquerque, NM.

As I told Mr. Nordwall, we have a very tight agenda this morning. I know that I am going to have to leave. If another Senator is here, we will let him go ahead and chair the hearing. If we do not finish before I have to leave, I am going to ask staff to finish chairing the hearing.

Let us start in the order that I mentioned your name.

Fred, go ahead.

STATEMENT OF FRED MATT, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES, PABLO, MT

Mr. MATT. Chairman Campbell, with what you have said, I will be as brief as I can. My name is Fred Matt. I am the chairman of the Confederated Salish and Kootenai Tribes of the Flathead Nation. On behalf of our tribal council, I am pleased to provide testimony regarding the substitute bill for S. 550 entitled, "American Indian Probate Reform Act of 2003."

I will summarize the most important points of my testimony. Before I get into my comments, I would like to say, Chairman Campbell, that I ran into a good friend of yours a couple of days ago, Doug Allard. I would not be a very popular person if I did not say hi and send his regards. I saw him the other day at one of the most popular gathering places that we have in Western Montana, WalMart.

The CHAIRMAN. Tell him hello for me. When I had a life, I was a jeweler and I made his wedding rings. He might have told you that.

Mr. MATT. He just went through cancer surgery. He is recovering very well. He looked very good. I would like to send his regards.

The CHAIRMAN. Thank you.

Mr. MATT. We just hosted the 13th annual Indian Land Working Group Conference in Flathead. We are pleased that David Mullin was there from your staff on behalf of the committee. The conference was a great success. The tribes appreciate the efforts this committee and the staff in attempting to correct the fractionated interest problems of Indian land ownership, while also endeavoring to retain the trust status of property on reservations.

We support the objectives of the Indian Land Consolidation Act Amendments of 2000, ILCA, and recognize that some amendments are necessary to clarify this complex legislation. Foremost, we encourage the committee to seek enactment of these amendments prior to the Secretary's certification of notices as required by ILCA which triggers the 1-year effective date.

The Flathead Reservation was created in 1855 by the Treaty of Hellgate. CSKT ceded over 22 million acres of tribal homelands and retained 1.3 million acres located in Northwestern Montana. We have always been, and remain, a part of that land. Initially we were successful opposing the General Allotment Act of 1887. However, competition for the land from outside business and political interests forced the passage of the Flathead Allotment Act in 1904.

Pursuant to that act and others, a total of 3,380 allotments were made to individual Indians. More devastating to their tribal self-governance and the economic base was the opening of the reservation to homesteading. The allotment era reduced tribal government ownership to approximately 30 percent of the total reservation.

In 1934, Congress enacted the Indian Reorganization Act for various reasons including the end of the devastation caused by the allotment era. We were the first tribe in the United States to organize under IRA, and one of the first tribes to begin to reacquire lost lands. We have come a long way since the 1930's, including being one of the first self-governance tribes. We have now compacted all land management functions, including land titles and records. We have also reacquired land on the Flathead Reservation to the point where nearly 70 percent of the lands are back in the hands of the tribe. We have provided land status maps with our written testimony to show what this has done to our reservation.

ILCA assists our goals for land restoration. However, currently the legislation, although not certified and, therefore, not in effect right now, is having the unintended consequences of pushing Indian land owners to request fee patents for their trust property. Indian land owners are fearful that they may not be able to leave their trust property to family members.

In my case, I own seven acres and a home that is in trust. My wife is a non-Indian. Some of my children are unenrolled. Some of them are enrolled members. It is a long story. I will not share that with you now.

The CHAIRMAN. That is okay. That is becoming more of a common story in Indian country everywhere.

Mr. MATT. If Section 207 of ILCA was effective in my situation, my wife and my unenrolled children would inherit the life estate

and my enrolled child would inherit the land and the title to the home. This is not my desired outcome.

The legislation needs to allow for descent of property to rightful heirs by will. In addition, if the land should acquire fee status due to inheritance by a non-Indian, I would first support the tribal option to keep the property in trust. It is the same option tribes exercise when a land owner now requests a fee patent by an application. Furthermore, if the Indian land owner does not make a will, the stricter rules of inheritance should apply. However, Indian land owners need the ability to estate plan.

Again, we need to balance our membership's needs with our self-governance. S. 550 attempts to provide that balance. The potential of Indian land owners on our Reservation who feel forced to prematurely transfer their interest from trust to fee status, poses a threat to our self-governance and tribal jurisdiction.

Next, we need to know the definition of Indian. This legislation is an opportunity to clarify the definition. We believe that it would be best to use the definition contained in the Indian Health Care Improvement Act. However, if S. 550 should broaden the definition of Indian, the legislation should also recognize the tribe's right to restrict the inheritance through an enactment of the tribal probate code.

S. 550 is an opportunity to establish the framework for probate reform and still allow tribes to enact a probate code of their own.

Last, CSKT needs access to acquisition funds for consolidating fractionated interests. The BIA has interpreted the pilot acquisition program, as authorized by Congress, not to apply on reservations where programs are operated by the tribes. This discrimination against tribes who utilize the Indian self-determination makes no sense. CSKT could eliminate nearly 3,000 undivided land interests with such funding. CSKT has identified 200 tracts of lands with 50 percent tribal ownership. In May 2003, CSKT submitted a proposal to the Department requesting funding in the amount of $6.5 million to complete such projects. CSKT suggests that the Committee either amend the land acquisition program so that all tribes can participate or allocate funding for tribes operating under the Self-Determination Act.

In addition, when ILCA, is implemented, we will also need funding for training and for estate planning if the amendments are going to be successful. Education about fractionation is probably a key factor for our membership. Since our membership received the BIA notice to Indian land owners in August 2001, our tribal council has committed to keeping our membership informed about this issue.

There are numerous items in this legislation. CSKT has addressed these in our prepared written testimony. We believe that through the combined efforts of land acquisition, probate reform, and estate planning education, we will eventually manage land fractionation on the Flathead Reservation.

We look forward to working on the technical issues surrounding S. 550 and hope to provide additional comments in the future. Thank you again for allowing me to testify. I would like to submit my written testimony for the record.

The CHAIRMAN. Without objection, your testimony will be placed in the record in its entirety.

[Prepared statement of Fred Matt appears in appendix.]

The CHAIRMAN. Thank you, Fred. What you have talked about of leaving land to your children and descendants that they might not be enrolled is an important point. I do not know if you have read the new version of S. 550. I understand there is a section that hopefully will take care of that problem by allowing Indian people to leave the land to their direct descendant with the tribal first right-of-purchase if that descendant decides to sell it. We are floating that idea with tribes. That might be the compromise that works for you.

We will now go to Chairman Lyons. Thank you for being here.

STATEMENT OF MAURICE LYONS, CHAIRMAN, MORONGO BAND OF MISSION INDIANS, BANNING, CA

Mr. LYONS. Thank you, Chairman Campbell, and Vice Chairman Inouye for inviting Morongo to testify today. Our position is spelled out in our written statement. In addition, I would like to make a few points.

Last year Chairman Campbell asked the Department of the Interior to delay implementation of the amendments to the Indian Land Consolidation Act. This was to allow Congressional review of concerns and issues that have arisen in Indian Country. To date, the Department of the Interior appears to have honored your request and we are thankful of their willingness to do so.

The proposed amendments will protect our members' rights of inheritance. Because of the way the 2000 act now defines Indian, the Morongo Band is faced with having to substantially reverse or revise our membership criteria in order to make possible for some of our members to pass the interest and Trust allotments to their heirs, to their children.

Arbitrarily revising our membership criteria will only cause further unfairness, divisiveness, and confusion. We should not be forced to amend our membership criteria in order to protect the right of our children to inherit family lands. The amendments to S. 550 provide a solution to the problem we have in California.

I was reading a book that I think fits right in with what we are doing here today. It was about George Washington and the Seneca Indian chiefs. They were talking about the land that they had at that time. George Washington was talking to Chief Cornplanter, and Chief Cornplanter told him: "The land we live on, our fathers received from God. They transmitted it to us for our children. We cannot part with it." President Washington told him: "In keeping with the spirit, the Government will never consent to your being defrauded, but will protect all your just rights."

That is something.

Thank you, Mr. Chairman, for hearing my testimony today. Your efforts today will help the promise George Washington originally made to America's first people. I would like to submit my written testimony for the record.

The CHAIRMAN. Without objection, your testimony will be placed in the record in its entirety.

[Prepared statement of Maurice Lyons appears in appendix.]

The CHAIRMAN. Thank you.

George Washington may have had very good intentions toward Chief Cornplanter, too. It is too bad that the people who followed him did not have as good intentions, very frankly.

Ms. Oshiro? Where is your office, by the way? Sacramento?

Ms. OSHIRO. California Indian Legal Services has offices throughout California. We also have an office here in Washington, DC, where I work.

The CHAIRMAN. I see. Thank you.

STATEMENT OF LISA OSHIRO, DIRECTING ATTORNEY, CALIFORNIA INDIAN LEGAL SERVICES, WASHINGTON, DC

Ms. OSHIRO. Thank you, Chairman Campbell, for inviting California Indian Legal Services to testify before you on S. 550. We come to you wearing various hats. First, California Indian Legal Services represents tribes and individuals throughout the State of California. One of our primary purposes is to protect the very limited and precious trust and restricted lands in California.

S. 550, as Chairman Lyons has said, includes some amendments to the definition of Indian that are very critical. I want to point out that there is a specific definition for California Indians that is very important because of the status of some of our tribes that were terminated by acts of Congress and have not yet been restored. Congress has, through various acts, allotted lands on the public domain and national forests that those members would like to continue to pass on to their descendants. They need to be recognized as Indians, although they are not members of a federally recognized tribe. The broader definitions under S. 550 are helpful all throughout Indian Country. We applaud your efforts in amending that.

I also come here wearing the hat of one of the participants on the S. 550 Task Force. California Indian Legal Services came together with the National Congress of American Indians, the Indian Land Working Group, and various tribal representatives last November in support of your bill, S. 1340, as we were trying to amend that and get that passed. At that time, we were specifically addressing the definition of Indian.

When you introduced S. 550 in March, we brought those people together, as well as additional advocates and representatives from throughout Indian Country. We have a very long distribution list. We have been one of the primary organizers of this informal S. 550 Task Force. We have been very appreciative of the participation of representatives from the Department of the Interior, from your staff, and from Indian tribes, Indian organizations, and Indian land owner associations. We have come together to try to address this very difficult and complex problem where we know that we had to make some tough decisions.

As Wayne Nordwall was pointing out, we are not able to reach consensus on everything. Not everyone can have their ideal bill. But we have been engaged in many discussions and deliberations about what we need to do to aggressively address this problem that is pervasive throughout Indian country. It poses a problem to the productive use of these lands, as our elders want to put these lands that they have fought so long and hard to protect to productive use for their current generation and for future generations.

We have been very happy to be participating with this informal S. 550 Task Force to bring together the collective knowledge, experience, wisdom, resources, and vision of all of these groups. We need a solution, and we need that solution now. We recognize the problems that the Department of the Interior has in managing these highly fractionated parcels. We are happy to really hear and echo the various provisions that were expressed in Interior's desire for and support for highly fractionated lands, partition, the Uniform Probate Code, the ability for individuals to freely devise their interests. It would also provide estate planning services.

That is where I switch to my next hat. In providing education and estate planning services throughout Indian country, we are encouraging Interior to also consider utilizing the services of Indian Legal Services throughout the country, which has long been recognized as the most effective and efficient model for the delivery of quality legal services throughout Indian country. There are programs, such as in the State of Montana, that do not receive sufficient funding to provide this type of estate planning services. This is another measure to address fractionation and promote consolidation in individual estate planning and family estate planning, to be able to provide that education and legal services to our communities. It also provides the confidential setting as well as other protections of the attorney/client relationship.

Before closing, I would like to thank you for your bill and for the commitment of your staff and for their availability, accessibility, and their participation in all of our meetings and discussions. This has been, as some people have pointed out, rather historic for all of these different interests to come together and work collaboratively and make those hard decisions.

In conclusion, we look forward to continuing our work with you in the coming days and weeks. There is an urgent need to pass this bill, S. 550, before the 2000 amendments are put into effect. We are doing this work because we must honor—and we would like to honor—the elders and their ancestors who have fought so long and hard to protect these precious lands so that they can rest with the comfort and the assurance that they can pass these lands on to their children and future generations, to continue to protect them, as well as to consolidate them, and put them to productive use.

Thank you. I would like to submit my written testimony for the record.

The CHAIRMAN. Without objection, your testimony will be placed in the record in its entirety.

[Prepared statement of Lisa Oshiro appears in apendix.]

The CHAIRMAN. Thank you for the nice compliment of the staff. They have worked very hard on this bill. They work hard on all bills, but they worked particularly hard on this bill. You certainly brought up the difficulty, the complications, about identifying who is Indian anymore. I can tell you that 50 years ago it was easier. The community was small. You tended to know families or you knew how it was as the community grew. There was intermarriage. More and more people are being reinstated as Federally-recognized tribes. I cannot tell. If they tell me they are, I take their word for it. It is getting more and more difficult all the time to define who is Indian, particularly when each tribe sets their own criteria.

Thank you.

Mr. Nunez, you are the chairman of the Indian Land Working Group from Albuquerque; is that correct?

Mr. NUNEZ. Yes, sir.

The CHAIRMAN. Please go ahead.

STATEMENT OF AUSTIN NUNEZ, CHAIRMAN, INDIAN LAND WORKING GROUP, SAN XAVIER DISTRICT, TOHONO O'ODHAM NATION

Mr. NUNEZ. Thank you very much, Chairman Campbell. The Indian Land Working Group thanks the committee for its invitation to appear and provide testimony concerning the proposed amendments of the Indian Land Consolidation Act.

I would like to state at the outset that we are very pleased with the changes that are contained in your bill. We look forward to its passage. I would like to make some additional comments from my prepared statement.

ILWG supports the implementation of a steady, long-term, adequately funded program of tribal and individual consolidation and acquisition of fractional interests to avoid loss of trust status of allotted lands; adequate land owner access to information about their lands; elimination of experimental estates; and land that have no foundation and no law; amendments that are written in a style comprehensible to the users; and true consultation with interests directly affected by trust reform measures.

ILWG further supports the ability of land owners to engage in owner management of parcels, if all owners agree; and a well thought-out and carefully structured family and private trust pilot project that protects against overreaching by third parties and preserves trust status; secretarially-maintained recording system for tribal inheritance codes which are encouraged under ILCA; and the establishment of missing persons investigation systems with appropriate unclaimed property provisions tailored for small accounts and possibly smaller highly fractionated land interests.

In conclusion, ILWG suggests that S. 550 substitutes be streamlined to enact those provisions that are critical to repairing the problems created by ILCA 2000, and the numerous provisions about which there is general consensus.

Thank you. I would like to submit my written testimony for the record.

The CHAIRMAN. Without objection, your testimony will be placed in the record in its entirety.

[Prepared statement of Austin Nunez appears in appendix.]

The CHAIRMAN. Thank you, I appreciate your comments.

I am going to submit all of my questions to be answered in writing, if you would. Senator Inouye will probably do the same thing.

Without objection, so ordered.

We will keep the record open for 2 weeks for any additional comments that staff would ask or if you have some further recommendations of how we can make S. 1721 work. I would certainly appreciate it.

Those in the audience, too, if you have any comments to submit, we would appreciate that, too.

The CHAIRMAN. With that, the hearing is adjourned.

[Whereupon, at 10:40 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF MAURICE LYONS, CHAIRMAN, MORONGO BAND OF MISSION INDIANS

Thank you Mr. Chairman and Vice Chairman Inouye for inviting the Morongo Band of Mission Indians to provide you with our testimony concerning S. 550, the American Indian Probate Reform Act of 2003, a bill to amend the Indian Land Consolidation Act. As you may recall, I testified before this committee in May of last year to encourage the Senate to adopt legislation to amend ILCA and I come before you today to do the same.

In 2002, Chairman Campbell asked the Department of the Interior to delay implementation of certain provisions of the Indian Land Consolidation Act Amendments of 2000 [the act] pending further Congressional review of concerns and confusion that have arisen in Indian country about the consequences—both intended and possibly unintended of those amendments. To date, the Department appears to have honored your request and we are thankful for their willingness to do so.

As I relayed to you in May of last year, the 2000 act prompted the Department to send out a series of notices to individual tribal members alerting them of expected changes to the rules of intestate succession and inheritance that will constrain the devising of interests on trust and restricted land to non-Indians. These notices had an immediate detrimental impact on our tribe's ability to plan for the future and manage our tribal lands effectively and our tribal members' ability to pass their land down to their children and grandchildren.

While the Department has to date been willing to not implement the amendments from the 2000 act, we know that they are not able to defer this action forever. To this end, we encourage you to act swiftly on this matter.

The Morongo Reservation is located approximately 17 miles west of Palm Springs. Our tribal membership enrollment is 1,200 and the reservation comprises approximately 33,000 acres of trust land, of which 31,115.47 acres are held in trust for the tribe, and 1,286.35 acres are held in trust for individual allottees or their heirs. We are continuing to make inquiries relative to the number of Morongo members that have an interest in trust allotments on our reservation and other reservations. We are also interested to learn how many non-Morongo members hold an interest in trust allotments on the Morongo Reservation.

We at Morongo share the desire of Congress to preserve the trust status of existing allotments and other Indian lands, and we appreciate this committee's hard work in 1999 and 2000 to strike a balance in the Indian Land Consolidation Act Amendments of 2000 between the individual property rights and interests of allottees and the sovereign rights and interests of tribal governments. However, we now recognize unintended consequences from this legislation have come about.

For example, because of the way that the 2000 act now defines "Indian," the Morongo Band is faced with having to revise its own membership criteria in order to enable some of our enrolled members to pass their interests in trust allotments to their own children. Congress must understand that we do not feel revising our membership is a solution. The fact is that changing the membership is a very divi-

sive matter for tribal governments and their members. We should not be forced to amend our membership criteria in order to protect the right of our members' children to continue having interests in their family lands.

S. 550 includes a solution to the problem we face in California. Specifically, the bill protects those individuals having an interest in the ownership, devise, or descent of trust or restricted land in the State of California, as long as that person is a descendent of an Indian residing in the State of California on June 1, 1852 This will allow members of my family who may no longer be eligible for membership in the Morongo Tribe—but are most definitely American Indians—to carry on the traditions of our family on our lands.

Due to the unique history of reservations and rancherias in California, this definition highly warranted. Mr. Chairman, as you know, tribes which exist today were largely cobbled together based on the geographic proximity of native people. For example, the Morongo Band of Mission Indians is made up from people who descended from Cahuilla, Chemehuevi, Luiseno, Serrano and many others. These people all lived in the same area and where combined into the Morongo Indian Reservation. This situation is shared by many of the tribes located in California and is the basis for a much needed definition for those native people who live California.

Mr. Chairman, thank you for your time and willingness to hear about the concerns of the Morongo Band of Mission Indians.

TESTIMONY OF TEX G. HALL

PRESIDENT OF

THE NATIONAL CONGRESS OF AMERICAN INDIANS

ON S. 550

TO THE UNITED STATES SENATE

COMMITTEE ON INDIAN AFFAIRS

October 15, 2003

Good morning, Mr. Chairman and Vice Chairman and Members of the Committee. My name is Tex Hall. I am the President of the National Congress of American Indians and the Chairman of the Mandan, Arikara & Hidatsa Nation. Thank you for inviting NCAI to testify on S. 550, a bill to amend the Indian Land Consolidation Act. The National Congress of American Indians (NCAI) was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization. We appreciate the opportunity to participate on behalf of our Member Indian Nations in the legislative process of the United States Congress and to provide this Committee with our views.

I want to especially extend our thanks to the Committee and its staff for their hard work on the Indian Land Consolidation Act. This is often a thankless task, but I want you to know that NCAI appreciates your hard work very much. I am basing my comments today on a substitute version of S. 550 that was circulated to us last Friday.

NCAI and tribal leaders are urging Congress to move forward with these technical amendments to the Indian Land Consolidation Act. We very much need quick action on the amendment clarifying that Indian land owners have the right to pass land to their lineal descendants so that they do not take their land out of trust. Moreover, we think that the Uniform Federal Probate Code will be very beneficial in limiting fractionation and improving estate planning. We are also in support of strengthening the land buy-back program and focusing our efforts on highly fractionated Indian land. Chairman Campbell and Vice Chairman Inouye have identified this bill as the first step on the road to trust reform, and we want to help make that happen.

