S. HRG. 108–81

INDIAN LAND CONSOLIDATION 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

MAY 7, 2003
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

87–046 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON INDIAN AFFAIRS

BEN NIGHTHORSE CAMPBELL, Colorado, *Chairman*
DANIEL K. INOUYE, Hawaii, *Vice Chairman*

JOHN McCAIN, Arizona,
PETE V. DOMENICI, New Mexico
CRAIG THOMAS, Wyoming
ORRIN G. HATCH, Utah
JAMES M. INHOFE, Oklahoma
GORDON SMITH, Oregon
LISA MURKOWSKI, Alaska

KENT CONRAD, North Dakota
HARRY REID, Nevada
DANIEL K. AKAKA, Hawaii
BYRON L. DORGAN, North Dakota
TIM JOHNSON, South Dakota
MARIA CANTWELL, Washington

PAUL MOOREHEAD, *Majority Staff Director/Chief Counsel*
PATRICIA M. ZELL, *Minority Staff Director/Chief Counsel*

CONTENTS

	Page
S. 550, text of	2
Statements:	
Berrey, John, chairman, Quapaw Tribal Business Committee, Quapaw, OK	68
Campbell, Hon. Ben Nighthorse, U.S. Senator from Colorado, chairman, Committee on Indian Affairs	1
Harris, Robert, Eastern Shoshone Tribe, Fort Washakie, WY	72
Lords, D. Jeff, acting deputy special trustee, Trust Accountability, Office of the Special Trustee, Department of the Interior, Washington, DC	59
Nordwall, Wayne, director, Bureau of Indian Affairs Western Region, Department of the Interior, Washington, DC	59
O'Neal, Ben, tribal council member, Eastern Shoshone Tribe, Fort Washakie, WY	72
Stainbrook, Cris, executive director, Indian Land Tenure Foundation, Little Canada, MN	74
Thomas, Hon. Craig, U.S. Senator from Wyoming	59
Willit, Judge Sally, Indian Land Working Group, Albuquerque, NM	77

APPENDIX

Prepared statements:	
Berrey, John	89
InterTribal Monitoring Association	93
Nordwall, Wayne	87
Nunez, Austin, chairman, Indian Land Working Group (with attachments)	105
O'Neal, Ben	91
Stainbrook, Cris (with attachments)	95

INDIAN LAND CONSOLIDATION ACT

WEDNESDAY, MAY 7, 2003

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

The committee met, pursuant to notice, at 10:03 a.m. in room 485, Russell Senate Building, the Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, Thomas, and Craig.

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

The CHAIRMAN. The Committee on Indian Affairs will be in session.

Welcome to the committee's hearing on the American Indian Probate Reform Act of 2003. I reintroduced the bill in March, joined by my colleague and friend, Senator Inouye.

For 200 years, the pendulum of Indian policy has swung from one extreme to another. Even today, one of the most damaging legacies of the Allotment Era of the 1800's is the continued fractionation of Indian lands. The allotment policy was designed to break up the tribal land mass and turn Indians into farmers. It resulted in millions of acres of Indian land lost to their Indian owners.

By virtue of Indian probate rules and the steady march of time, millions of more acres have passed from the original Indian allottees to thousands of descendants with undivided and economically useless interests in the land. The fractionation problem is at the heart of the ongoing trust reform efforts.

There are bright spots, however. The Department's land consolidation pilot has resulted in thousands of small parcels being returned to tribal ownership through a voluntary purchase program. I want all the people concerned to know that this committee will work on this measure for as long as it takes to get it right. In fact, that original pilot program was authorized by this committee. I believe the core concepts are solid. Hopefully the witnesses will offer some suggestions of how to make a bill that I think is a good bill, a better bill.

[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-

(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)).

58

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)).

○

The CHAIRMAN. Senator Thomas, did you have an opening statement?

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Thank you, Mr. Chairman. I want to thank you for holding this hearing. Certainly it is one of the most important things to us in Wyoming. Last year, the Eastern Shoshone General Council created a working group. Ben O'Neal was a part of that group and was elected to the Council. He is here to testify. We are very pleased about that.