I have comments and some questions about specific provisions in my written testimony, but I think these are issues that can be readily addressed. NCAI will be sending out a broadcast to all tribes after today's hearing to encourage them to comment on the specifics of the substitute bill. If significant concerns arise among tribes, we trust that the Committee will work collectively with tribal leaders to address those concerns. But, in general, I want to express our support for moving forward with this important legislation.

HISTORY

The problem of fractionation and fragmentation of Indian land is rooted in a history that is familiar to members of this Committee. In the late 19th and early 20th century, the federal government began a push to destroy the reservation land base and assimilate Indian people through "allotment" programs. The General Allotment Act of 1887 was the most broadly applicable of the allotment statutes, and between the years of 1887 and 1934 the tribes lost more than 90 million acres, nearly 2/3 of all reservation lands. In 1934, Congress passed the Indian Reorganization Act of 1934 (IRA), in order to stop allotment and the abrupt decline in the economic, cultural and social well-being of Indian tribes caused by allotment. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "the land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship."(78 Cong. Rec. 11727-11728, 1934.)

The purpose of the Indian Land Consolidation Act is to specifically address some of the damage caused by allotment. First, the ownership of many trust allotments has become fractionated into hundreds or thousands of undivided interests. According to the BIA, there are approximately 4 million different ownership interests in170,000 tracts of allotted land held in trust. Fractionation has created an accounting nightmare for the federal government and enormous difficulties in putting the land to beneficial use. Second, the inheritance provisions also have created a situation where allotted land interests pass to heirs who are not members of Indian tribes, and the interest then is no longer in trust status. For many tribes far more Indian land passes out of trust than into trust each year through this process. This loss of trust land is a continuation of the disgraceful legacy of the allotment era, and compounds the jurisdictional and management difficulties in dealing with Indian land.

Finally, allotment left many tribes with scattered parcels and often rendered the tribal land base essentially unusable from a practical standpoint. It was not just the loss of land, but also the manner in which the remaining land was separated and divided which has created such ongoing hardship for the tribes:

> *The opening of the reservation in this fashion [under the allotment policy] had many ramifications other than the sheer loss of land. Much of the remaining Indian land estate was crippled. As any large rancher, miner, or timber executive can attest, effective resource management can best be achieved on a large, contiguous block of land in single ownership. The allotment program deprived most tribes of that opportunity. The tribal land ownership pattern became checkerboarded, with individual Indian, non-Indian, and corporate ownership interspersed.*

C. Wilkinson, American Indians, Time and the Law, at 20.

In sum Mr. Chairman, I do not think that I can overemphasize the importance of land consolidation in Indian country. Of the 90 million acres of tribal land lost through the allotment process, only about 8

percent have been reacquired in trust status since the IRA was passed sixty-five years ago. Still today, some tribes have no land base, many tribes have insufficient lands to support housing and self-government, and most tribal lands will not support economic development. Further improvements to the Indian Land Consolidation Act are vital to the future of Indian communities.

THE INDIAN LAND CONSOLIDATION ACT

Congress passed the Indian Land Consolidation Act (ILCA) in 1984 in order to address fractionation and provide for tribal land consolidation. ILCA authorized new powers for tribal land consolidation, the buying, selling and trading of fractional interests, and perhaps most importantly for our purposes Section 207 of the ILCA prevented the devise or descent of certain small interests in trust and restricted lands. Specifically, any interest that is 2% or less of the total acreage of a tract would not pass to a decedent's heirs or devisees if the interest realized less than $100 in income during the preceding year. Such interests escheated to the reservation's tribal government. Congress amended this provision the next year. The 1984 amendment altered the income generation test to take into account a five-year earning-history of each interest. The amendment also allowed an owner to prevent an interest's escheat by devising the interest to another owner in the same parcel of land. The original version of section 207 of the Act was found to be an unconstitutional taking of property in 1987 (*Irving v. Hodel*). In 1997, the Supreme Court also ruled against the constitutionality of the 1984 version of Section 207 (*Youpee v. Babbitt* (1997)).

THE 2000 ILCA AMENDMENTS

The Supreme Court decisions were clearly correct in refusing to allow Congress to disenfranchise Indian landowners without compensation, but the decisions also eliminated the major mechanism contemplated in the Act for limiting the fractionation of Indian land. The purposes of the 2000 amendments were to create some new mechanisms for addressing fractionation.

Section 207 was intended to encourage the consolidation of interests and prevent the loss of trust or restricted land when non-Indians inherit it. To prevent Indian lands from passing out of trust, non-Indian heirs would generally only receive a life estate in Indian lands. Section 207 was also intended to address fractionation by limiting the way that Indian land passes as a "joint tenancy in common." If a person devises interests in the same parcel to more than one person, unless there is language in the will to the contrary, it is presumed to be a "joint tenancy with right of survivorship," meaning that that each of a decedent's heirs share a common title, so the last surviving member of the group obtains the full interest as it was owned by the decedent. Any interest of less than 5% passing by intestate succession would also be held by the heirs with the "right of survivorship." The Secretary of Interior must certify capacity to manage Section 207 before it can take effect, and so far the Secretary has not provided that certification.

NCAI supported the 2000 ILCA amendments because we believed that overall they had a lot of very positive provisions in them. Without amendments to ILCA, the 4 million existing ownership interests in allotted Indian lands will continue to grow exponentially and Indian land will continue to go out of trust status. At the time, we also recognized that there are a lot of difficult tradeoffs and that no bill could come to a perfect resolution. We relied on the assurances of the Committee that the 2000 amendments would not be the last word on this topic,

but that we could expect to be able to come back with technical amendments to continue to correct and improve the statute as we gain more experience with it.

THE SUBSTITUTE S. 550

We believe that S. 550 is taking the right approach in changing parts of the 2000 amendments before they take effect. In particular, Indian landowners have raised concerns that some provisions could limit their ability to devise their land to their children, and that the ability to devise land to your heirs is an inherent property right that cannot be taken without compensation. NCAI passed a resolution last year (SD-02-101) supporting S. 550's predecessor bill, S. 1340, and many of the concepts in the bill remain the same. The following is our views on a number of major items in the bill, and we hope to continue working with Committee staff on the more technical issues.

- **Reassurance to Landowners** - The bill would make clear that Indian land owners can devise land in trust to their children and lineal descendants. We think this is a very positive development that will reassure Indian landowners and help keep land in trust. I believe that the compromise reached on this issue is an important one because it took a lot of pressure off defining "who is an Indian?" We recognize the need for the amendments regarding devise to non-Indian heirs, and strongly support the tribal purchase option at probate as a very important mechanism to keep land in trust.

- **Uniform Probate Code** - We also support the Uniform Federal Probate Code. While tribes can always develop their own probate codes, the bill recognizes that very few tribes have done so, and sets up a Uniform Federal Probate Code for Indian trust property if the tribe does not write a code. The Uniform Federal Probate Code will decrease fractionation and improve probate planning. In particular, when a landowner does not write will, the land will go only to Indian spouses, descendants, siblings or parents, stopping the search for more distant relatives and thus limiting fractionation. NCAI remains very concerned about the effects of fractionation, and we need to continue developing ways to attack this problem.

- **Partition of Highly Fractionated Lands** - We also support the mechanism for partition of highly fractionated Indian lands. While this provision has a similar effect as Section 205 of the existing law, it would go further and allow the consolidation of non-trust interests that are held in common with the Indian owners. Tribes are acquiring fractionated interests because they want to use the underlying land for a purpose, to build a school, or housing or for agriculture or any of a number of important purposes. But a tribe does not currently have a ready mechanism to acquire an interest that has gone out of trust. The tribe may have 98% of the interests, but no mechanism to acquire the final 2% if they are in fee status.

- **Owner Managed Interests** - The bill contains a new provision for "Owner-Managed Interests." Under this provision, if all the owners of a trust property agree to put the land in "owner-managed" status, the owners could enter into 25-year surface leases without Secretarial approval. (Any other transaction, such as a sale or a mineral lease would still require Secretarial approval.) The Secretary would not be responsible for the collection

or accounting of lease revenues while the land is in "owner-managed" status, but the land would remain in trust, free from property taxes, and within the jurisdiction of the tribal government. This provision has some attraction in that it would support self-determination and reduce bureaucracy on routine transactions. It does, however, run contrary to the longstanding principal that all transactions in Indian land require federal approval. The fact that this is purely voluntary and requires the consent of all owners makes a difference. I am going to encourage tribal leaders to provide their views on this issue to the Committee and to NCAI over the next two weeks.

- **Unclaimed Property and Missing Heirs** - The bill contains provisions for dealing with unclaimed property and missing heirs. NCAI did some work on these provisions because we were concerned about proposals that did not have sufficient notice requirements. The current draft requires a person to be missing for six years, and requires the Secretary to do a real search and notice process before any property can be considered unclaimed. A claims fund would be established and missing persons would always have the opportunity to make a claim for lost property even if they turned up many years later. NCAI has heard from several tribes that they have real difficulties with unclaimed property, but once again, I am going to encourage tribal leaders to provide their views on this issue to the Committee and to NCAI over the next two weeks.

- **Limitations on Tribal Probate Codes** - We have questions about the provisions of S. 550 that place limitations on federal approval of tribal probate codes. One of the powers of tribal government is the power to control the devise and descent of property. We believe that the statute should allow more leeway for tribes to develop codes that will utilize inherent tribal authority and tribal probate law as a mechanism to address the issues of fractionation and land loss.

- **Notice to Tribes on Land Going Out of Trust** – One of the more important provisions in the bill is the tribal purchase option, which would allow the tribe the option to purchase any property that is intended to be taken out of trust. In order to exercise this option, though, the tribe must receive notice of the transaction. We would encourage the Committee to include a specific notice provision that will enable the tribe to use its purchase option.

- **Program for the Acquisition of Fractional Interests** - We support expanding the program for the acquisition of fractional interests, but think it should do more to include tribal governments. The primary actor in Indian land consolidation is not the federal government, but the Indian tribes who have developed land consolidation programs on their own initiative. Just as in every other area of Indian policy, federal efforts on land consolidation will only be successful when they work in partnership with the tribal governments in a government-to-government relationship. Tribes have acquired hundreds of thousands of fractionated ownership interests in order to further their own land consolidation and land recovery goals, and every one of these transactions works to the benefit of the federal government.

- **Developing a Federal-Tribal Partnership on Land Consolidation** - We were disappointed that Interior recently abandoned its proposed tribal leaders workgroup on Indian land fractionation. This is an area where we can truly find a lot of common ground between Interior and the tribes. We are aware that the Department is thinking of expanding its efforts in land consolidation. There are different issues and interests that tend to shape the land consolidation strategies of tribes versus the federal government. We need to understand these issues and interests in order to craft strategies that will promote tribal land consolidation efforts while reducing Interior's management and administrative costs. The only way that fractionation is going to be addressed on the necessary scale is if tribes have ownership in the process and the federal government assists tribes with that effort. *Cobell* gives Congress the reason to get serious about this effort. We are asking for the development of a partnership between the federal government and tribal governments that will provide tribes with the tools and incentives to acquire fractionated interests and consolidate lands.

- **Funding Land Acquisition** - The Land Acquisition program must be adequately funded in order to prevent land fractionation, and all of its attendant difficulties for both the federal government and tribal governments, from growing into an exponentially greater problem. For the FY 2004 budget, I would note that the line item for land consolidation has been increased from $13 million to nearly $23 million. This is an important increase, but we will need more if we are to get serious about this problem. This is a prime example of an investment will repay itself in later years.

- **Ideas for the Future** - Tribal programs would also benefit from lower interest rates on the loans, and other means of lowering the tribes' out-of-pocket expenses, freeing up resources for additional acquisitions. We need to develop ideas that will expand the efforts of tribal land consolidation programs, including:

  1) Creating a categorical exemption for NEPA either legislatively or through Interior regulation, in order to reduce the time and expense related to land transfers;

  2) Providing tax-exempt bond financing to tribes to acquire lands for consolidation;

  3) An interest free loan program that provides federal loans for the purchase of fractionated interests;

  4) Developing a tax credit for turning in fractionated interests or other tax credit structure that would have incentives for owners of fractionated interests.

- **What We Should Do Now** - We believe that the best thing that can happen in the near future is to (1) move S. 550 on the issues that are ready for inclusion in the bill and are within the jurisdiction of this Committee, and (2) develop a collaboration between Interior, Congress and the tribes in creating new incentives for land consolidation that may take longer to develop or require the involvement of a broader range of Congressional committees. This second step could perhaps take the form of an

amendment to § 213 that would direct the Department of Interior to begin its study of coordination with tribal governments immediately.

CONCLUSION

Thank you for the opportunity of appearing before you today. Land fractionation in Indian country is a particularly difficult problem because of the inherent contradictions and competing goals. For decades Congress has been frustrated and somewhat defeated by the issue.

This Committee's leadership has taken a very productive and realistic approach that we must continue working on the problem, and if we make mistakes we can come back and fix them. I greatly appreciate the Committee's willingness to work with us in this manner. I have no doubt that we will be back to work with you again in the coming years on technical amendments to the law. With this understanding, NCAI supports S. 550 as we have outlined in our testimony above.

We greatly appreciate the work of the Committee on Indian Affairs, and would like to thank you especially for your attention to this most important issue.

Testimony of D. Fred Matt, Chairman
Confederated Salish and Kootenai Tribes
of the Flathead Nation
on Substitute S. 550
Held on October 15, 2003
(Revised)

Chairman Campbell and honored Members of the Committee on Indian Affairs, my name is Fred Matt, and I am Chairman of the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation. On behalf of my Tribal Council, I am pleased to provide testimony regarding the substitute bill for S.550 entitled "American Indian Probate Reform Act of 2003."

CSKT appreciates the efforts of this Committee and its staff in attempting to correct the fractionation problems of Indian land ownership and to retain the trust status of the property. We support the objectives of the Indian Land Consolidation Act Amendments of 2000 (ILCAA) and recognize that some amendments are necessary to clarify this complex legislation. Further, we encourage this Committee to complete the amendments prior to the Secretary's certification of notices required by the ILCAA triggering the 365-day effective date for the "descent and distribution" Section 207 (25 U.S.C. §2206) of the Act. We are here today to provide the Committee with CSKT's comments on probate reform as it relates to tribal sovereignty and self-governance. I think we all realize there is no quick and easy, or cheap fix to Indian land fractionation.

I. Introduction.

The Flathead Indian Reservation was reserved through the cession of over 22 million acres of tribal homelands to the United States retaining approximately 1.3 million acres for the "exclusive use and benefit" of CSKT as well as other treaty rights. *The Treaty of Hellgate*, Treaty of July 16, 1855, 12 Stat. 975. The CSKT bitterly opposed the allotment policy on the Flathead Reservation and initially avoided the adverse effects of The General Allotment Act of February 8, 1887, 24 Stat. 388. Despite treaty promises, the competition for the land from outside business and political interests forced the passage of the Flathead Allotment Act of April 23, 1904, 33 Stat. 302 (FAA), the legal authority for disposal of lands located within the exterior boundaries of the Flathead Reservation. In 1908, the federal government granted 2,390 allotments of 80 to 160 acre tracts to Indians. Later, additional allotments on the CSKT Flathead Reservation were made pursuant to other congressional acts comprising in all a total of 3,380 original allottees.

Commencing in 1910, the CSKT Flathead Reservation was open to homesteading and approximately 404,000 acres of land were patented to non-Indian settlers, 61,000 acres were granted to the state of Montana, 18,500 acres of land were reserved by the United States for the National Bison Range, and some 1,700 acres of land were also reserved by the United States for other purposes. As a result, the most valuable asset of CSKT, the land, was sold to non-Indian

settlers at below-market value, nearly destroying the tribal economic base. The transfer of land from tribal ownership to private ownership created jurisdictional battles and barriers to tribal self-governance on our own Reservation which we struggle with daily.

In 1934, Congress repudiated the federal policy of allotments with the enactment of the Indian Reorganization Act, 48 Stat. 984, and approximately 35,000 acres of "surplus" lands were restored to CSKT tribal ownership. In addition, CSKT adopted the first constitution pursuant to the IRA which was approved on October 18, 1935. At that time, the land base of the CSKT had diminished to approximately 30 percent tribal ownership. Since the era of the forced sale of tribal assets, the CSKT have expended great efforts and much resources to reacquire lands within the exterior boundaries of the Flathead Reservation. The mission statement of the CSKT acknowledges the great importance of tribal ownership and control over all lands within our reservation boundaries.[1] Currently, the CSKT have restored its land base to nearly 70 percent tribal ownership. Attached at the end of this testimony, please find the land status maps of the CSKT from 1855 to present.

Additional history that helps explain CSKT's struggle for self-determination and the desire to have a hand in the decisions that affect us. Since 1990, the CSKT have operated the realty program pursuant to Public Law 93-638, The Indian Self-Determination and Education Assistance Act of 1975, as amended. First under a contract then in 1994 the CSKT took the next step and evolved from a contract tribe to a compact Tribe. The CSKT compacted the Land Titles and Records Office in the latter part of 1995. Land Titles and Records Office is governed by federal regulations found at 25 Code of Federal Regulations, Part 150 and maintains land records and title documents for nearly 1 million acres of individual allotted/trust, Tribal trust and Tribal fee lands on the Flathead Reservation.

As a result of our active land stewardship, the CSKT has first-hand experience and knowledge of Indian land issues. CSKT believes that through the combined efforts of land acquisition, probate reform and estate planning education, we will eventually manage land fractionation on the Flathead Reservation. In general, CSKT supports Substitute S. 550 with requests for minor amendments. Namely, 1) clarify the definition of Indian, 2) allow devise freely with Tribal options to purchase prior to trust property attaining fee status, 3) reduce the applicable percentage for 5 or fewer owners from 100 percent consent to 90 percent for leasing purposes, 4) authorize Tribes to probate trust estates in Tribal Court, and 5) reserving the right to provide additional comments on other technical amendments upon further review.

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[1]The CSKT Mission Statement: "Our mission is to adopt traditional principles and values into all facets of tribal operations and service. We will invest in our people in a manner that ensures our ability to become a completely self-sufficient society and economy. We will strive to regain ownership and control over all lands within our reservation boundaries. And we will provide sound environmental stewardship to preserve, perpetuate, protect and enhance natural resources and ecosystems." *Adopted by Tribal Council May, 1996.*

II. Probate Reform.

In August 2001 when some of the CSKT Indian landowners received the BIA brochure entitled "Notice to Indian Land Owners," it generated fear among our membership and initiated a flood of requests for fee patent applications. The Notice identified a change in the federal inheritance laws, of most interest, who may inherit which was different from past practice. Amidst this uproar of change, Senate Bill 1340 was introduced to amend the ILCAA of 2000 and to provide for probate reform. Unfortunately, CSKT could not fully answer our tribal member landowners' questions which compounded their concerns. Currently, the Indian Land Consolidation Act Amendments of 2000 (ILCAA) are having the unintended consequence of Indian landowners requesting fee patents for their trust property to avoid the federal legislation that may prohibit them from devising their land to their heirs. We have several applications for fee patent pending the results of this legislation. For example, one individual has a pending application for approximately 560 acres awaiting some direction. The CSKT Tribal Council recognizes the need to get accurate information to our membership as well as balance and preserve the intended goals of ILCAA. The potential of Indian landowners on our Reservation, who feel forced to prematurely transfer their interest from trust to fee status, poses a threat to our self-governance and Tribal jurisdiction.

The proposed substitute bill S. 550 would enact the "American Indian Probate Reform Act of 2003". The findings should recognize that Indian tribes have inherent power to prescribe rules of inheritance for members. Diminishing any inherent authority raises concerns for Indian tribes given the erosion of tribal sovereignty by recent United States Supreme Court decisions. However, CSKT recognizes that probates of trust land located in different states requires the application of different state laws and encumbers the process. In addition, some tribes may be limited by their tribal constitution to regulate the inheritance of allotted lands and the ILCAA does not vest authority not otherwise granted by tribal law. 25 U.S.C. § 2211. Consequently, a uniform federal probate code may be necessary to assist with facilitating the probates in the absence of a tribal probate code. However, the uniform federal probate code should expressly verify that a tribe may enact laws relating to inheritance that will supercede the provisions of the federal law upon approval of the Secretary. Clearly, this recognizes the unique features of each Tribe and that Tribes are in the best position to determine and resolve the fractionated interests on their reservation.

A. Clarify the Definition of Indian. The ILCAA of 2000 provided a minor amendment to the definition of Indian that has resulted in a more restrictive interpretation. Pursuant to ILCAA, "Indian" means:

> Any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of 'Indian' under a provision of Federal law *if the Secretary determines* that using such law's definition of Indian is consistent with the purposes of this Act.

Under the ILCAA of 2000 definition, an individual may inherit trust land if he or she is an enrolled member or eligible for enrollment in a federally recognized Indian tribe or if he or she is found to meet the definition of Indian under other federal law. Unless the Secretary clarifies which federal laws she will consider consistent with the Act, if an heir is not enrolled, the burden shifts to the heir to prove at the probate proceeding that a specific federal statute contains a broader definition of "Indian" and that definition is consistent with the purposes of ILCAA.[2] The latter interpretation will delay probate proceedings, leave the determination of who is an Indian to the subjective decision of the administrative law judges or attorney decision makers, who may or may not use the same criteria. Furthermore, the definition is too vague for staff assisting Indian landowners with estate planning services to determine whether an heir may be able to meet the burden of proof at the time of probate.

Historically, the Department has allowed anyone of any degree of Indian blood to inherit as long as they are a lineal descendent. The ILCAA of 2000 sought to limit those devises. Here, Substitute S. 550 proposes a broader definition of "Indian" through a range of categories such as enrolled member or eligible for enrollment, lineal descendant within 3 degrees, a current undivided interest owner in trust, and a California definition including in accordance with the Indian Health Care Improvement Act. CSKT appreciates the pressure of Congress to define who the federal government may owe a trust responsibility and also understands that a limited definition will prevent further fractionation of trust interests. However, merely clarifying the federal law that the Secretary may recognize for the definition of Indian pursuant to the ILCAA such as the Indian Health Care Improvement Act codified at 25 U.S.C. §1603(c) as proposed for the California definition may be the clearest and most consistent solution. Furthermore, following existing federal law may lessen a challenge that the definition does not meet the unique political status.

Most importantly, the legislation should recognize that Tribes retain the inherent right to determine its membership and inheritance of its members. If Congress should amend the definition of Indian to broaden the scope of individuals recognized, the legislation should continue to preserve an Indian tribes' inherent authority and allow tribes to enact their own limitations on inheritance through the enactment of a tribal probate code.

B. Amend the "Special Rule" of inheritance by devise subject to a Tribal purchase option. The CSKT does not oppose the rules of construction provided in Substitute S. 550 to broaden the special rule of inheritance to allow an Indian landowner to explicitly devise his or her property to a non-Indian "in fee." Again, the United States Supreme Court has already recognized that "a decedent's right to pass on property to one's heirs is itself a valuable right."

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[2]For example, the BIA has suggested the use of the Development of Tribal Mineral Resources Act codified at 23 U.S.C. § 2101: Definitions: (1) "Indian" means any individual Indian or Alaska Native who owns land or interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Hodel v. Irving, 107 S. Ct. 2076 (1986). Babbitt v. Youpee,117 S. Ct. 727 (1997). As a result, CSKT have 72 Youpee estates in various stages of the probate process representing an ownership change to 174 individuals. The CSKT supports amendments that will lessen the risk of the United States Supreme Court finding ILCAA unconstitutional again. Therefore, the CSKT does not object to the amendment allowing an Indian landowner to devise his or her trust land to a non-Indian heir "in fee." However, CSKT offers its support for broadening the special rule with the understanding that any devise through a probate proceeding to a non-Indian will be subject to the tribal purchase option now provided for in 25 U.S.C. § 2205(c).

C. Provide a Definition for "Family Farm." Substitute S. 550 provides an exemption of the Tribes' purchase option of lands devised to a non-Indian if the land is a "family farm." Currently, the legislation does not provide a definition of family farm. Since this exemption prohibits or delays a tribal purchase option, it is critical that the legislation define a "family farm" and recognize the potential enforcement issues arising from such exemption. For example, if the land status has transferred to "fee status" owned by a non-Indian, a tribe may not even receive notice of its purchase option upon a sale to a non-family member. The legislation should clarify enforcement of the restriction on the deed such as adjudication in Tribal Court. Otherwise, Tribes may be forced to waive sovereign immunity to enforce its right to purchase in state court since a family member may be an Indian or non-Indian or more likely left with no enforcement remedy.

D. Provide a Grandfather Clause for Existing Wills. In 1994, the CSKT realty office sponsored an "Estate Planning" effort. As a result, we have approximately 300 Wills on file for trust landowners. Now, the proposed amendments to the ILCAA have the potential of creating an enormous administrative burden on our staff to prepare Wills and to provide technical estate planning assistance. As a P.L. 93-638 Compact program responsible for providing Will drafting assistance, CSKT recommends that some consideration be given to Indian landowners who already have a Will and some flexibility provided to the judge to interpret the devise in a manner that best reflects the knowledge that the landowner probably had at the time of preparing his or her Will.

E. Development of a Land Title and Records [LTRO] System to Track Life Estates and Fee Interests held by Non-Indians and Allocate Funding for Notification Provisions. Again, CSKT compacted the federal function of operating the title plant for recording, maintaining, and certifying of title documents, and the issuance of title status reports. The intestate section of ILCAA requires recording of life estates and possibly fee interests. Our present system has the ability to track a life estate by including it on the Title Status Report (TSR). However, in a case where the life estate holder is a non-tribal member and the owner dies, it becomes difficult to track, as non-members are not probated in the same manner as Tribal members. Also, when an interest is fee patented, there is no way to keep track of a life estate. Similarly, CSKT supports the concept of joint tenancies right of survivorship as an estate planning tool, however, the ability to track such interests requires additional discussions.

In addition, Section 207 provides for a notification to landowners of their interests in trust property and this is a good concept. However, CSKT recommends further review of the ability of Land Titles and Records to achieve this goal in a cost effective manner and allocate the necessary funding to effectively accomplish notice.

F. Encourage Broad Secretarial Authority to Approve Tribal Probate Codes. The CSKT requests that Substitute S. 550 authorize the Secretary to approve a Tribal Probate Code that a Tribal government has enacted to determine inheritance and land consolidation efforts of the Tribes for allotted lands. The proposed Uniform Federal Probate Code should only be applicable if Tribes do not have governing Tribal law. The Indian tribes are in the best position to identify and eventually resolve fractionated interests on their reservation. Nonetheless, Substitute S. 550 purposes federal restrictions on the approval of a Tribal Probate Code that merits further review and discussion. In addition, since authorized in 1983 by ILCA, there are very few Tribal Probate Codes approved by Secretary. In general, the barriers to enacting Tribal Probate Codes should be recognized and alleviated through the Secretarial approval process required in ILCAA and proposed amendments.

G. Recognize Tribal Court Findings Through Regulations and Authority to Probate Trust Estates. Section 207 of the ILCAA provides for the use of Tribal Court findings of fact and conclusions of law by regulations of the Secretary. To date, the Secretary has not proposed such regulations. However, ILCAA should recognize Tribal Court as a forum to facilitate probate of estates of its members. The proposed amendments should recognize that the Secretary may grant Tribal Court authority upon certain conditions defined by regulation or pursuant to the 638 compact process. This may alleviate a choice of law question, expedite probate of member estates and reduce the number of forums required to probate the estate of a tribal member. For example, generally state law applies to probate trust estates if no applicable tribal law applies. With the enactment of a Uniform Federal Probate Code for inheritance of trust property, Tribes are faced with determining which law applies to non trust property. With the enactment of a Tribal Probate Code, tribal law should apply to the entire estate and authorizing Tribal Court adjudication will expedite the process. This is an area worthy of further exploration and discussion.

H. Family and Private Trust Pilot. Section 207 provides an amendment to develop a Family and Private Trust Pilot Program. This concept requires more information to respond. It is unclear how you create a trust relationship within another trust obligation. In addition, federal law allows only tribes and individual Indians to hold property in trust. Those laws may require an amendment for a family trust. However, CSKT has found a general interest among our membership in this concept.

I. Unclaimed and Abandoned Property. Another amendment to Section 207, provides a process for the unclaimed and abandoned property. This section also requires further information and clarification. In general, we recognize there should be some exception for minors, non compos, etc., as well as additional due process prior to abandoning IIM monies. In

general, CSKT supports amendments to allow individuals and Tribes an opportunity to purchase undivided interests of co-owners whose whereabouts are unknown or after notice is published. A process should be developed to provide for adjudicated in Tribal Court to protect the due process interests of individuals. Similarly, the abandonment provisions should also have strict guidance. However, CSKT would suggest that the voluntary abandonment process should follow the gift deed provisions as a better process. The efforts to find missing persons is a good process and probably the most cost effective. Again, this is an area that requires funding to be successful.

III. Land Acquisition.

Section 213 limits CSKT from participating in the pilot programs for acquisition of fractional interests. In general, the funding for the pilot land acquisition projects provided for in the ILCAA are not available for compact Tribal programs. However, due to our aggressive land acquisition, CSKT are in a position to counteract the fractionated interest on our reservation with additional funding. The CSKT identified 200 tracts of land in which the CSKT owns more than 50 percent interest. The total amount needed to acquire the remaining interests in these tracts is just under $6.5 million with less than 15 percent going towards appraisals and administrative costs. In May, 2003, we submitted this proposal for funding to the Department for review.

By acquiring these interests, the CSKT would eliminate over 3000 Individual Indian Monies (IIM) accounts that have minimal value. In fact, several of the listed specific interests have only a two percent ownership interest. For example, one tract has 14 owners with a combined total interest of only 0.62 percent on an 80-acre tract, while another track has 43 owners with a combined total interest of only two percent on 79.6 acres. Both of these particular tracts of land have active agricultural leases in place requiring administrative overhead to manage, record, and distribute small amounts of money to 57 individual owners. Therefore, consolidation of these ownerships is a prudent alternative that would eliminate the on-going costs to perform managerial duties, while eliminating the IIM accounts. Therefore, the CSKT requests that this Committee consider recommending an allocation for funding specifically for P.L. 93-638 Compact Tribes.

IV. Non-Probate Amendments.

A. Clarify the Leasing Authority of Tribes or Indian Landowners with Majority Ownership and applicability of ILCAA to approval of Rights-of-Way. Based on the number of owners in a tract of land, the ILCAA provides an applicable percentage of owner's consent required for approval of an lease. However, if there are five or fewer owners of undivided interest, a lease requires consent of all the landowners (regardless of the amount of undivided interest owned) prior to approval. 25 U.S.C. § 2218. Substitute S. 550 amends ILCAA to clarify the process and grant authority to the Secretary to approve leases with 90 percent consent. In addition, this is an opportunity for the Committee to recognize that generally federal law and regulations require consent of the Tribe with ownership interest in a tract of land prior to approval of a right-of-way across such land. 25 Code of Federal Regulations, Part 169.

Therefore, CSKT recommends that "rights-of-way" be stricken from the heading in section 2218.

B. Tribal Notification of Trust to Fee Status with Option to Purchase. In Section 217, CSKT supports the amendment and clarification of paragraph (f) providing the Tribes an opportunity to purchase prior to the Secretary terminating trust status. This provision is also required in Section 207 of ILCAA for probate of estates. In addition, this amendment again requires a definition of a "family farm."

C. Partition. Section 205 of Substitute S. 550 in general recognizes the sovereignty of Tribes for partitioning highly fractionated interests. CSKT supports the partition section providing for Tribal consent. The definition of highly fractionated requires further development and we request additional opportunity to respond. CSKT would also recommend that tribal newspapers are recognized as newspapers of general circulation. Again, notification and due process are key to the process. Further, CSKT supports the limitation of potential buyers pursuant to current regulations that require Tribal consent for nonmember acquisitions. 25 CFR §151.8.

Next we should review the issues surrounding dry or passive trust land status as well as when a fee patent is issued on an undivided interest in the land. By operation of law, a non-Indian inheriting trust property cannot hold such interest in trust. However, even if reacquired by a Tribe or Indian the land does not revert back to trust status but rather requires the fee to trust application. Still, it would be helpful to identify a forum such as federal or tribal court to resolve some of these issues.

V. Allocation of Funding for P. L. 93-638 Tribes for Compact Realty Programs.

The complexity of the ILCAA and estate planning services will require training of staff, notice to Indian landowners, development of a Tribal Code and upgrading the system for Land Title and Records. In addition, the funding for the pilot land acquisition projects provided in the ILCAA are not available for compact Tribal programs. The CSKT should not be penalized for pursuing self-governance through compacting federal functions. Therefore, the CSKT requests that this Committee consider recommending an allocation for funding specifically for P.L. 93-638 Compact Tribes for the following functions:

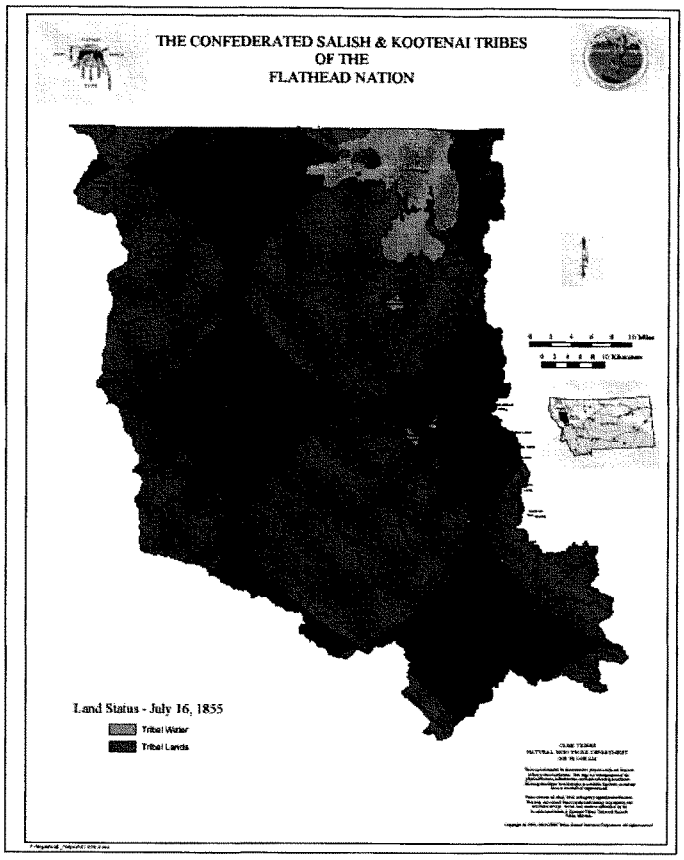
1. Training
2. Estate Planning Services
3. Development of Tribal Probate Codes
4. LTRO Upgrade and Development of a Tracking System
5. Land Acquisition Funding for Compact Tribes to Acquire Fractional Interests.

VI. Summary.

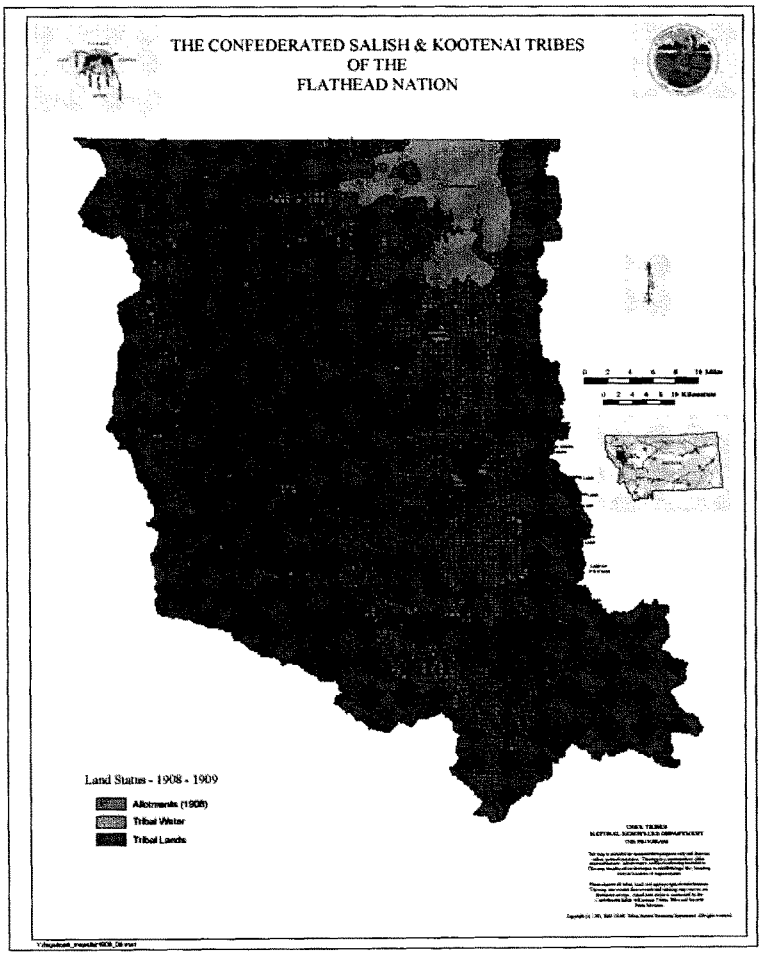
Again, CSKT appreciates the opportunity to participate in the amendment of this very important legislation. CSKT understands the complex nature of Indian land issues and recognize that there is no easy solution or legislative answer. Still, there are many positive aspects in the ILCAA and the proposed amendments in the Substitute S. 550. This testimony touches upon some of the issues CSKT has experienced over the years, as well as the recent concerns raised since the passage of the Indian Land Consolidation Act Amendments of 2000 by our membership. We look forward to working on the technical issues surrounding Substitute S. 550 and hope to provide additional comments as requested.