Obviously it is important for us to deal with this issue. Individual land owners in Wyoming are concerned about the future and how they are going to go with their families. Without doing something, it is very limited in what we can do with the States.

I know you have worked long and hard on this, Mr. Chairman. I want to join with you in seeking to find a solution. We did not get it done last year. We need to work on it this year.

Thank you.

The CHAIRMAN. Thank you. With that, we will go ahead and start with our first witness, Wayne Nordwall. He will be accompanied by D. Jeff Lords.

Mr. Nordwall, let me ask you. Are you related to the Nordwalls around Reno somewhere? Adam Nordwall and that family?

Mr. NORDWALL. Yes, Mr. Chairman; he is my uncle.

The CHAIRMAN. He is a good friend of mine. I have not seen him for years. We used to pow wow together a long time ago, 25 or 30 years ago.

Go ahead, Mr. Nordwall.

STATEMENT OF WAYNE NORDWALL, DIRECTOR FOR THE BUREAU OF INDIAN AFFAIRS WESTERN REGION, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY D. JEFF LORDS, ACTING DEPUTY SPECIAL TRUSTEE, TRUST ACCOUNTABILITY, OFFICE OF THE SPECIAL TRUSTEE

Mr. NORDWALL. Thank you, Mr. Chairman.

I would like to submit our testimony for the record.

The CHAIRMAN. Without objection, all written testimony will be included. You can divert from that if you would like.

[Prepared statement of Wayne Nordwall appears in appendix.]

Mr. NORDWALL. Rather than read from that or deal with it, I made some notes last night to talk about some of the general issues that you just discussed.

The CHAIRMAN. That will be fine.

Mr. NORDWALL. Probably one of the single most important measures pending in the Department of the Interior right now is trust reform. A key to getting trust reform accomplished is resolving this fractionated heirship issue.

Without some sort of a resolution, any system that we could create in order to deal with these issues in the short term probably will not last very long because fractionation would rapidly outpace almost anything we could put in place.

We support generally the concepts that are in S. 550. However, after having reviewed the latest draft, and having more experience

on the ground in dealing with the Indian Land Consolidation Act [ILCA] amendments of 2000, we believe that the existing version is overly complex. We would like to work with the committee in order to make a bill that is a little more understandable and will be capable of being implemented in the field.

At this point you have already gone over some of the history of the allotment process so I will not go over that again other than to say that the direct result of the allotment process was a loss of over 100 million acres of trust land. It is the side effects that we are concerned about at this hearing; principally, the fractionation itself and the problems we have in probating all these numerous estates.

I was just looking in the room and I see many of the people that we worked with back in the 1970's that are still here and still trying to resolve this issue. I met with an old BIA realty officer. He said:

> You know, if we cannot solve this problem relatively soon, within a generation or two or three, all the land in Indian country will be so fractionated that it will become almost de facto communal land. Nobody will know who owns it. It will just be there and it will be a resource that nobody will really be able to administer.

So we began reviewing the past history of this thing. It has been well documented since at least the 1920's. The first big detailed report was the Miriam Report in 1928 which outlined all the problems with fractionation, with the allotment policy, and was a very detailed analysis of all the problems created. That was the foundation for the Indian Reorganization Act in 1934.

Two of the cornerstones of the original Indian Reorganization Act were a title that dealt specifically with fractionation, and a complete separate title that dealt with probate. Like many things that have happened over the years, by the time it went through the legislative process, the two titles had been dwindled down to one or two paragraphs that were simply inadequate to address all of the problems.

Had the original provisions been enacted, this problem may have been solved in the 1930's. That is past history. All through the 1950's and 1960's there were additional efforts to get a legislative solution to this problem. All of those efforts for various reasons failed. Either the allottees opposed it, or the tribes opposed it, or the Administration opposed it. There was never a solution worked out.

We began working on this issue again in the early 1980s. At that point we were working primarily with the old House Interior and Insular Affairs Committee because they had Indian expertise over there. That expertise is now in this committee.