Submitted By:

D. Fred Matt
Chairman, Tribal Council



CSKT Land Status - July 16, 1855



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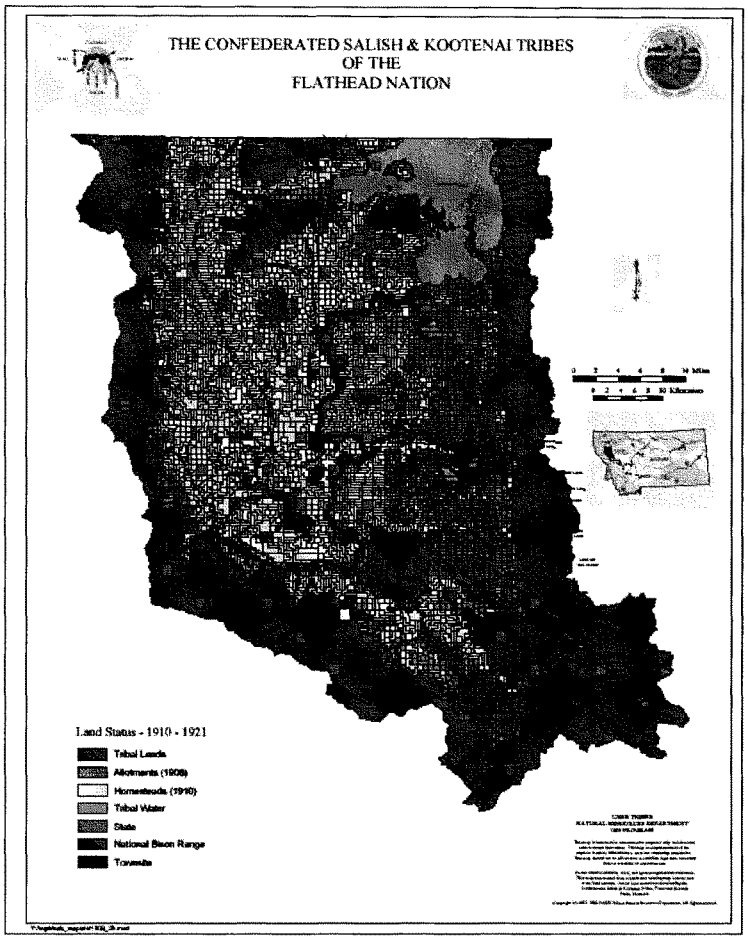

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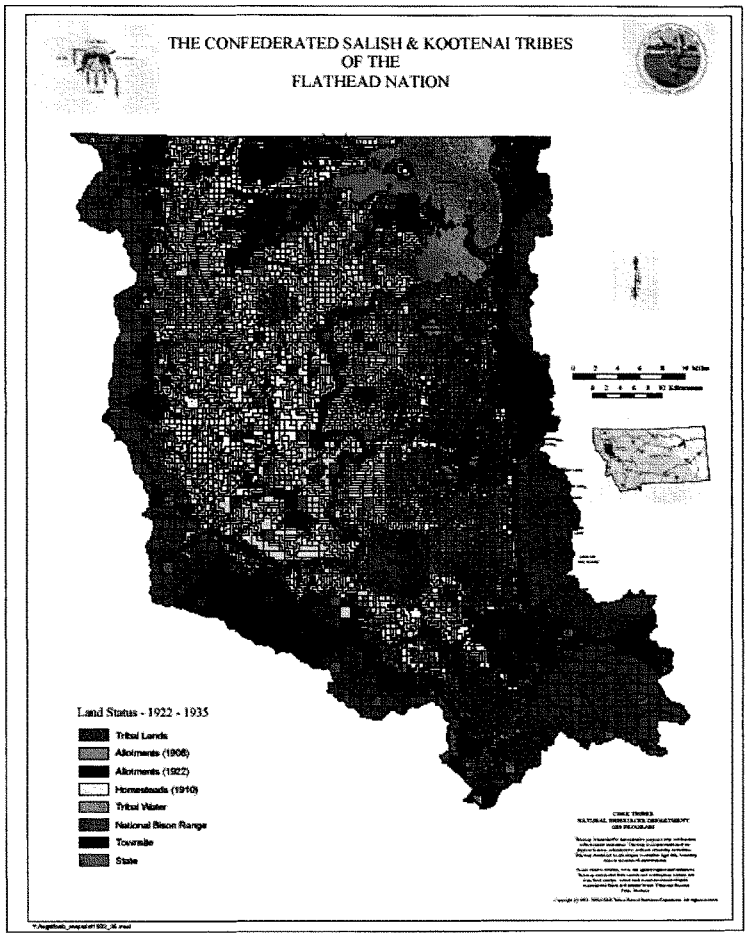

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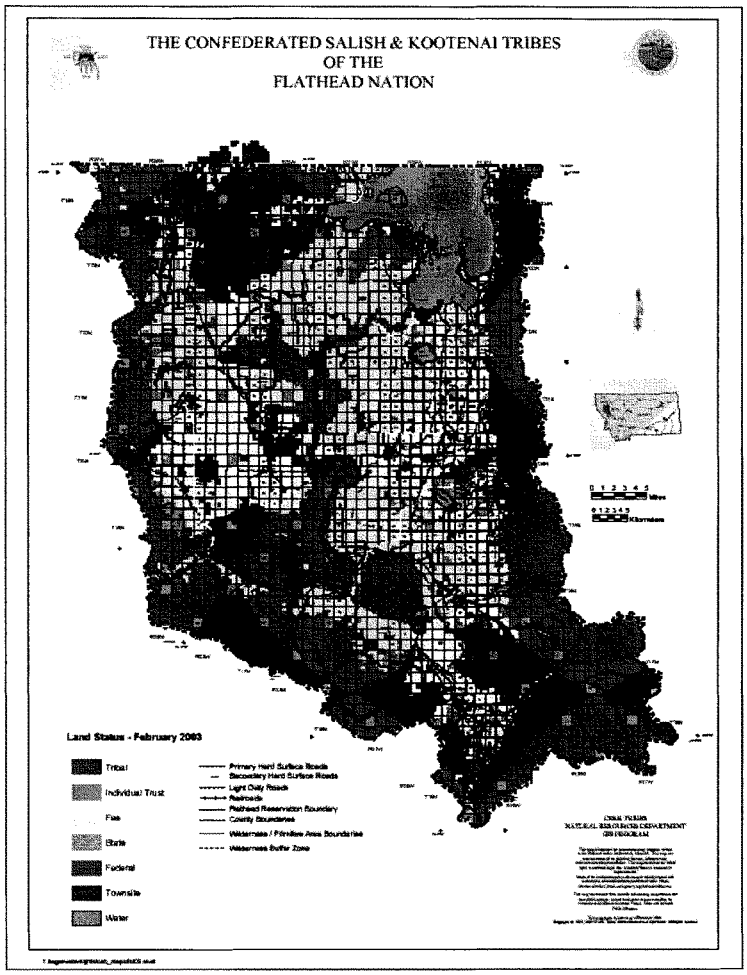

CSKT Land Status February, 2003

TESTIMONY

OF

WAYNE NORDWALL

DIRECTOR, WESTERN REGION

BUREAU OF INDIAN AFFAIRS

U.S. DEPARTMENT OF THE INTERIOR

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

HEARING ON

S. 550, THE "AMERICAN INDIAN PROBATE REFORM ACT OF 2003"

October 15, 2003

Mr. Chairman, Mr. Vice Chairman and Members of the Committee, I am pleased to be here today to provide the Administration's views on S. 550, a bill to amend the Indian Land Consolidation Act (ILCA) to improve provisions relating to the probate of trust and restricted land. Since a new version of S. 550 was introduced yesterday the Administration did not have time to review the bill but will submit our views after our review is complete. The Department believes that probate reform is important. This bill also appears to be an effort to take the Fractionation of lands, in a marginal way, through the probate reform process. The Department urges the Committee to seriously and meaningfully address land fractionation in Indian County.

For nearly one hundred years, this problem has grown, and we are now at the point where absent serious corrective action millions of acres of land will be owned in such small ownership interests that no individual owner will derive any meaningful value from that ownership. The ownership of many disparate, uneconomic, small interests benefits no one in Indian Country and creates an administrative burden that drains resources away from other beneficial Indian programs.

While Congress has occasionally taken bold steps, such as attempting to have interests of two percent or less escheat to the tribe, sadly, a consistent theme within the history of legislation attempting to deal with fractionation has been that needed provisions are often deleted or compromised in an effort to reach consensus in Indian Country. In many instances, the hard decisions have been avoided. This conflict avoidance has resulted in an incomplete legislative solution to the problem and fractionation has continued to grow. Given the state of fractionation on many reservations, S. 550 may, in fact, be the last opportunity to meaningfully address this issue, if it is not too late to do so. Accordingly, Congress should carefully consider what its goals and objectives are and ask whether its efforts will make a meaningful difference in the challenges presented by fractionation in Indian Country.

We must find a way to consolidate Indian land ownership in order to restore full economic viability to Indian assets. Any meaningful effort for land consolidation also should include provisions relating to probate reform. We welcome the opportunity to work closely with the Committee to craft legislation that will better meet the dual goals of probate reform and the consolidation of fractionated land.

Over time, the system of allotments established by the General Allotment Act (GAA) of 1887 has resulted in the fractionation of ownership of Indian land. As original allottees died, their heirs received an equal, undivided interest in the allottee's lands. In successive generations, smaller undivided interests descended to the next generation. Fractionated interests in individual Indian allotted land continue to expand exponentially with each new generation. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly. These four million interests could expand to 11 million interests by the year 2030 unless an aggressive approach to fractionation is taken. There are now single pieces of property with ownership interests that are less than 0.0000001 percent or 1/9 millionth of the whole interest, which has an estimated value of .004 cent.

The Department is involved in the management of 100,000 leases for individual Indians and tribes on trust land that encompasses approximately 56 million acres. Leasing, use permits, sale

revenues, and interest of approximately $226 million per year are collected for approximately 230,000 individual Indian money (IIM) accounts, and about $530 million per year are collected for approximately 1,400 tribal accounts. In addition, the trust currently manages approximately $2.8 billion in tribal funds and $400 million in individual Indian funds.

There are approximately 230,000 open individual Indian money accounts, the majority of which have balances under $100 and annual throughput of less than $1,000. Interior maintains over 19,500 accounts with a balance between one cent and one dollar, and no activity for the previous 18 months. Total sum included in these accounts is about $5,700, for an average balance of .30¢. On average each IIM account costs about $150 per year to maintain. At that average rate, it costs almost $3,000,000 to manage these accounts. Nonetheless, the Department has an equal responsibility to manage each account and the real property associated with it, no matter how small and regardless of account balance. Obviously, no one benefits from such expenditures.

Under current regulations, probates need to be completed for every account with trust assets, even those with balances between one cent and one dollar. While the average cost for a probate process exceeds $3,000, even a streamlined, expedited process (if one was available) costing as little as $500 would require almost $10,000,000 to probate the $5,700 in these accounts.

The Committee should also be mindful of the recent ruling in the *Cobell* case, and its implications for the cost of administering the many small interests now held in trust for individual Indians. On September 25 of this year, Judge Lamberth issued a ruling in the *Cobell* litigation with regard to the breadth of the Secretary's accounting duties for individual Indian money accounts. The ruling requires an accounting method that involves transaction-by –transaction verification and expands the scope of the historical accounting from the one proposed by the Department.

The Department submitted a plan to the court that would have cost approximately $335 million. The court decided in essence that Congress intended that historical accounting provides a complete history of all financial transactions in IIM accounts and all individual Indian land ownership transactions since the passage of the GAA in 1887. The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting

land ownership records. The Department currently holds more than 600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the majority of these records. The court has ordered that the bulk of the accounting be completed in three years, although it allowed the Department to propose a revised timetable, in light of the scope of duties imposed by the court. The Department's January 2003 plan had a five-year time frame for a much smaller project.

Unlike most private trusts, the Federal Government bears the entire cost of administering the Indian trust. As a result, the usual incentives found in the commercial sector for reducing the number of small or inactive accounts do not apply to the Indian trust. Similarly, the United States has not adopted many of the tools that States and local government entities have for ensuring that unclaimed or abandoned property is returned to productive use within the local community.

PERSISTENT PROBLEM

The overwhelming need to address fractionation is not a new issue. In the 1920's the Brookings Institute conducted the first major investigation of the impacts of fractionation. This report, which became known as the Merriam Report, was issued in 1928 and formed the basis for land reform provisions that were included in what would become the Indian Reorganization Act of 1934 (IRA). The original versions of the IRA included two key titles; one dealing with probate and the other with land consolidation. Because of opposition to many of these provisions in Indian Country, most of these provisions were removed and only a few basic land reform and probate measures were included in the final bill. Thus, although the IRA made major reforms in the structure of tribes and stopped the allotment process, it did not meaningfully address fractionation (and the subsequent adverse impacts in the probate process).

Accordingly, in August 1938, the Department convened a meeting in Glacier Park, Montana, in an attempt to formulate a solution to the fractionation problem. Among the observations made in 1938 were that there should be three objectives to any land program: stop the loss of trust land; put the land into productive use by Indians; and reduce unproductive administrative expenses.

Another observation made was that any meaningful program must address probate procedures and land consolidation. It was also observed that Indians themselves were aware of the problem and many would be willing to sell their interests.

Similar observations were made in 1977 when the American Indian Policy Review Commission reported to Congress that "although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments" and that "more than 10 million acres of Indian land are burdened by this bizarre pattern of ownership." The Commission reiterated the need to consolidate and acquire fractionated interests and suggested in this report several recommendations on how to do so. Many of the observations and objectives made in 1938 and 1977 are the same today.

In 1992 the General Accounting Office (GAO) conducted an audit of 12 reservations to determine the severity of fractionation on those reservations. The GAO found that on the 12 reservations upon which it compiled data, there were approximately 80,000 discrete owners but, because of fractionation, there were over a million ownership records associated with those owners. The GAO also found that if the land was physically divided by the fractional interests, many of these interests would represent less than one square foot of ground. In early 2002, the Department attempted to replicate the audit methodology used by the GAO and to update the GAO report data to assess the continued growth of fractionation and found that it grew by over 40 percent between 1992 and 2002.

As an example of continuing fractionation, consider a real tract identified in 1987 in *Hodel v. Irving* (481 U.S. 704 (1987):

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be

entitled to $.000418. The administrative costs of handling this tract are estimated by the BIA at $17,560 annually.

Today, this tract produces $2,000 in income annually and is valued at $22,000. It now has 505 owners but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the 505 owners could agree) for its estimated $22,000 value, the smallest heir would now be entitled to $.00001824. The administrative costs of handling this tract in 2003 are estimated by the BIA at $42,800.

Fractionation continues to become significantly worse and as pointed out above, in some cases the land is so highly fractionated that it can never be made productive because the ownership interests are so small it is nearly impossible to obtain the level of consent necessary to lease the land. In addition, to manage highly fractionated parcels of land, the government spends more money probating estates, maintaining title records, leasing the land, and attempting to manage and distribute tiny amounts of income to individual owners than is received in income from the land. In many cases the costs associated with managing these lands can be significantly more than the value of the underlying asset.

CONGRESSIONAL RESPONSE

Congress recognized 20 years ago the need to take firm action to resolve the problem of small uneconomic interests in Indian land. In 1983 Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than 2 percent. A lawsuit challenging the constitutionality of ILCA was filed shortly after its passage. While the lawsuit was pending Congress addressed concerns with ILCA expressed by Indian tribes and individual Indian owners by passing amendments to ILCA in 1984.

In 1987, the United States Supreme Court held the escheat provision contained in ILCA as unconstitutional because "it effectively abolishes both descent and devise of these property

interests." (See *Hodel v. Irving* (481 U.S. 704, 716 (1987)). However, the Court stated that it may be appropriate to create a system where escheat would occur when the interest holder died intestate but allowed the interest holder to devise his or her interest. The Court did not opine on the constitutionality of the 1984 amendments in the *Hodel* opinion. However in 1997, in *Babbit v. Youpee* (519 U.S. 234 (1997)), the Court held the 1984 amendments unconstitutional as well.

As a result, Committee staff, the Department, tribal leaders, and representatives of allottees worked together to craft new ILCA legislation. This cooperation led to enactment of the Indian Land Consolidation Act Amendments of 2000. Neither the 1984 amendments nor the 2000 amendments authorized the system discussed by the Court in *Hodel* where an interest holder would be able to devise his interest to an heir of his choice.

The 2000 amendments attempted to address the fractionation problem through inheritance restrictions which, when effective, would make certain heirs and devisees ineligible to inherit in trust status, and require that certain interests be held by the heirs and devisees as joint tenants, with rights of survivorship. The legislation also contained provisions for the consolidation of fractional interests. Tribes and individual allotment owners can now consolidate their interests via purchase or exchange, with fewer restrictions. The legislation also attempted to enhance opportunities for economic development by negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. Finally, the amendments extended the Secretary's authority to acquire fractional interests through the Indian land acquisition pilot program, with the establishment of an Acquisition Fund, and the authorization of annual appropriations to help fund the acquisitions. While many of these new authorities were immediately effective, the inheritance restrictions were not. Under ILCA, the Secretary is required to certify that she has provided certain notices about the probate provisions of the 2000 amendments before most of these provisions become effective. Congress requested that the Secretary not certify because additional amendments were needed.

Some of the land related provisions are currently in effect. For example, the ILCA pilot project has acquired a total of 58,297 interests. However, during this period the number of fractionated interest grew even larger. Moreover, completion of the first phase in the Midwest Region, Great

Lakes Agency, is expected by December 2003, signifying that majority ownership has been achieved on the first three reservations. In addition, as mentioned above, the 2000 amendments have begun enhancing opportunities for economic development by providing for negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. This has streamlined the leasing process for land owners to enter into business and mineral leases. While many of the land related provisions have proven to be successful, many other provisions, especially the probate provision, have proven to be complicated and difficult to implement.

DEPARTMENTAL CONCERNS AND SOLUTIONS

The Department of the Interior was hopeful that the 2000 amendments would solve the fractionation problem. During congressional hearings on the amendments, the then Assistant Secretary Kevin Gover testified that the amendments would both eliminate or consolidate the number of existing fractional interests and prevent or substantially slow future fractionation. He also stated that several technical amendments needed to be made to the legislation.

Unfortunately, the 2000 amendments have not solved the issue, in part due to ambiguities in the statute and in part due to the possibility that full implementation could result in the loss of trust status for a significant part of the Indian land base. The 2000 amendments have proven to be complicated and difficult to implement. In addition, certain provisions were left to be dealt with in an anticipated package of amendments. For instance, the 2000 amendments do not contain a federal code of intestate succession; state laws of wills do not apply in testate cases and the federal law of wills leaves many gaps; and certain lands in California and Alaska were exempted from the probate provisions. At the same time, fractionation continues to be a pervasive problem in Indian Country. Therefore, prior to passing legislation Congress should thoroughly consider the above issues as well as authority to dispose of unclaimed property; authority to partition to permit individuals as well as tribes to consolidate land holdings; expedited, less cumbersome probate for small estates; and authority to purchase highly fractionated interests without consent during probate.

As stated above, two important areas need to be addressed in any future amendments: unclaimed property and the partition of land.

Under state law, a state may sell or auction off certain personal property that has not been claimed by an owner within a certain amount of time, usually within 5 years. This is not the case with inactive IIM accounts or real property interests. Often times the whereabouts of account owners are unknown to the Department because account holders do not respond to our requests for address information and our repeated attempts to locate them have been unsuccessful. This may be because the small amount in their account does not make such effort worthwhile. However, the Department must account for every interest regardless of size and we do not have the authority to stop administering accounts where whereabouts of the owner are unknown. We must have the authority to close these small accounts and restore economic value to the assets if the owner does not claim their interest within a certain amount of time. If the owner does not come forward, the revenue generated from the interest should be held in a general holding account against which claims could be made in the future if the owner's whereabouts become known or the interest could be used to further the fractionation program.

Partition authority is also important to the Department. The existing partition statute authorizes sales to tribes that have obtained majority ownership or consent, but that authority has seldom been used to date. A partition in kind authority is needed to give owners the ability to obtain a discrete parcel of land where feasible. Equally important, however, is the ability to trigger the sale of fractionated land which cannot be feasibly partitioned. The existing sales authority should be simplified, extended to individual Indian landowners, and possibly broadened to reduce the consent requirement where highly fractionated land is involved. We would like to work with the Committee to come up with an appropriate process to conduct these sales, and also to make the pilot program more applicable. Unless the Department has the authority to deal with deminimus holdings, more and more lands will simply become unmanageable.

The Department has been heavily engaged on working toward a constructive solution to these issues. Over the last six months the Department has worked with congressional staff, the Indian Land Working Group, and the National Congress of American Indians on developing ideas and

legislative language to constructively address probate reform and land consolidation. We have made significant progress, however, much remains to be done.

CONCLUSION

Thank you, Mr. Chairman, Mr. Vice Chairman and Members, for taking the lead on these important issues for Indian people and trust reform. Too often key provisions needed to address this issue have been struck out of legislation in an attempt to accomodate opposition. Tough decisions are going to have to be made in order to solve this issue so that we can have a workable program that addresses fractionation in a meaningful way. This concludes my statement. I will be happy to answer any questions you may have.

TESTIMONY ON S. 550, THE INDIAN PROBATE REFORM ACT OF 2003
Before the Senate Committee on Indian Affairs

SUBMITTED BY THE
INDIAN LAND WORKING GROUP

PRESENTED BY AUSTIN NUNEZ,
CHAIRMAN OF THE INDIAN LAND WORKING GROUP
October 15, 2003

The Indian Land Working Group ("ILWG") thanks the Committee for its invitation to appear and provide testimony concerning further proposed amendments to the Indian Land Consolidation Act.

We have attached to our written testimony four appendices: (1) An overview of fractionation, Indian probate, ILCA and trust reform, (2) a copy of a draft uniform probate code prepared by our organization, (3) our prior testimony submitted May 7, 2003 and (4) a chart entitled "Addressing Fractionation."

I. HISTORICAL FACTS

I begin my testimony by referencing important historical facts:

1. DOI'S HISTORICAL RECORD IS NEGATIVE.

   The Department of Interior has never properly administered the allotted land base. The 1996 Cobell suit could as easily been filed in 1913 when the department had a probate backlog of 40,000 cases involving estate assets worth $60 million dollars.

2. THERE HAS BEEN NO TRUE EFFORT TO MANAGE ALLOTTED LANDS.

   The federal government has, in fact, spent less time and money attempting to manage allotted lands than it has devising methods of getting out from under the burdens associated with its role as trustee.

3. ELIMINATION NOT MANAGEMENT OF ALLOTTED LANDS WAS DESIRED.

During the peak in the allotment period (1916-1921), forced fees were issued as fast as land was being allotted.

That fact was cited as a departmental accomplishment.

4. THERE IS A LONG HISTORY OF INADEQUATE APPROPRIATIONS.

WW I produced reduced Indian appropriations. So did the Great Depression which immediately followed.

On the heels of the depression, WW II ensued. It again constricted Indian appropriations.

WW II was followed by aggressive Termination in which Indian tribes and lands were eliminated for the government's fiscal benefit.

5. OVER TWO DECADES OF RECENT BUDGET STAGNATION.

After a 5-year boom in the 1970s early self-determination era, budget stagnation again set in, as documented by recent Tribal Priority Allocation studies.

6. FRACTIONATION WAS WORSENED BY INADEQUATE SYSTEMS.

Eras of budget and program constriction have produced the chaotic conditions in the allotted land base and fostered uncontrolled fractionation.

At no time did the government inform landowners of the need to avoid fractionation by Indian estate planning.

Estate planning would, at any point, have been a very cost effective way of helping curb the growth of fractionation.

7. INEFFECTIVE NOVELTY EXPERIMENTS WERE USED IN A QUEST FOR A CHEAP FIX.

In 1983 and 1984, the government looked only to legal experiments to make fractionation go away cheaply.

The vehicle selected twice, the "2% rule," was a costly and abject failure.

8. TRUST REFORM IS LITIGATION- AND BUDGET- DRIVEN.

Since 1996, all trust reform measures have been litigation-driven and have done little to address the actual needs of Indians.

The most ironic feature of trust reform is that in an era of decreased central government, Indians have been given double bureaucracies (OST and BIA) to siphon off funds needed for vital community programs.

Despite double bureaucracies, the probate backlog has grown.

9. ILCA 2000 WAS DISASTROUS.

A low point in reform occurred on November 7, 2000. On that date, the devastating amendments to the Indian Land Consolidation Act were passed.

The legislation was incomprehensible. Its extraordinarily narrow definition of "Indian" unleashed widespread panic in Indian Country that, in turn, produced a tidal wave of fee patent applications. This consequence defeated one of the Act's primary goals—enhancement of tribal sovereignty.

II. PROGRESS

I quote from the overview attached to the testimony:

"For the first time in the history of ILCA, it is now possible to say that genuine progress has been made."

"Current proposals do not, as past ones have, assume that landowners will bear sole sacrifice for fixing a problem about which the government dropped the ball and made worse by reducing its performance capability at the time the problem of fractionation was exploding."

III. NO REALISTIC QUICK FIXES

It is important to reiterate a remark made by an Interior witness at the May 7, 2003 hearing.

> There are "no quick fixes to the problem of fraction." This has *always* been the ILWG's position.

IV. ILWG SUPPORTS

The ILWG supports the implementation of a steady, long-term, adequately funded program of:

- Tribal and individual consolidation and acquisition of fractional interests
- Reasonable inheritance limitations using standard and accepted principles of law
- Life estates to avoid loss of trust status of allotted lands
- Permanent enhancement of individual estate planning capability to reduce fractionation
- A proper definition of Indian
- Adequate landowner access to information about their own lands
- The elimination of experimental estates in land that have no foundation in known law
- Amendments that are written in a style comprehensible to the users
- True consultation with interests directly affected by trust reform measures
- The ability of landowners to engage in owner-management of parcels if all owners agree
- Grants to legal services agencies to provide services to landowners and tribes for probate, estate planning and code writing activities

- A well-thought out and carefully structured family and private trusts pilot project that protects against overreaching by third parties and preserves trust status

- The inclusion of tribes in the land acquisition pilot project and adequate funding for acquisitions

- A secretarially-maintained recording system for tribal inheritance codes which are encouraged under ILCA.

- The establishment of missing persons investigation systems with appropriate unclaimed property provisions tailored for small accounts and, possibly, small or highly-fractionated land interests.

- Abandonment provisions are supported only to the extent that genuine efforts are made to locate the true owners.

V. ILWG DOES NOT SUPPORT:

The ILWG does not support the following measures in or associated with S. 550 and trust reform.

- Purely litigation-driven reform processes that have as their primary goal the avoidance of burden to the trustee without commensurate benefit to the landowners and tribes (E.g.'s intestate joint tenancy, improper restraints on alienation of joint tenancy interests and passive trust interests)

- At this time, the inclusion of partitionment provisions in the ILCA amendments proposed under S. 550 until the reasons for partitionment's devastating effects are studied in those regions where partition has been widely used (E.g. Eastern Oklahoma) and eliminated in the legislative proposal

- Land performance Contracts with contractor payment tied to savings to the government since, as with HMOs, the correlation could create an institutional conflict of interest that operates against the interests of the actual holder of the property right

- S. 550 or S. 550 Substitute's intestate untested descent pattern [i.e. descendants, followed by siblings, then, parents] that does not

follow inheritance based upon degree of consanguinity (relationship). The consequences of the novel structure are not known and have not been examined for unintended consequences.

- In the S. 550 Substitute's descent provisions, the non-specification of a spousal life estate share size when the decedent is survived by Indian issue

- In the testate provisions, forced shares for spouses and children in existence at the time of the testamentary act; the provision nullifies the purpose of will making

- The succession provisions' rules of construction and interpretation as written. They need to be re-worded in plain language

VI. ILWG CONCERNS

The ILWG is specifically concerned about the following:

- ILCA 2000's expansion of gift deeding or provisions for deeding at less than fair market value to promote land consolidation in ILCA are being used to by-pass land sale requirements in certain regions. This problem requires prompt evaluation and corrective action.

- All legislative proposals involving ILCA to date and related reform processes have been done without benefit or perceived need for prior data development or resources studies.

  The consequences are inadequate data are self-evident.

  At least 1/3 of the Indian population was rendered non-Indian by ILCA 2000. Actual existing Indian owners of trust lands were rendered non-Indians holding trust interests. The trust status of California and other public domain allotments was imperiled not only by the definition of Indian but by off-reservation descent provisions.

  Hard data is needed for each allotted area so that the impact of particular reform measures can be ascertained.

  Such information should include but is not limited to: How many allotments were made, the authority for allotting, when allotting occurred. For each reservation, the tribes to whom allotments were

made and whether allotting was on or off reservation. If off-reservation, whether any tribe asserts jurisdiction. If on reservation, whether more than one tribe asserts jurisdiction. The amount of tribal land in relation to allotted land for each allotted reservation or area. The number of allotments for each tribe still in trust status. The number of owners in each allotment of trust/restricted and fee interests. The uses for which the lands may be developed which also has bearing on value.

The routine federal response when pressed to develop base data is that the legislative and trust reform processes cannot be held up to develop such data.

This is the equivalent of saying that it is a mistake to defer house construction merely because no foundation has been laid or framing erected.

There is nothing to prevent the data from being compiled rapidly by the Department of Interior since all information is readily available through BIA's Land Titles and Records Offices, BIA agency offices and records BIA possesses for each of the allotted tribes.

In fact, the Department cannot possibly perform trust fund accounting without having the data compiled, especially as to the numbers of allotments for each area and numbers of owners. Why Interior doesn't know that is unclear.

- Specific concern exists regarding the lack of safeguards and provisions for review of ILCA 2000's geographic unit valuation processes used for assigning land values to fractional interests slated for acquisition.

- Specific concern also exists about inadequate protections for landowners in partitionment where incidents of value could be peeled off leaving remaining owners with a devalued resource. The partitionment processes in S. 550 and the substitute contemplate situations in which certain interests aren't susceptible to partition and may not be disposed of by partitionment by sale.

- Significant concern is noted about comments reported to have been made by the Special Trustee regarding burdening IIM accounts

with administrative fees in order to consume or "confiscate" the accounts rather than effectuate actual distribution to the owners.

- Similar concerns are present about remarks widely attributed to the Special Trustee that allotted lands should go to fee simple or be sold on the court house steps referencing sharp practices that produced massive allotted land loss in Eastern Oklahoma.

- There is also evidence that OST officials do not understand the correlation between probate reform and trust fund accounting and distribution issues.

  Certain high-level officials, despite the Department's own Heirship Task Force studies, appear to oppose a Uniform Probate Code. They are said to favor trust reform, first, oblivious to the correlation between the determination of title and trust fund distribution.

  At a minimum, 92% of all titles to allotted lands are transferred in probate. Ascertainment of account distributees is largely a function of probate. Simplification through uniformity of applicable inheritance laws is essential to trust reform

- A major concern is also present that the federal government, in light of recent supreme court cases, has not declared allotted land consolidation, acquisition, regulation and inheritance preempted subject matters for which there is no room for involvement by non-federal or tribal interests. Unless the subject matters are so declared, the federal goals of fractionation resolution and trust fund accounting could easily be impaired.

VII. CONCLUSION

The ILWG suggests that S. 550's substitute be streamlined to enact those provisions that are critical to repairing the problems created by ILCA 2000 and the numerous provisions about which there is general consensus.

Action should be deferred on provisions that warrant further study or raise serious legal questions.

ATTACHMENT #1:

BRIEF HISTORICAL OVERVIEW OF FRACTIONATION, PROBATE, ILCA AND TRUST REFORM
(Prepared by S. Willett, September 2003 for the ILWG)
13th Annual Indian Land Symposium

Indian Country is at the threshold of a new century and millennium. One-fifth of its land base is shackled by the residue of a malformed but enduring policy experiment that that had no chance of working under any set of assumptions. Allotting like most federal Indian policies was designed primarily to ensure that Indians would no longer be cared for by the federal government. What it produced was demographic collapse for Indians nationwide.

Allotting did not spontaneously combust upon Indian Country in 1887. By 1863, allotting had been around for more than 60 years. Between 1850 and 1860, 8,595 patents for and certificates of allotment were issued. In 1875, homestead privileges were extended to Indians.

Despite the fact that inheritance accounts, today, for at least 92% of allotted interest title transfers and probably 100% in the early years of allotting, no formal authorization for probate of allotments existed for nearly a quarter of a century after the General Allotment Act of 1887 was passed. Presumably, the reason for the omission was that the lion's share of allotments were to lose their trust or restricted status in 25 years. At that point, the Indian problem "was to melt away like the snow in the spring" according to Henry Dawes the architect of allotting.

When provisions were finally enacted in 1910 (25 USC §§ 372 and 373), it was not for the benefit of Indians. Formal process was instituted at the instance of people who acquired Indian allotted interests. They demanded a system that assured the integrity of their title.

Prior to 1910, the department handled probate in an ad hoc way. The power to probate was inferred from the requirement of the General Allotment Act that the Secretary convey a patent to the heirs.

Despite the 1910 formalization of probate processes, in 1913, Commissioner Cato Sells reported 40,000 heirship cases awaiting

determination. The estates were collectively valued at $60,000,000. The Department of Interior has never adequately handled its probate function.

More time has, in fact, been devoted in figuring out how to get rid of having the responsibility for Indians than developing and implementing adequate procedures for performing the government's responsibilities to Indians.

Throughout the 20th century, the issue of heirship (fractionation) was periodically raised as a matter that needed to be addressed. No action taken. On January 12, 1983, after the proposal had circulated in the Department for a period of years with technical experts opposing the 2% provision, the Indian Land Consolidation Act was passed.

Its principal features were: authorization for tribal land consolidation plans, authorization of fair market value acquisitions by tribes and the 2% rule.

Of these provisions, only the 2% rule was actively implemented because it was built into the probate system. The 2% rule was the cornerstone of ILCA. It required no additional appropriations to implement and accomplished transfers of interests from decedents' estates to tribes for no compensation.

Recognizing limitations and inequity in the 2% measure as enacted in 1983, § 207 containing the 2% rule, was amended on October 30, 1984.

The 1983 version was struck down by the supreme court in Hodel v. Irving, 481 U.S. 704 (1987). The 1984 amendment was invalidated in Babbitt v. Youpee, 519 U.S. 234 (1997)

Despite two resounding rejections of the rule--with Justice Scalia asking the government at oral argument in Youpee why it was back, since the court had already decided this issue--a third version of the 2% rule was formulated.

The push dissolved when Congress came up with perceived better mouse trap: the Indian Land Consolidation Act Amendments enacted November 7, 2000.

These amendments unleashed a furor in Indian Country that has not abated and will not until its most heinous features are eliminated.

ILCA 2000's primary features are: a significantly narrowed definition of Indian, limited inheritance, an experimental intestate joint tenancy provision,

a secretarial pilot project and establishment of a fund for land acquisition, new consent requirements for transactions, long-awaited provisions giving landowners rights to information about their own land holdings which had previously been denied in many areas, tribal partitionment processes and authorization for landowners to engage in land consolidation transfers in probate.

The criticisms of ILCA 2000 were that the act orphaned large populations of Indians, was incomprehensible to all who attempted to use or explain it, had too many different effective dates and interfered with the ordinary expectations of the average landowners, to name only a few.

Reports were received from throughout Indian Country that landowners were in a panic. NCAI went on record saying that, while the amendments were well intended, they went too far. Landowner groups opposed them as harmful and extremely damaging. Interior shared all the same concerns.

As a result of the widespread negative reaction to ILCA 2000, the drafter of ILCA 2000 developed another set of amendments to ILCA. That proposal, S. 550, suffered from many of the same problems that ILCA 2000 did. In certain respects [e.g. passive trust interest provisions], it made problems created in the 2000 ILCA amendments worse.

It was widely opposed in May 2003 during testimony on the bill before the Senate Indian Affairs Committee. *See* ILWG Testimony Re S. 550 for a full discussion of problems associated with the proposal.

A working group was formed to address fractionation reform. It consists of representatives from landowner groups, tribes, individual landowners, legal services and national Indian organizations.

The hearings showed that there has been a narrowing of differences among the groups and strong unified opposition not only to the most devastating features of ILCA 2000 but also to S. 550 as introduced.

A series of meetings and telephone conferences have been held by the working group. Work assignments have been made and discussions, problems and issues hammered out.

For the first time in the history of ILCA, it is now possible to say that genuine progress has been made. Current proposals do not, as past ones have, assume that landowners will bear sole sacrifice for fixing a problem about

which the government dropped the ball and made worse by reducing its performance capability at the time the problem of fractionation was exploding.

No interest group will get everything they want. However, new provisions will permit Indian people to benefit their families in an ordinary way without having their children and grandchildren of Indian blood (approximately 65% of all inheritance) cut out because someone has altered their status as Indian as a gimmick to further the government's fiscal and administrative interests at the expense of people to whom a trust responsibility is owed.

As to those measures that the ILWG considers lethal. It will continue to fight till the last dog dies to prevent the passage of any measure considered destructive to Indians. ILWG will continue to fight for reform as a function of fixing fractionation reasonably and fairly, not simply shifting the burden to tribes and landowners to get the government off the hook.

ATTACHMENT #2

UNIFORM INDIAN PROBATE CODE
Proposed by the Indian Land Working Group
May 7, 2003

SEC. 501. APPLICABILITY.

(a) IN GENERAL.-

(1) APPLICABIILTY TO TRUST OR RESTRICTED LANDS.- Except as provided in Section 501(a)(2), below, this title shall apply to all Indian trust or restricted allotted lands administered by the United States, except those of the Five Tribes of Oklahoma, the Osage Tribe and in Alaska, and to federally administered personal assets, including IIM and judgment funds.

(2) ELECTION.- A tribe may elect to be exempt from the requirements of this code by issuing a formal resolution of its election not to be covered and, thereafter, filing the resolution with the Secretary of Interior.

(h) NOTIFICATION.- Upon receipt of a formal resolution from a tribe, the Secretary of Interior shall immediately notify local Indian agencies of the Bureau of Indian Affairs and all tribes of the resolution.

(i) LIST.- Annually, the Secretary of Interior shall publish an updated list of tribes that have filed formal exemption resolutions with the Department of Interior. The list will show the date upon which the tribal action was taken.

(j) RULE OF CONSTRUCTION.- Nothing in Section 504 is intended to supersede any tribal succession law that became effective before the date this code was passed.

(k) OTHER LAW.- The trust preservation provisions set forth in Section 502 shall not preclude the application of any other federal law relating to inheritance. Nothing in this section shall be construed to prevent the application in probate of a more restrictive inheritance requirement under tribal law.

(l) SPECIAL LAWS.- A tribe may enact laws relating to inheritance to apply to the lands under its jurisdiction instead of the laws set forth in this code. Upon approval by the Secretary, a tribe's inheritance laws shall supersede the provisions of this code as to that tribe.

(m) COMPILATION.-

(1) Upon approval, the Secretary of Interior shall directly notify each Indian agency and tribe with a probate contract or compact that the enacting tribe has promulgated an inheritance code and its effective date. Notification to the same parties is also required for changes or amendments to tribal inheritance laws.

(2) The Secretary of Interior shall maintain a compilation of all tribal inheritance laws that apply to trust or restricted assets, including changes or amendments to inheritance laws.

(3) The compilation will indicate the date of enactment and the date of approval by the Secretary of Interior, if applicable.

(4) Tribal inheritance laws based upon special statutes will list the public law number, the statute-at-large citation and date of enactment.

(5) Tribal purchase options based upon statutes will list the same information listed in (g)(4) and, where applicable, the Code of Federal Regulations citation.

(6) The compilation of tribal inheritance laws will be updated annually. Publication will be in the Federal Register on February 1.

SEC. 502 PRESERVATION OF TRUST STATUS.

To give effect to the stated purpose of the Indian Land Consolidation Act, as enacted and amended, of the preserving trust status of existing Indian lands, with respect to the probate of allotted lands after the date of enactment of this code-

(a) Inheritance by non-Indians is limited to the receipt of a life estate.

(b) Non-Indian heirs-at-law shall receive a life estate in the amount of an intestate share as determined by reference to applicable law. The remainder passes to the next Indian heirs in line of intestate succession.

(c) Eligible non-Indian devisees receive a life estate of the same size as the share devised to them under the will. Devisee eligibility is established in Section 503, below.

(1) The remainder will pass to the contingent beneficiary, first, or co-beneficiaries, second, if either has been named for the interests devised to a non-Indian.

(2) If no contingent beneficiary has been named or no co-beneficiaries exist, the remainder passes under the residuary clause of the will.

(3) If there is no contingent or co-beneficiary(ies), residuary clause or beneficiary named in the residuary clause, the remainder passes at law to the next Indian heirs as determined by applicable laws of intestate succession.

(h) Nothing in this code prevents conveyance of an interest in trust or restricted lands to a non-Indian.

SEC. 503. ELIGIBLE WILL DEVISEES.

IN GENERAL.- No person shall be entitled to receive an interest in trust or restricted lands covered by this code except as provided below:

(a) Eligible devisees are:

(1) The decedent's heirs-at-law, lineal descendents or relatives of the first or second degree. An exception to this limitation is specifically set forth in subsection (b), below;

(2) Members of the tribe with jurisdiction over the lands devised, or

(3) The tribe with jurisdiction over the devised lands.

(h) SPECIAL RULE.- A testator who does not have a potential devisee from among the classes of eligible devisees listed in Section 503(a)(1),(2) or (3) may devise his or her estate or specific assets thereof to any person related

by blood subject to the trust limitations set forth in Section 502(a) through (c).

(i) JOINT TENANCY.- The devise of a single interest in an allotment to multiple beneficiaries shall be construed as a joint tenancy with a right of survivorship.

SEC. 504 INTESTATE SUCCESSION.

(a) IN GENERAL.- Subject to the provisions of Section 502, above, when an Indian owner of trust or restricted assets covered by this code, including federally administered personal assets, dies without a will, the surviving spouse is entitled to a one-third life estate in all assets of the estate.

(1) The remainder passes as described in (b) through (e), below.

(2) If the decedent is not survived by a spouse, the assets of the estate descend in accordance with (b) through (e) below.

(h) Non-spousal shares: The order of inheritance when there is no will for persons other than the spouse is as follows:

(1) The decedent's children each receive an equal share. If any are deceased, each deceased child's share descends to his or her issue by right of representation. Right of representation means that the lineal descendents stand in the place of their immediate deceased ancestor and share equally that individual's relative share of the estate.

(2) If there are no surviving children or issue, estate assets descend to the decedent's parents in equal shares. If only one parent is living, estate assets pass to the living parent.

(3) If the decedent is not survived by children or their issue or parents, the assets of the estate descend to the decedent's siblings without right of representation. Half-siblings are treated the same as whole siblings.

(4) If the decedent has no close family heirs under (b)(1), (b)(2) or (b)(3), estate assets descend to the tribe with jurisdiction over the interests owned by the decedent.

(h) In accordance with such rules as the Secretary of Interior may prescribe a co-owner may prevent acquisition of an interest in an allotment by the

tribe under (b)(4) by direct purchase of the interest from the estate during probate. Notice of potential tribal descent will be provided to co-owners by appropriate means.

SEC. 505. CHANGED MARITAL CIRCUMSTANCES.

(a) Spousal Share.- As qualified by Section 505(b), below, when an Indian testator marries after having executed a will, the surviving spouse shall receive a life estate to the extent of a spousal intestate share as determined by applicable law.

(b) The surviving spouse shall not receive a life estate if any of the following conditions are present:

(1) The will evidences a clear, permanent intention not to benefit persons beyond those listed in the will regardless of changed circumstances.

(2) The will was made in contemplation of the marriage.

(3) Separate provision has been made for the spouse outside the will.

(h) Divorce or Annulment.-

(1) An individual who is legally divorced from a decedent or whose marriage
has been finally annulled cannot inherit by prior devise any portion of the trust or restricted estate of a deceased Indian. Devises to such individuals are treated as revoked as of the date the divorce or annulment was final including degrees subsequently entered *nunc pro tunc*.

(2) The property that is the subject of a revoked spousal devise passes first, to any contingent beneficiary for the devise named in the will; if none, then to co-beneficiaries in the same devise, if any. If neither is named, the property passes under the residuary clause of the will. If no residuary gift is made, the property passes at law as determined by Section 504, above, or any applicable tribal code.

SEC. 506. PRETERMITTED CHILDREN. If an Indian testator executed a will before the birth or adoption of a child as recognized by 25 U.S.C. 372a or Section 507 of this code and non-provision for the afterborn or after-adopted child is the product of inadvertence rather than an intentional exclusion, such afterborn or after-adopted child shall receive an intestate share of the estate as a life estate to prevent fractionation or further fractionation of devised estate assets.

SEC. 507. RECOGNIZING CUSTOM ADOPTIONS FOR ALASKA NATIVES. Any Alaska Native who considers him- or herself to have been adopted by custom by a deceased allotted landowner and who has not previously had a reason to obtain legal recognition of the adoption may present an affidavit in probate claiming an adoptive relationship to such decedent for purposes of inheritance. If affected heirs do not dispute the relationship or the evidence after record development supports the affiant's claim of adoption by relevant custom, the individual alleging custom adoption may inherit the same share as he would inherit if he were legally adopted by any method recognized in 25 U.S.C. 372a. [as corrected]

SEC. 508. FEDERAL PREEMPTION. Indian probate, allotted land management, leasing, taxation and regulation, allotted land consolidation, including anti-fractionation measures, and all logically related matters are federally preempted subject matters. Nothing in this section shall prevent delegation of duties by the United States to tribes under contracts or compacts under existing law.

SEC. 509. EXISTING OWNERS OF TRUST OR RESTRICTED LAND AND LINEAL DESCENDENTS OF DECEASED LANDOWNERS.

(a) Notwithstanding any other provision of law or the Indian Land Consolidation
Act Amendments of 2000, individuals of Indian descent who have previously inherited trust or restricted lands in probate proceedings conducted by the United States under the authority of 25 U.S.C 372 and 25 U.S.C. 373 are declared to be Indian for land management and administrative purposes from November 7, 2000 and after.

(b) Notwithstanding any other provision of law or the Indian Land Consolidation Act Amendments of 2000, lineal descendents of deceased Indian landowners are affirmed to be Indian for purposes of inheritance, land management and administration purposes from November 7, 2000 and after.

ATTACHMENT #3

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Testimony on S.550, the American Indian Probate Reform Act of 2003
Before the U.S. Senate Committee on Indian Affairs

By Austin Nunez, Chair of the Indian Land Working Group
And Chairman of the San Xavier District of the
Tohono O'odham Nation

May 2, 2003

Honorable Chairman and Members of the Committee, I appreciate the opportunity to address this committee on these very important and complex matters related to Indian trust allotments. The ILWG finds S.550 unacceptable to our organization which represents individual landowners and to Indian landowners whose 5th Amendment protected property rights would be adversely impacted by the legislation if passed.

S. 550 does not cure the "serious flaws that complicate tribal and individual land management," that "make administration of trust allotments more difficult" or that "threaten the trust status of allotted lands" as the ILWG informed the Committee in it's May 22, 2002 testimony regarding S. 1340.

In fact, in many respects, S. 550 would make bad conditions even worse and prevent trust fund accounting from becoming a possibility.

The Indian Land Working Group and its constituents take the occasion of this testimony to go on public record to decry the squandering of scarce appropriations for experiments that do nothing to address the core allotted land problems and that are designed to benefit only the government while filling the legislative record with high-minded language.

The Department of Interior did nothing to improve trust fund accounting or its feeder system, probate, from 1996 when the Cobell litigation was filed until the Department resoundingly lost before the Court of Appeals in 1999.

The only notable action it undertook during this period was to decimate its allotted land probate capability, which accounts for about 92% of allotted land title transfers, in the very month the Cobell litigation was filed

For a 20-year period, the Department engaged in a pattern of purposeful downsizing of its allotted land/probate administration capability, while transferring allotted land resources to non-Indian functions, while fractionation was exploding.

When DOI finally did something, it engaged in reform "for show" purely for the benefit of the court in Cobell. It developed a resource-competitive, expensive and now discredited High Level Implementation Plan--replete with the $140 million dollar TAAMS debacle--that duplicated manpower and functions and skyrocketed the amount of money the Department would burn off in what an

Osage attorney called a "mesmerizing display of activity." It has been reported that it is costing the DOI $17 million dollars to "maintain" TAAMS while $130 million has now been appropriated to the DOI for "Historical Accounting". Our question is what is TAAMS accomplishing? There is still no accounts receivable system under which trust resources are being managed and there is a certified title report backlog and probate backlog which have a stranglehold on the entire records system.

The probate backlog is greater, today, than it was when alleged "reform" started.

BITAM, the now defunct, stealth reform proposal, and its current sequel, that has the support of no one in Indian Country because there has been no consultation, appear only to move high-level bodies around and change the chain of command at great remove from where the rubber meets the road.

Meanwhile, and millions upon millions of dollars later, the most impoverished population in the country, individual Indians, who own interests in allotted lands from which they get minimal benefit, are overlooked and, in fact, increasingly, blamed for being costly trouble makers.

Certain members of Congress and tribes, curiously and inappropriately, blame individuals and their representatives for the excesses and abuses caused by departments of government that are running amok and unaccountable to anyone. It is a blame the messenger scenario.

Who could have imagined that a trustee, a legal fiduciary, would behave toward a court or conduct formal litigation in the same shoddy manner that it treats its wards or that it would squander homeric sums serially reorganizing personnel and creating slick organization charts without ever touching the real problems or issues central to trust reform.

It is inconceivable that any entity, private or governmental, would purport to design a management or administrative system without first ascertaining or inventorying what which is to be managed or administered. Yet that is precisely what has occurred.

Reform to date, has structured systems and developed organizational charts in a vacuum upon the unfounded assumption that people and assets will conform to any half-cocked design or concept.

The results of such self-focused thinking are manifest. The Department of Interior's preferred definition of Indian, "tribal membership," in some areas fails to include one-seventh of existing landowners (in specific regions studied by GAO) who previously inherited land in trust. The figures could be higher in other regions.

Blame is assigned to individuals or their representatives for the cost of "reform" as gerryrigged by the Department of Interior and its political super ego, the Department of Justice. The former are simply trying to obtain what is long overdue. Blaming individual landowners for the government's extravagant failings is the equivalent of blaming the passengers on the Titanic for running the ship into an iceberg.

Complicating the situation, individual landowners must now confront the Amendments to the Indian Land Consolidation Act of 2000 which have caused literal "panic" nationwide among individuals who hold interests in allotments.

Legions of allotted landowners with children of Indian blood, but too little for enrollment in a tribe, are now faced with the gut wrenching choice of taking their interests out of trust or denying their children a birthright.

From 1887 to 1934, there was never a membership requirement for inheriting property in trust. From 1934 to 1980, only IRA tribes had a membership requirement (for wills) but nevertheless permitted heirs at law to inherit by devise.

At no time until 2000 did government in its negative history of Indian relations interfere with the traditional and ordinary expectation within Indian families, and everyone else, that children and grandchildren are eligible to inherit property.

The definition change in the 2000 ILCA amendments has caused chaos and destroyed all ability for landowners to engaged in simple estate planning for the benefit of their immediate families.

Beyond panic, the definition change is causing rancor and tension within Indian communities. The hallmark of bad federal policy eras is that Indians are pitted against other Indians for perceived federal benefit. The definition of Indian contained in the 2000 ILCA amendments is very bad policy.

It is said that a membership requirement enhances tribal sovereignty.

That cannot possibly be true since in the same act, the Secretary of Interior is given the power to withhold or grant tribal code approval at her election and also tells tribes that they cannot restrict inheritance by descendents of the original allottee--a provision it does not apply to itself in Section 207 of the amendments.

COMPLAINTS: The following lists the widespread complaints about the Indian Land Consolidation Act Amendments of 2000. The complaints come not only from unsophisticated landowners, who are frankly lost and frightened, but also from highly-trained realty personnel nationwide, Indian land organizations and even lawyers who specialize in allotted land issues:

> **The amendments are unreadable, unknowable and cannot be explained to landowners for estate planning purposes.**
>
> **Interior's efforts to instruct departmental personnel about the 2000 ILCA amendments have not been adjudged successful by the those who have attended training sessions. The most frequent complaint heard is that the sessions create more questions than answers about the amendments. Repeatedly heard is the remark that trainers have to "get back" to persons who have asked questions. It is also said that trainers and presenters disagree among themselves about what provisions mean.**
>
> **The ILCA 2000 definition of "Indian" orphans massive populations of individuals who have always been recognized as Indian including, most notably, unenrolled Indians who previously inherited land in trust in federal probate proceedings. They are now non-Indians who hold property in trust.**
>
> **The 2000 ILCA definition of Indian idiosyncratically inflicts greater harm upon persons of higher blood quanta (of multiple tribes) than individuals with lower Indian blood quanta possessing higher degrees of non-Indian blood.**
>
> **The 2000 ILCA definition of Indian combined with the intestate joint tenancy provision eliminates any pretense of estate planning of trust or restricted interests for a large portion of allotted landowners.**
>
> **The 2000 ILCA definition of Indian, making non-Indians out of real Indians, adds to tribal jurisdictional problems that are exploding across Indian Country due to the supreme court's aggressive, anti-Indian jurisdictional decisions.**

Even BIA and tribal organizations, such as NCAI, agree that the 2000 ILCA amendment definition went too far. On this single issue, there is consensus among individuals, realty personnel and their superiors with realty experience, tribes and tribal organizations.

The intestate joint tenancy provision, itself, has no foundation in known realty or probate law worldwide.

The intestate joint tenancy provision would render on-going trust fund accounting impossible.

The intestate joint tenancy provision would require, if legal at all, the design, creation and long-term funding of additional, expensive bureaucratic administrative systems within Interior.

The off-reservation descent provisions nullify the primary goal of ILCA to preserve trust status of land by pushing property out of trust.

There is no mechanism for seeking review of secretarially appraised values as established using broad geographic fair market values.

There is no individual consolidation funding or support for individual consolidation which is as central to reducing fractionation as tribal consolidation.

There is no actual landowner estate planning education program that can reliably be implemented which is a critical ingredient of fractionation reduction given the lack of such information disseminated to landowners by the government at any time in the past and the danger of uncontrolled fractionation in the future.

The 2000 ILCA amendments use probate terminology incorrectly and give certain terms different meanings in different parts of the act.

Certain provisions give the appearance of being mutually irreconcilable and the amendments do not explain how the inconsistencies can be reconciled.

Indian landowners have to force their way into land consolidation and anti-fractionation discussions. Throughout the development of the Indian Land Consolidation Act in all its forms, actual and proposed, the government has consistently consulted only with tribes--when it bothers to consult at all--although the property rights impacted by the trustee belong to the allotted landowners whose rights are protected by the Due Process Clause of the United States Constitution.

The 2000 ILCA amendments did not mandate or address actual restoration of 2% interests to the true owners to ensure trust fund accounting can be done for the nearly 13,000 interests

In the final analysis, the government would do well to listen to the property owners because they are the ones that file suit and who win their cases in court. We point to Mitchell II, both 2% cases and Cobell. Individual landowners win their cases because the government is reckless. It violates the law and experiments senselessly and expensively, to detriment of Indian Country, in a quest for a cheap fix.

There is no quick way to fix fractionation that is legal and inexpensive. A problem 116 years in the making--actually older, since allotting long predated the General Allotment Act of 1887--is not susceptible to instant resolution at no cost. Efforts to get immediate and cheap solutions are illegal.

If the 2% cases show anything it is that, perceived "cheap fixes," premised exclusively upon wildly experimental concepts developed by theorists with no real world experience in the exact subject matter blow back on the government and take Indian Country down with it.

Individual landowners, the holders of the property rights, oppose further experimentation in connection with their allotted resources.

<u>The Indian Land Working Groups opposes S. 550 for the following reasons</u>:

The bill does not simplify or lessen problems associated with trust land, trust record or trust fund administration. It exacerbates them.

It does not cure critical omissions created by the 2000 ILCA definition of Indian: lineal descendents and unenrolled Indians who previously inherited land in trust.

It is not written in such a way as to be understandable to or usable by the intended target population, the Indian community, both tribal and individual.

Like the 1983 and 1984 2% rules, it engages in novelty experimentation. This time with the "passive trust interest." It attempts to fabricate an estate in land out of a "status" fudging known vesting principles to cover the chaos that the 2000 ICLA definition of Indian has created.

The fabricated interest in land, the experimental passive trust interest, would require the creation of an unprecedented, costly, dual tracking system to monitor the ownership of non-Indians which the department has no procedure for or realistic capability of doing except by extracting even more resources from Indian programs, if then.

It continues the pattern of violating known principles of relevant law by purporting to add further restrictions, outside of the patent or certificate of allotment, upon joint tenancy interests to foil landowners absolute right to break a joint tenancy by conveyance.

The partitionment provisions provide no protection against peeling off incidents of value leaving the remaining landowners with devalued assets.

That the partitionment process is not intended to be fair to the landowners is evidenced by two facts: (1) Only the government and the acquiring tribe develop the value or price leaving the landowners in an ineffective, after-the-fact objection posture which is itself suggestive of breach of trust--dealing with one ward at the expense of another and (2) It is possible to proceed with a form of partitionment when the determination has been made that the property is not reasonably partitionable. (See Attachment C for comprehensive discussion of partitionment developed by John Sledd, Director of the Native American Project – Columbia Legal Services).

Exacerbating the preceding factors is the fact that the notice provisions do not meet the black letter law requirement of actual notice and an opportunity to be heard. The provisions instead mention only constructive notice (publication) as a notice procedure making others optional and do not require the actual direct provision of the partitionment plans to the parties whose interests are affected.

For these reasons, the Indian Land Working Group opposes S. 550.

The Indian Land Working Group endorses a Uniform Probate Code. It has drafted the attached code (see Attachment A) to accomplish the following purposes:

To eliminate loss of further trust status of lands.

To simplify existing and past probate provisions and make tribal probate codes readily-retrievable to users

To limit inheritance fairly to landowners and not alter ethnic status as Indian as a function of budget.

To permit tribes, fairly, to opt in or out of the uniform code.

To limit inheritance before reaching the point of explosive fractionation (after 2nd degree of consanguinity [relation]).

To promote non-fractionating will devises.

To eliminate state-tribal jurisdictional problems that are created by the categorization of large numbers of Indians as non-Indian.

To eliminate the potential for inappropriate and complicating state intrusion into a fragile and expensive area of federal endeavor that impacts one-fifth of the remaining Indian land base; an area that is already at the outer limits of manageability.

To enhance bloodline inheritance, a traditional Indian value, while fairly treating non-blood relatives following the pre-1974 Arizona and Standing Rock Tribal probate codes as conceptual models. The code does not discriminate against non-Indians. All non-bloodline relatives within the eligible family heir pool, Indian and non-Indian alike, are treated identically.

Additional Conclusions And Recommendations

Land Records:

BIA upper management cannot seem to escape the "*central control*" paradigm. Before computers it was impossible to have central control. At one point in the history of computing, before distributive networking, it seemed desirable to centralize. This was likely because other alternatives were not considered.

The TAAMS disaster, an oil and gas income distribution system that was retrofitted for Indian Land Records, is another example of the fallacy of the "*all local problems can be solved with one central solution*" philosophy. Even after the General Accounting Office criticized TAAMS and reported that "the project lacked management, was risky and needed further analysis", BIA manager were still determined to pursue it.

One thing that is consistent throughout the half century of BIA automated record keeping is the propensity to move bravely forward on the path to failure. It is remarkable that BIA managers are in denial about their failures and are determined to continue to maintain their tradition of failure.

Recommendations:

1. **Authorize and provide funding to tribes and agencies to design and acquire computer systems to accommodate local needs.**
    a. **Land and ownership records**
        i. **Tract database**
        ii. **Ownership transaction database**
        iii. **Land status reports**
        iv. **Owner land inventory reports**
        v. **GIS land inventory data**
    b. **Lease management systems, including:**
        i. **Lease data**
        ii. **Accounts receivable**
        iii. **Billing**
        iv. **Collection**
        v. **Income distribution to owners**
2. **Limit the use of central systems to the functions that need to be centralized.**
    a. **Budget reports**
    b. **Databases that need to be shared nationally**
3. **Replace central control with annual audits of the tribal and agency systems.**
    a. **Authorize and fund annual audits of tribal and agency systems.**
4. **Make land and lease records available to the public**
5. **Recreate the automated records system from the paper documents**
6. **Implement data cleanup locally at each reservation where documents and local knowledge is available; this include correcting land title records to reflect the Supreme Court decision in Babbitt v. Youpee (117 S CT.727 1997).**

The ILWG recommends customized use of the MAD (Management, Accounting, and Distribution) system. This means tribes and agencies could change/add to this system to meet local data and resource management needs. A detailed overview of the MAD system and what a locally designed system can accomplish is included under Attachment D.

Repeal the 5% joint tenancy with the right of survivorship (JTWROS) feature (Sect. 2206). In intestate (no will) cases where the fractionated land interest is less than 5% of an allotment (in an allotment of 160 acres that would be less than 8 acres!) only the surviving tenant can will this interest to his/her heirs. No jurisdiction (State or Foreign) now uses or has ever used joint tenancy for intestate descent and distribution.

Amend S.1340 to provide for Judicial Review in Section 2214. The current Department of Interior appraisal system gives the Regional Appraiser "final approval for the specific values generated by the appraisal systems". The restriction of judicial review to section 207 (Decent and Distribution) suggests that adversely affected property owners have no legal recourse against appraisals they don't agree with.

Repeal the Definition of Indian (Section 2201). This definition cuts off far too many people who now qualify as Indian under other federal laws – yet are unaffiliated (not enrolled) for a variety of different reasons. At the Standing Rock Sioux Reservation alone, 4,096 heirs representing 14,749 acres will not be able to pass their land on to their children. Only eight tribes have written probate codes that are more restrictive than the former requirement for inheriting trust lands, i.e., documentable Indian blood.

Correct the Current Land Acquisition Pilot Program: Individual Indian landowners must be included in all acquisition pilot projects to enable consolidation of fractionated land title. Currently, the Secretary is making indiscriminate purchases of fractionated interests within the designated pilot project reservations. Purchases are not tied to consolidation or use plans; tribal laws and ordinances are not considered in these purchases.

We recommend that the Committee incorporate the MAD (Management, Accounting, and Distribution (MAD) system into all current and future Acquisition Pilot Projects. This system is being used by tribes within the Great Plains Region for local management and processing of income derived from fractionated interests. WE would also recommend that the BIA Pilot Project be used as a source of funding for efforts within the Indian Land Tenure Foundation's " National Tribal Investment Fund" which the Foundation has described in it's testimony today.

Amend S.1340 to protect the trust status of off-reservation allotments. No study has been done to evaluate the impact of this provision upon the affected Indian population. If the owner of a trust allotment is not Indian under the new P.L. 106-462 definition, the interests pass to heirs in fee status, further diminishing the trust land base.

While California was excluded from coverage in P.L. 106-462, the provision is no less negative as to other Indian populations who will have no way of knowing that their interests have gone to fee and will become subject to state taxation. It is the job of the Trustee to preserve the corpus of the trust – THE LAND – not to dissolve it.

Limit the use of Non-APA Adjudicators for Indian estate proceedings and require a sunset provision for this precedure.

Without legal authorization, the Department has expanded the use of non-APA (Attorney Decisionmakers) proceedings to make them the primary adjudication system. By amending 25 USC 372, the Department of the Interior is permanently affording to Indian landowners - to whom it has a trust responsibility - lesser protections in law that it affords permittees and licensees on Public Lands. To request a hearing, rather than be assigned an ADM, heirs must request a hearing 20 days from the date of notice.

In closing, the ILWG would like to make the Committee aware of a work group comprised of representatives from the California Indian Legal Services, the National Congress of American Indians, and the ILWG. Over the past half year, this group came together over concerns about provisions within both the S.1340 and the current S.550. The workgroup's primary concern at this time is refining the definition of Indian passed within the Indian Land Consolidation Amendments of 2000 (P.L. 106462) and passage of a uniform probate code which is acceptable to both tribes and Indian individuals. In addition the work group is formulating legislative language to address partititonment, see Attachment B; "Missing persons" and related "diligent search" standards (See Attachment D); and estate planning education (See H.R. 4325 – 105th Congress, 2nd Session; "Title I Estate Planning" which addresses fractionation and promotes consolidation of fractionated interests through education.

In closing, we look forward to working with your Committee and staff in formulating legislation which preserve and restores the trust land base, now and for the future generations.

ATTACHMENT A:

UNIFORM INDIAN PROBATE CODE
Proposed by the Indian Land Working Group

SEC. 501. APPLICABILITY.

(a) IN GENERAL.-

(1) APPLICABIILTY TO TRUST OR RESTRICTED LANDS.- Except as provided in Section 501(a)(2), below, this title shall apply to all Indian trust or restricted allotted lands administered by the United States, except those of the Five Tribes of Oklahoma, the Osage Tribe and in Alaska, and to federally administered personal assets, including IIM and judgment funds.

(2) ELECTION.- A tribe may elect to be exempt from the requirements of this code by issuing a formal resolution of its election not to be covered and, thereafter, filing the resolution with the Secretary of Interior.

(b) NOTIFICATION.- Upon receipt of a formal resolution from a tribe, the Secretary of Interior shall immediately notify local Indian agencies of the Bureau of Indian Affairs and all tribes of the resolution.

(c) LIST.- Annually, the Secretary of Interior shall publish an updated list of tribes that have filed formal exemption resolutions with the Department of Interior. The list will show the date upon which the tribal action was taken.

(d) RULE OF CONSTRUCTION.- Nothing in Section 504 is intended to supersede any tribal succession law that became effective before the date this code was passed.

(e) OTHER LAW.- The trust preservation provisions set forth in Section 502 shall not preclude the application of any other federal law relating to inheritance. Nothing in this section shall be construed to prevent the application in probate of a more restrictive inheritance requirement under tribal law.

(f) SPECIAL LAWS.- A tribe may enact laws relating to inheritance to apply to the lands under its jurisdiction instead of the laws set forth in this code. Upon approval by the Secretary, a tribe's inheritance laws shall supersede the provisions of this code as to that tribe.

(g) COMPILATION.-

(1) Upon approval, the Secretary of Interior shall directly notify each Indian agency and tribe with a probate contract or compact that the enacting tribe has promulgated an inheritance code and its effective date. Notification to the same parties is also required for changes or amendments to tribal inheritance laws.

(2) The Secretary of Interior shall maintain a compilation of all tribal inheritance laws that apply to trust or restricted assets, including changes or amendments to inheritance laws.

(3) The compilation will indicate the date of enactment and the date of approval by the Secretary of Interior, if applicable.

(4) Tribal inheritance laws based upon special statutes will list the public law number, the statute-at-large citation and date of enactment.

(5) Tribal purchase options based upon statutes will list the same information listed in (g)(4) and, where applicable, the Code of Federal Regulations citation.

(6) The compilation of tribal inheritance laws will be updated annually. Publication will be in the Federal Register on February 1.

SEC. 502 PRESERVATION OF TRUST STATUS.

To give effect to the stated purpose of the Indian Land Consolidation Act, as enacted and amended, of the preserving trust status of existing Indian lands, with respect to the probate of allotted lands after the date of enactment of this code-

(a) Inheritance by non-Indians is limited to the receipt of a life estate.

(b) Non-Indian heirs-at-law shall receive a life estate in the amount of an intestate share as determined by reference to applicable law. The remainder passes to the next Indian heirs in line of intestate succession.

(c) Eligible non-Indian devisees receive a life estate of the same size as the share devised to them under the will. Devisee eligibility is established in Section 503, below.

(1) The remainder will pass to the contingent beneficiary, first, or co-beneficiaries, second, if either has been named for the interests devised to a non-Indian.

(2) If no contingent beneficiary has been named or no co-beneficiaries exist, the remainder passes under the residuary clause of the will.

(3) If there is no contingent or co-beneficiary(ies), residuary clause or beneficiary named in the residuary clause, the remainder passes at law to the next Indian heirs as determined by applicable laws of intestate succession.

(d) Nothing in this code prevents conveyance of an interest in trust or restricted lands to a non-Indian.

SEC. 503. ELIGIBLE WILL DEVISEES.

IN GENERAL.- No person shall be entitled to receive an interest in trust or restricted lands covered by this code except as provided below:

(a) Eligible devisees are:

(1) The decedent's heirs-at-law, lineal descendents or relatives of the first or second degree. An exception to this limitation is specifically set forth in subsection (b), below;

(2) Members of the tribe with jurisdiction over the lands devised, or

(3) The tribe with jurisdiction over the devised lands.

(b) SPECIAL RULE.- A testator who does not have a potential devisee from among the classes of eligible devisees listed in Section 503(a)(1),(2) or (3) may devise his or her estate or specific assets thereof to any person related by blood subject to the trust limitations set forth in Section 502(a) through (c).

(c) JOINT TENANCY.- The devise of a single interest in an allotment to multiple beneficiaries shall be construed as a joint tenancy with a right of survivorship.

SEC. 504 INTESTATE SUCCESSION.

(a) IN GENERAL.- Subject to the provisions of Section 502, above, when an Indian owner of trust or restricted assets covered by this code, including federally administered personal assets, dies without a will, the surviving spouse is entitled to a one-third life estate in all assets of the estate.

(1) The remainder passes as described in (b) through (e), below.

(2) If the decedent is not survived by a spouse, the assets of the estate descend in accordance with (b) through (e) below.

(b) Non-spousal shares: The order of inheritance when there is no will for persons other than the spouse is as follows:

(1) The decedent's children each receive an equal share. If any are deceased, each deceased child's share descends to his or her issue by right of representation. Right of representation means that the lineal descendents stand in the place of their immediate deceased ancestor and share equally that individual's relative share of the estate.

(2) If there are no surviving children or issue, estate assets descend to the decedent's parents in equal shares. If only one parent is living, estate assets pass to the living parent.

(3) If the decedent is not survived by children or their issue or parents, the assets of the estate descend to the decedent's siblings without right of representation. Half-siblings are treated the same as whole siblings.

(4) If the decedent has no close family heirs under (b)(1), (b)(2) or (b)(3), estate assets descend to the tribe with jurisdiction over the interests owned by the decedent.

(c) In accordance with such rules as the Secretary of Interior may prescribe a co-owner may prevent acquisition of an interest in an allotment by the tribe under (b)(4) by direct purchase of the interest from the estate during probate. Notice of potential tribal descent will be provided to co-owners by appropriate means.

SEC. 505. CHANGED MARITAL CIRCUMSTANCES.

(a) Spousal Share.- As qualified by Section 505(b), below, when an Indian testator marries after having executed a will, the surviving spouse shall receive a life estate to the extent of a spousal intestate share as determined by applicable law.

(b) The surviving spouse shall not receive a life estate if any of the following conditions are present:

(1) The will evidences a clear, permanent intention not to benefit persons beyond those listed in the will regardless of changed circumstances.

(2) The will was made in contemplation of the marriage.

(3) Separate provision has been made for the spouse outside the will.

(c) Divorce or Annulment.-

(1) An individual who is legally divorced from a decedent or whose marriage has been finally annulled cannot inherit by prior devise any portion of the trust or restricted estate of a deceased Indian. Devises to such individuals are treated as revoked as of the date the divorce or annulment was final including degrees subsequently entered *nunc pro tunc*.

(2) The property that is the subject of a revoked spousal devise passes first, to any contingent beneficiary for the devise named in the will; if none, then to co-beneficiaries in the same devise, if any. If neither is named, the property passes under the residuary clause of the will. If no residuary gift is made, the property passes at law as determined by Section 504, above, or any applicable tribal code.

SEC. 506. PRETERMITTED CHILDREN. If an Indian testator executed a will before the birth or adoption of a child as recognized by 25 U.S.C. 372a or Section 507 of this code and non-provision for the afterborn or after-adopted child is the product of inadvertence rather than an intentional exclusion, such afterborn or after-adopted child shall receive an intestate share of the estate as a life estate to prevent fractionation or further fractionation of devised estate assets.

SEC. 507. RECOGNIZING CUSTOM ADOPTIONS FOR ALASKA NATIVES. Any Alaska Native who considers him- or herself to have been adopted by custom by a deceased allotted landowner and who has not previously had a reason to obtain legal recognition of the adoption may present an affidavit in probate claiming an adoptive relationship to such decedent for purposes of inheritance. If affected heirs do not dispute the relationship or the evidence of after record development supports the affiant's claim of adoption by relevant custom, the individual alleging custom adoption may inherit the same share as he would inherit if he were legally adopted by any method recognized in 25 U.S.C. 372a.

SEC. 508. FEDERAL PREEMPTION. Indian probate, allotted land management, leasing, taxation and regulation, allotted land consolidation, including anti-fractionation measures, and all logically related matters are federally preempted subject matters. Nothing in this section shall prevent delegation of duties by the United States to tribes under contracts or compacts under existing law.

SEC. 509. EXISTING OWNERS OF TRUST OR RESTRICTED LAND AND LINEAL DESCENDENTS OF DECEASED LANDOWNERS.

(a) Notwithstanding any other provision of law or the Indian Land Consolidation Act Amendments of 2000, individuals of Indian descent who have previously inherited trust or restricted lands in probate proceedings conducted by the United States under the authority of 25 U.S.C 372 and 25 U.S.C. 373 are declared to be Indian for land management and administrative purposes from November 7, 2000 and after.

(b) Notwithstanding any other provision of law or the Indian Land Consolidation Act Amendments of 2000, lineal descendents of deceased Indian landowners are affirmed to be Indian for purposes of inheritance, land management and administration purposes from November 7, 2000 and after.

Attachment B:

Partionment:

Sec. 4 (Proposed 25 USC 2204(c)). The proposed subsection would enable tribes to compel Secretarial partition or sale to the tribe of trust land in which the tribe owns any interest, however small. Under some circumstances partition or sale could occur without ever actually notifying individual owners or seeking their consent. In other circumstances, partition could proceed even if the majority of owners affirmatively objected. Where owner

consent would be required, Interior could "deem" owners to have consented if they did not affirmatively object. These provisions are unfair to allottees and would constitute an unconstitutional denial of due process. They should be deleted. Partition can be important to overcoming the problems of fractionated ownership. New partition authority, however, should be enacted only if it protects the constitutional rights of allottees, and gives them, and not merely tribes, the ability to force partition so that their interests can be made useable.

Proposed 25 USC 2204(c), Generally. Partition is a potentially useful solution to the impasse in land management decision-making that can result when there are multiple owners of undivided interests. Under current law, allotments can be partitioned, if all owners request it, or the Secretary finds that partition would be to their advantage. 25 USC § 378; 25 CFR § 152.33. S. 550 would expand the availability of partition, but only at the behest of tribes, not individuals. The goal of consolidation will be furthered if allottees are also given this new authority, so that their initiative and capital can be added to that of tribes.

The proposed subsection provides for two different kinds of partition. The first is partition in kind, in which undivided interests would be divided and each owner would receive full ownership of a smaller parcel, reflecting his or her former undivided interest in the original, larger parcel. The second is a partition by sale, that is, the land would be sold and the proceeds divided among co-owners in proportion to their interests. The sale provisions in S. 550, however, are more analogous to condemnation than true partition, since the only authorized buyer would be the Indian tribe having jurisdiction of the land.

The two kinds of partition proposed in S. 550 would occur somewhat differently, depending on whether or not the tribe was the largest single interest holder at the outset of the process. (The Bill also refers to situations in which the tribe owns a majority interest but in such a case the tribe will also be the single largest interest holder.) Proposed 25 USC 2204(c)(3) provides that any partition, whether in kind or by sale, may proceed where a tribe owns an interest in a parcel and either that interest is the largest interest, or at least 50% of interests "consent or do not object." Thus, where a tribe is the largest interest holder, neither actual nor implied consent of other owners is required. In a highly fractionated allotment, a tribe might own as little as a few percent interest, yet still be the largest interest holder, and thereby preclude the need to even seek consent of other owners. This provision needlessly disregards the interests of individual landowners. It should be revised to condition partition on consent of a majority of owners, in all cases.

Proposed 25 USC 2204(c)(6), partitions in kind. In evaluating proposals for partition in kind it is important to remember that such partition is at best a mixed blessing for undivided interest holders. They may gain, in that partition gives each the undivided ownership of some portion of the land, to use as they see fit. They may also lose, however, in that they no longer have the right to make non-exclusive use of the entire larger parcel.

Partition in kind under the proposed substitute Bill is initiated by a request from a co-owner tribe. Interior must then give other owners notice of the proposed partition, but only "through publication of other appropriate means." Proposed 25 USC 2204(c) (6)(B)(i). Reliance on published notice is inconsistent with the fiduciary obligations of the United States to all owners of trust interests; it also fails to meet minimum requirements of due process. The Supreme Court has repeatedly held that due process requires notice before government may deprive individuals of property. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). That notice must be "reasonably calculated" to actually reach the intended recipient. *Id.* at 314. Actual, personal notice is always preferred. *Id.* Published notice is suspect, although permissible where the need to proceed is great, the intended recipient's interests are small, or there are severe practical barriers to giving better notice. *Id.* at 313-316.

Published notice to allotment owners would not be consistent with due process in many circumstances, as when the United States has an individual mailing address or the ability to readily obtain one from the tribe or elsewhere, or where Interior is aware or has itself determined that the interest holder is not capable of managing his or her own affairs. *Cf.* 25 CFR 115.104 (determinations that individual Indians need assistance managing trust funds). To meet constitutional and fiduciary standards, the legislation should require personal notice to owners or, if that is impracticable, alternative means, which are best, calculated to provide actual notice.

Following "notice," the in-kind partition process calls for Interior to "make available" to any co-owners or interested parties the tribe's or Secretary's proposed partition plan. Proposed 25 USC 2204(c)(6)(B)(ii); 2204(c)(6)(D)(iii); 2204(c)(6)(E)(I). Under proposed 25 USC 2204(c)(6)(B)(iii), an individual co-owner may submit comments or objections, or a competing plan, but there is no Interior obligation to distribute those or make them public. Thus, the burden is placed on allottees -- the supposed beneficiaries of the federal trust relationship -- to ferret out the actual partition plan, even if they are minors, or live far away, or are mentally infirm, or uneducated, or otherwise unable to protect themselves. The provisions should be amended to require Interior to provide every owner with a copy of the plan and a notice explaining how to get copies of co-owner comments or competing plans.

The Secretary may decline to partition in kind if he finds that the parcel "cannot be partitioned in a manner that is fair and equitable to the owners." Proposed 25 USC 2204(c)(6)(C). He must continue to process the partition if he makes the contrary finding. Proposed 25 USC 2204(c)(6)(D) and (E). In most jurisdictions, a partition in kind is permitted only if it is possible to create for each co-owner a separate parcel which can practically be used and which has a value equal to the value of the undivided interest. The standard in the proposed substitute draft should be amended to impose similar, specific requirements in addition to the general "fairness" standard.

Following the determination regarding the feasibility of partition, there are additional notice requirements. These requirements, however, are not uniformly stated, which could result in confusion as to allottee's rights. If the Secretarial determination is against partition, he must "inform" owners of the decision and of the right to appeal. Proposed 25 USC 2204(c)(6)(C). If the determination is favorable to partition, and the tribe is the largest single owner, the Secretary must "provide notice" of the determination and "inform" each owner of the right to appeal. Proposed 25 USC 2204(c)(6)(D). If the determination is favorable to partition, but the tribe is not the largest single owner, the Secretary must "inform" owners that partition will proceed unless the owners of more than 50% of the interests affirmatively object. Proposed 25 USC 2204(c)(6)(E)(i). These multiple formulations do not make clear whether "informing" owners is the same as giving them "notice;" nor do they specify what type of notice (or information) is adequate. The provisions should be rewritten to use consistent terminology.

As noted above, if the tribe is not the largest single owner, the partition will nevertheless proceed unless owners of a majority of interests affirmatively object within the time set by the Secretary. Proposed 25 USC 2204(c)(6)(E)(i) and (ii). This effort to ease partition by placing the burden on allottees to object is inappropriate, and inconsistent with the federal fiduciary role. As a practical matter, any experienced advocate in Indian Country could recite stories of clients, particularly traditionalists and elders, who sought advice with regard to letters received months or years before and never responded to. That may reflect the reality that letters from the government are rarely good news; in part it reflects cultural differences between Indian and non-Indian communities, and the fact that many allottees own interests in so many parcels that it is difficult for them to determine whether a notice affects a significant interest or a trifling one. Given these facts, it is wrong to equate the willingness and ability to timely respond to bureaucratic notices with the extent of an individual's interest in or use of trust land. At the barest minimum, the statute should provide a minimum 90 day response period. Left to its own devices, Interior is likely to adopt unreasonably short deadlines in order to minimize the work of dealing with objections.

Even if a majority of interests do affirmatively object, that need not end the matter. The Secretary is authorized to propose successive partition plans, and there is no requirement even for a cooling-off period between successive proposals. Proposed 25 USC 2204(c)(6)(F). Given repeated proposals, the odds will favor partition eventually, regardless of the allottees' desires.

Proposed 25 USC 2204(c)(6)(G) provides that, if interests are "not susceptible" to a partition in kind, Interior may order their sale to a co-owner, or to Interior itself. This is a peculiar authority, allowing the trustee to condemn the interest of one beneficiary in order to transfer it to another, or to the trustee himself. Some authority to sell smaller interests is probably needed, since very small interests cannot practically be converted to a single-ownership parcel. The "not susceptible to partition" standard, however, is too broad and ill defined to protect allottees. A clearer standard should be developed, perhaps tied expressly to the physical inability to create a useful parcel for a particular undivided interest.

Proposed 25 USC 2204(c)(7), partitions by sale. This proposed subsection authorizes partition of allotments by sale. Such a partition represents a significant intrusion on allottee interests, converting ancestral property into mere cash. Such an involuntary sale may be appropriate for small interests, incapable of physical partition, as noted above. A forced sale is also, of course, appropriate, where government -- whether federal or tribal -- needs the land for a particular public purpose. The current proposal is far broader than this. That breadth seems particularly unnecessary given that, only two years ago in the 2000 ILCA amendments, Congress gave tribes the power to force sale of all trust interests in an allotment to the tribe whenever a majority of the ownership consents. 25 USC 2204(a). That provision struck a better balance between tribal and allottee interests since it also allowed a co-owner to buy the land in lieu of sale to the tribe.

The partition by sale provisions of the proposed substitute Bill closely parallel those of the partition in kind provisions in proposed 25 USC 2204(c)(6). Consequently, the partition by sale authority shares most of the flaws of the other process, including:

- Reliance on published notice without justifying this departure from constitutional norms, proposed 25 USC 2204(c)(7)(B)(ii);
- Confusion between requirements of "notice" and requirements to "inform" owners, *compare*, proposed 25 USC 2204(c)(7)(B)(ii)(I), (C)(i), and (D)(i)(I) ("notice") *with* proposed 25 USC 2204(c)(7)(B)(iii), (C)(ii), and (D)(i)(II) ("inform");

- Merely giving allottees "access to" key data, namely the appraisal, rather than affirmatively providing that data to allottees, proposed 25 USC 2204(c)(7)(B)(ii)(II) and (B)(v)(II);
- Giving allottees the opportunity to object to tribal purchase only if the tribe is not the owner of the largest single undivided interest, proposed 25 USC 2204(c)(7)(D);
- Reliance on a fiction of consent when allottees fail to affirmatively object (in those limited situations where the bill would give them any right to object), *id.*;
- Establishing no minimum time that allottees shall have to object, *id.*

While the process created in this subsection is described as a partition, it is in fact a tribal condemnation, since the process is initiated at tribal request, the Secretary has no discretion not to proceed, and the only permitted buyer is the Indian tribe. Proposed 25 USC 2204(c)(7)(A), (7)(C), and (D)(i). It is appropriate to allow tribal condemnation for public purposes such as roads and utilities, with appropriate legal safeguards built into the law. Those safeguards are missing from S. 550. The Bill does not require the tribe to demonstrate the public purpose for condemnation, nor does it recognize a right to jury trial or any equivalent check on the exercise of this extraordinary governmental power. Individual allottees are given no opportunity to challenge the propriety of condemnation, save by an appeal at the conclusion of the process. Their only role during the process is to "comment on" the appraisal of their land, proposed 25 USC 2204(c)(7)(B)(iii), unlike the tribe, which can also pursue an interlocutory appeal of that appraisal. Proposed 25 USC 2204(c)(7)(B)(v)(III). The ultimate result of these provisions is that the Secretary is cast more as facilitator of tribal condemnation than as a neutral decision maker and trustee for all allotment owners.

Proposed 25 USC 2204(c)(8), enforcement of partition. This paragraph provides that, if a co-owner refuses to execute partition or sale documents, the tribe or the United States may sue in federal district court to compel him or her to do so. The opportunity for judicial review is appropriate, and it is also appropriate that the burden of initiating such review be upon the tribe, rather than upon opposing allottees. However, it is inconsistent with the trust responsibility to provide for the United States to sue its own beneficiaries to force them to surrender their trust corpus to a tribe. This paragraph also contains insufficient procedural protections for the allottees, as it does not clearly allocate nor define the burden of proof, allows for inconvenient venue, fails to clarify the relationship between this provision and the appeal rights which are accorded allottees under other paragraphs, and forces allottees to bear their own costs even if they prevail in court.

These provisions should be amended to clearly provide that:

- Only a tribe may initiate suit, although the United States may be a party;
- The burden would be upon the tribe to prove by a preponderance of evidence that every requirement of 25 USC 2204(c) has been met;
- The action would proceed according to the Federal Rules of Civil Procedure, including opportunity for discovery;
- Every owner would be permitted to defend in such an action, notwithstanding his or her failure to take an administrative appeal of a partition under proposed 25 USC 2204(c)(6)(C)(ii), (c)(6)(D)(iv)(c)(6)(E)(ii)(II), (c)(7)(C)(ii), and (c)(7)(D)(ii);
- Venue would lie in the district which is the residence of the defendant, or the residence of defendants who together own a larger percentage of the parcel than the defendants who are residents of any other district; and
- A defendant who prevails, including a defendant as to whom the tribe voluntarily dismisses, would be entitled to costs and attorneys fees if the legal position of the tribe were found by the court to be substantially unjustified.

ATTACHMENT C:

Fractionation:Options and Solutions
By
Arvel Hale

An 1890 oil painting by James Taylor Harwood is titled "The Gleaners." It depicts two women and three young children harvesting wheat from a barren hill. The wheat stocks are in clusters that are scattered over the hill. They are

harvested by breaking each one just above the roots. The stocks are then placed in a pile and then tied in bundles. An old wooden pushcart is used to haul the bundles from the field.

"The Gleaners" inspires thoughts of the toughness of the people who lived prior to the 1900's. However in the year 2002, mechanical harvesters and big trucks replace human toughness with a faster and better way to harvest wheat.

The problem of fractionated interests in Trust Land is as overwhelming as a field of wheat when there are no tools to harvest it. Each year hundreds of fractionated interests are created by gifts and probates. Many of these interests have little or no market value. On one reservation 94.77% of all tribal interests were smaller than 2%. On the same reservation 77.47% of all allotted interests are less than 2%.

Fraction	Tribe Interest	Total Interests	Tribal Percent	Allotted **Percent**	**Tracts**	Acres
0% - 2%	2,644	54,683	94.77%	77.47%	1,259	35,426.36
2% - 5%	42	7,358	1.51%	10.36%	1,459	48,390.31
5% - 50%	96	7,301	3.44%	10.34%	2,473	269,882.40
50% - 99&	8	1,295	0.29%	1.82%	320	36,940.07
Total Interests	2,790	70,587	100.01%	99.99%	2,380	443,809.74
100%	3,065	59	52.35%	0.08%	3,476	566,496.03
Totals	5,855	70,646			5,856	1,010,305.77

Even more astonishing is that of 91,630 interests for which there was sufficient data to develop a credible estimate of market value, 3,070 had a value of less than $1.00.

Value Range	Number of Interests	Accumulated Number	Percent	Accumulated Number
Less than $1	3,070	3,070	3.35%	3.35%
$1 to $10	12,328	15,398	13.45%	16.80%
$10 to $50	17,678	33,076	19.29%	36.10%
$50 to $100	9,245	42,321	10.09%	46.19%
$100 to $1000	30,868	73,189	33.69%	79.87%
Greater $1,000	18,441	91,630	20.13%	100.00%

These statistics are not only astonishing but are alarming. Especially when the cost, using current BIA practices is considered.

Cost to Process Real Estate Transactions of Owner Interests using Current BIA Methods

		Cost per Owner Interest Transaction								
Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr -aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value

Less than $1	3,070	$5	$350	$20	$20	$5	$400	$1,228,000	$1,427	86036.57%
$1 to $10	12,328	$5	$350	$20	$20	$5	$400	$4,931,200	$58,663	8405.93%
$10 to $50	17,678	$5	$350	$20	$20	$5	$400	$7,071,200	$458,218	1543.20%
$50 to $100	9,245	$5	$350	$20	$20	$5	$400	$3,698,000	$676,842	546.36%
$100 to $1,000	30,868	$5	$350	$20	$20	$5	$400	$12,347,200	$11,523,724	107.15%
Greater $1,000	18,441	$5	$350	$20	$20	$5	$400	$7,376,400	$122,851,554	6.00%
Totals	91,630							$36,652,000		

The cost to complete an application, prepare a deed, update owner records on the computer is based on the time required for a GS-7 Realty Specialist to accomplish those tasks.The appraisal cost is the contract rate used for non-BIA appraisers to prepare an appraisal report. BIA appraisal staff costs are about the same as contract appraisal costs.

These costs are not the only problem. The time required to accomplish the tasks under current BIA methods will not keep up with the creation of new fractionated interests. In some BIA Regions requests for appraisal reports are over two years old. BIA Title plants are up to one year behind on recordings.Without innovative thinking there is no way out of the fractionated interests dilemma.

There is Hope. For the past ten years I have been working with the Great Plains Region to develop the Management, Accounting, and Distribution (MAD) system. We seemed to have had to fight the BIA hierarchy every step of the way. The preference of the BIA has been to spend millions of dollars on a TAAMS, which does not work. MAD has been developed for less than the cost on one of the TAAMS planning meetings in Dallas.

The philosophy behind MAD is that must save people time. Tasks that normally take weeks to do were reduced to a day. A task that takes a day was reduced to an hour.MAD also allows for custom applications at the agency level. Expensive meetings in Dallas are not required to accommodate the need of an agency Realty Offices.

Most modifications for and agency can be done within a day. The necessity to have a lengthy process to write RFP's and have committee hearings before changes can be made is abolished. Agency staff need solutions not more meetings and discussions.

		Cost per Owner Interest Transaction								
Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr -aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
Less than $1	3,070	$5	$1	$1	$20	$5	$32	$98,240	$1,427	6882.93%
$1 to $10	12,328	$5	$1	$1	$20	$5	$32	$394,496	$58,663	672.47%
$10 to $50	17,678	$5	$1	$1	$20	$5	$32	$565,696	$458,218	123.46%
$50 to $100	9,245	$5	$1	$1	$20	$5	$32	$295,840	$676,842	43.71%
$100 to $1,000	30,868	$5	$1	$1	$20	$5	$32	$987,776	$11,523,724	8.57%
Greater $1,000	18,441	$5	$1	$1	$20	$5	$32	$590,112	$122,851,554	0.48%
Totals	91,630							$2,932,160		

Using the appraisal module on the MAD system appraisal costs are reduced from $350 per report to $1.00 per report. The time required for an appraisal is reduced from months and years to about 5 minutes.

The MAD system will print the deed. It looks up owner name, owner interests, and property legal descriptions in seconds and prints the Deed.

The MAD system has an owner update module that allows a realty staff to update records, recalculate fractions, check fractions for unity, and print status reports.

The following chart describes the process which could take place within the MAD system when trust income is collected, deposited and dispersed locally. This chart provides for interaction with a local financial institution that is responsible for collections, payments, accounting, audits and reconciliations according to private trust standards.

Option for Collection and Distribution of Rental Income to Land Owners

Agency		Bank	
Step	**Process**	**Step**	**Process**
1	Prepare Lease		
2	Prepare Rental Payment Schedule		
3	Prepare Lessee Accounts Receivable (rental bills owed by lessees)		
4	Prepare Owner Accounts Receivable (rent owned to each land owner)		
5	Prepare Lessee Bills		
6	Sent Bills to Lessees		
		7	Collect rental payments from lessees
		8	Prepare schedule of daily collections
		9	Send collection schedule to BIA
10	Post lessee payments to payment ledger		
11	Prepare owner payment distribution schedule containing the amount to pay each land owner		
12	Send owner payment distribution schedule to Bank		
		13	Electronically transfer each owner's rental payment to their bank account
14	Print owner statements showing amount owned, amount paid and balance due		
15	Send Statements to owners		
16	Prepare internal agency audit and reconciliation reports	17	Prepare internal bank audit and reconciliation reports
18	Reconcile Agency and Bank reports		

ATTACHMENT D:

WHERE ABOUTS UNKNOWN
SEARCH STANDARDS

All searches conducted for "***Where Abouts Unknown***" must follow a search pattern to maintain integrity of the information being searched. An "***Affidavit of Search***" must accompany each individual search that will be submitted to the Probate Court Judge for final review. In addition, each "***Affidavit of Search***" must be notarized. Before the judges final approval of the "***Affidavit of Search***", it may or not be accepted, depending upon the information contained in the "***Affidavit of Search***". The judge may return the affidavit and request the responsible party(s) conduct additional searches. In each case the searches should not exceed 15% of the total of the account.

Depending upon the total of the account, "***Where Abouts Unknown***" the following levels of searches must be conducted:

LEVEL I SEARCH

1. Name Search (Internet Surname Search)
2. Social Security Number Search
3. Last Known Address Search
4. Neighborhood Search

LEVEL II SEARCH

1. National Wants and Warrants Check
2. Forwarding Address Search (USPS)
3. Real Property Search
4. Professional Licensing Search
5. News Clipping Search
6. Corporate Ownership Search
7. Driving History Search
8. Motor Vehicle Search
9. Death Record Search
10. Criminal Records Search
11. Civil Records Search
12. Field Interviews (*Local on Site Interviews*)

If the total of the account is between $100.00 and $500.00 a Level I search must be conducted. If a Level I searches has revealed the next of kin, then an "***Affidavit of Search***" must be completed and submitted to the court having proper jurisdiction.

If the total of the account is $500.00 and above, the search should consist of a Level I and Level II search. A "***Where Abouts Unknown***" next of kin may or may not be located within theses searches. The searches should not excide 15% of the total of the account.

In the event that the next of kin has been identified an "***Affidavit of Search***" must be completed and submitted to the court having proper jurisdiction.

In ***EVERY CASE*** regardless of the results obtained from the search(s) conducted, an "***Affidavit of Search***" must be submitted to the proper jurisdiction.

Testimony of Lisa C. Oshiro, Directing Attorney
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respectfully submitted to the
Committee on Indian Affairs
United States Senate

on S. 550, the American Indian Probate Reform Act of 2003
and other amendments to the Indian Land Consolidation Act.

October 15, 2003

Thank you, Mr. Chairman Campbell, for this opportunity to address you and other distinguished members of the Senate Committee on Indian Affairs on S. 550, the American Indian Probate Reform Act of 2003, and other proposed amendments to the Indian Land Consolidation Act. The issues addressed by the Indian Land Consolidation Act and the proposed amendments in S. 550 are very important to preserve the Indian land base throughout Indian Country and especially in California.

I. INTRODUCTION

California Indian Legal Services (CILS), a law firm devoted exclusively to the representation of Indian people and Tribes, submits these comments based upon the collective experience of the firm over a period of thirty-six years. CILS was incorporated in 1967 by public interest attorneys and California Indian leaders. When it was created, CILS became the first non-profit law firm in the history of the United States devoted exclusively to representing the rights of Indian tribes and individual Indians. Over the years, CILS has had remarkable successes – ranging from the creation of the Native American Rights Fund to cases in the Supreme Court, Ninth Circuit, other federal courts and state courts.

CILS has represented most of California's 107 federally recognized tribes during its existence and has served as counsel in many successful cases resulting in the restoration of improperly terminated California Indian rancherias. CILS has also represented many California Indian tribes in their legislative efforts, often successful, to restore their rightful status as recognized tribes. In addition, CILS has represented over 30,000 California Indians in matters such as Indian status, land status, and probate, and CILS has also worked with the Senate Committee on Indian Affairs on numerous policy issues and pieces of legislation. As general counsel to the Advisory Council on California Indian Policy, CILS helped publish the most comprehensive report on the history and status of California Indians ever commissioned by the United States Congress.[1] Our

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[1]Congress commissioned exhaustive reports that detailed the tragic history and its remaining effects on California Indians. See, Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, September 1997.

historical role in California Indian affairs provides CILS with a clear perspective on how the 2000 amendments would impact California Indians, as well as on how beneficial S. 550 will be for the California Indian community. Moreover, because we have a long history of representing tribes and individuals, CILS understands the sometimes competing nature of individual and tribal interests, and what policies strike a reasonable balance between such interests.

II. THE INDIAN LAND AND NATURAL RESOURCE BASE IN CALIFORNIA

With 107 federally recognized tribes in California, one might expect the Indian land base in California to be substantial. However, the Indian land base in California is extremely small. The reservations and rancherias under the jurisdiction of the Pacific Region Office[2] consist of approximately 400,000 acres of land held in trust for the benefit of California Indian tribes. An additional 63,000 acres of public domain and reservation allotments are held in trust for the benefit of individual California Indians.[3] By contrast, the eighteen unratified treaties between the United States and California Indian tribes would have reserved approximately 8.5 million acres of Indian land in California.[4]

Some federally recognized tribes in California have no tribal land base whatsoever.[5] Many of the reservations and rancherias in California are extremely small: most are less than 500 acres; 22 are 100 acres or less and, of these, 16 are 50 acres or less; seven are 20 acres or less; five are under 10 acres; and four are under five acres.[6] Only 11 California Indian tribes have a land base of over 10,000 acres.[7] This lack of land stems, at least in part, from Congress' failure to ratify negotiated treaties, the termination of California Indian tribes under the California Rancheria Act of 1958, as amended, and their partial restoration.[8]

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[2] This does not include the three reservations that straddle the California/Arizona border, which are under the jurisdiction of the Phoenix Area Office. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996."

[3] Id.

[4] See Flushman and Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 390, 418 (1986) at 403-404.

[5] See Table 1 to the ACCIP Economic Development Report.

[6] Id.

[7] The ACCIP Trust and Natural Resources Report, at pp. 11-12.

[8] The ACCIP Historical Overview Report: The Special Circumstances of California Indians," at p. 5,13; See, e.g., The ACCIP Termination Report: The Continuing Destructive

III. EFFECT ON INDIAN ELDERS IN CALIFORNIA

CILS urges the Senate Committee on Indian Affairs to complete work on S. 550 as soon as possible. Serving many Tribes and elders, CILS is in a unique position to gauge the effect of the 2000 amendments on the California Indian elder population and we regret to report that the uncertainty occasioned by the 2000 amendments to the Indian Land Consolidation Act has created great distress among California Indian elders. No other recently enacted piece of federal legislation has caused as much anguish and fear among the American Indian community, especially our elders. Since the passage of the 2000 amendments to the Indian Land Consolidation Act, Indian elders in California who possess interests in trust allotments have been under significant stress and discomfort – because the definition of "Indian" and limitations in the probate provisions of the 2000 amendments would have the effect of preventing them from leaving their lands to many of their children, grandchildren, and great-grandchildren. Estate planning and will drafting, which could reduce fractionation and encourage consolidation, are currently complicated by the possibility that the 2000 amendments could limit the ability of elders to leave their trust and restricted interests to their children, grandchildren and great-grandchildren. The S. 550 amendments could restore this ability.

California Indian elders are a remarkable group of survivors. Beyond the ravages of the Gold Rush era, California Indians have survived the unrelenting antipathy, until recent times, of the State of California to its native people, as well as a federal government that seemed intent on terminating their status or refusing to recognize their existence. Despite some of the poorest treatment and the most sordid history native people in the United States have ever experienced, California Indian elders have managed to remain Indian, survive as members of communities they have kept alive and vibrant against all odds, and keep almost one-half million acres of individual and tribal lands in trust. California Indian elders find themselves once again fighting to maintain their existence as Indians and fighting to keep their precious limited land base.

California Indian elders deserve the comfort and the certainty that their precious trust lands will remain in their families and will be passed on to future generations. Moreover, they deserve the right to live out their lives secure in the knowledge that, whether by will or by intestate succession, their lands will remain protected and in trust status. We therefore urge the Senate Committee on Indian Affairs to act quickly and restore confidence and certainty to the trust probate process.

IV. PROPOSED S. 550 SUBSTITUTE FROM THE S. 550 TASK FORCE

Since its inception, CILS' number one priority, as identified by the California Indian community, has been the preservation and enhancement of the Indian land base in California. This priority

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Effects of the Termination Policy on California Indians."

has led CILS to undertake significant efforts to ensure that some of the amendments to the Indian Land Consolidation Act enacted in 2000 be repealed or modified. To that end, CILS has worked closely with the Senate Committee on Indian Affairs since the 2nd Session of the 107th Congress, on S. 550's predecessor bill, S. 1340; and CILS has served as coordinators, along with organizations such as the Indian Land Working Group and the National Congress of American Indians, for an informal S. 550 Task Force. The S. 550 Task Force, a coalition representing tribal and individual Indian interests, has sought to fashion a fair and effective substitute bill for S. 550 which balances the needs of individual landowners, Indian tribes, and the Department of the Interior. From the day of Chairman Campbell's introduction of S. 550 on March 6, 2003, CILS has assisted in coordinating numerous meetings, drafting sessions, discussion groups, community education forums and the like. As a result of this significant effort by the national Indian community, the S. 550 Task Force has drafted and shared with this Committee a proposed S. 550 substitute bill, which we hope will inform and guide the Committee's current and future efforts on the Indian Land Consolidation Act.

Sometimes we are faced with what appear to be almost insurmountable challenges. Such challenges often require communities to come together and aggressively take on those challenges by making tough decisions which reflect a great deal of deliberation and compromise. Everyone agrees that the current level of fractionation of trust and restricted lands, and the associated management of the fractionated interests, pose massive problems for the owners of such interests (including Indian tribes), the Indian tribes with jurisdiction over such interests, and the Department of the Interior (DOI). S. 550 has provided Indian Country with an opportunity for everyone to be a part of a solution which prevents further loss of trust and restricted lands, promotes the consolidation of fractionated interests in trust and restricted lands so that such lands and their resources (such as cultural and environmental resources) may be protected and/or put to productive use for housing, schools, health clinics, cultural centers, economic development, and other community purposes. The Task Force's proposed S. 550 substitute bill attempts to do all of these things while also respecting and protecting the rights and interests of individual landowners, and preserving and promoting the jurisdiction and sovereignty of Indian tribes.

The Task Force's proposed S. 550 substitute bill reflects an effort to bring together the collective knowledge, experience, resources, and vision of individual owners of trust and restricted interests, Indian tribes, tribal staff, consultants and advocates, Indian organizations, Congressional members and staff, and DOI officials and staff to provide solutions with immediate and long-term benefits throughout Indian Country. Some of the most critical features of the proposed S. 550 substitute bill are: the definition of "Indian;" probate provisions that are more easily understood, and that allow individual landowners to pass their interests to their children, grandchildren, and great-grandchildren; estate planning services that will help slow the fractionation that normally occurs through intestate succession; and consolidation of highly fractionated parcels through a variety of mechanisms. We strongly encourage this Committee to incorporate such provisions into an S. 550 substitute bill that will become law during this 1st session of the 108th Congress.

We have made progress in simplifying significant portions of the bill, and acknowledge that some areas remain complicated due to the complexity of the problem itself. Also, while the S. 550 Task Force has reached consensus on many provisions in its proposed S. 550 substitute, there remain areas where Task Force members respectfully disagree with one another and we are committed to continuing to work together to reach resolution of such areas as we move closer to this Committee's final markup of S. 550.

Respectfully submitted,
CALIFORNIA INDIAN LEGAL SERVICES

Lisa C. Oshiro
Directing Attorney

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