We prepared the original draft of what became ILCA, the Indian Land Consolidation Act. Our original thought was that we would vest most of the authority to deal with this issue in the tribes by authorizing them to create tribal probate codes. In a sort of catch-all, fall-back position in order to try to slow fractionation, the escheat provision was put in there that for the tiny fractional interests that were continuing to pass until the tribes enacted their codes, they would escheat to the tribes. As this committee is well aware, the act was amended in 1984. There were two versions of

ILCA, both of which have subsequently been struck down by the Supreme Court as unconstitutional.

We started looking at the problem again in 1993. We revised ILCA substantially. *Irvin* had been decided. *Youpee* was pending. We essentially removed the escheat provision altogether. We tried to come up with a uniform probate code. Again, as is typical of the way these things work, by the time it went through the process, certain provisions were put in there that either do not directly address the problem sufficiently in order to resolve it, or they are so confusing that it literally cannot be implemented.

We have a team that has been put together that consist of administrative law judges, members of the solicitors office, and tribal attorneys that have sat around trying to analyze how the probate provisions of the existing ILCA are supposed to work. They cannot agree on what exactly they say.

Our employees in the BIA are supposed to go out and explain this to Indian country. We issued a notice to over 200,000 people, as the act requires, to try to advise them of the terms. All this created was confusion and fear in Indian country because the provisions are basically unintelligible.

So we started working with the committee starting almost immediately after the 2000 amendments were passed on what became S. 1340. Initially S. 1340 was a relatively simple bill that addressed only certain key probate issues. But it morphed into something that is a little more complicated in the existing version which has now been reintroduced as S. 550.

It is far more complex than the original version. At this point the Administration just believes that it will not work again because it is simply too complex. It has this passive trust, active purchases, and inactive purchases. It has a variety of things in there that we cannot interpret and we know we cannot explain it to Indian country.

Last year the Department held a 2-day conference where we invited members of Indian country. We also had the Secretary's office represented. Deputy Secretary Griles was there, as well as Jim Cason and Ross Swimmer. We invited members of the committee and they were present.

The conference was to brainstorm some ideas on how to finally resolve this fractionated heirship problem and how to address probate. A lot of ideas were floated on the table. For those of us who have been working on this for a long time, it was old history because all the new people arrive at the table and think they have new ideas. They have actually been discussed many times before.

One of the things that I did was ask the Deputy Secretary and other people from Interior to read a 1938 report that was drafted at the end of a meeting that was held in Glacier Park, MT. The people who ran this meeting were Felix Cohen and John Collier, who basically are the people who created the cornerstone of modern Federal law and modern Indian policy.

I told them to think about the discussion that they had that day and to read this report. They would be shocked when they read this report. They came back the next day. I was surprised that they had actually read it.

If you tear off the cover of this report and take away the date, and read the text, the ideas, the suggestions, and the problems that were facing the Department of the Interior and Indian country in 1938, they are exactly the same problems we are talking about now.

If the committee does not have a copy, I will leave a couple here so that the staff can look at it. I urge them to look at this report. It is really something that is just truly amazing when you review this. Felix Cohen and John Collier are, of course, the fathers of modern Indian law.

At any rate, where are we right now? We have S. 550 which we greatly appreciate the Committee introducing and to the extent we can, we will work with the committee in order to try to revise and create a better bill.

The Department also has a work group in place right now that is working on a plan to expand the pilot project nationwide in order to begin acquiring fractionalized interests. A Federal Register Notice was published a couple of weeks ago inviting tribal leaders to participate on that in order to determine which tribes should be selected next in the process and how the process should actually be implemented out in Indian country.

When we get to the end of this, we still believe that the most viable solution to most of these problems is to reconsolidate these fractional interests and invest them in the tribe. Then the tribe will be allowed to issue land assignments or deal with land issues under traditional tribal law.

We also have in place a to-be initiative we are going through and trying to re-engineer all the Department's trust processes. One of the processes that is being re-engineered is probate. Again, we would like to point out that even though we are looking at this to-be process, that only addresses process, it does not address substance. That is what S. 550 addresses and that is what we need to work with. We need a substantive change in the law because no matter how we streamline the process this problem is just going to overwhelm anything we can put in place.

Finally, we do have an informal meeting process. We have not become part of the formal group. The NCAI, the Indian Land Working Group, and others have been meeting periodically to discuss S. 550 and ways to correct ILCA. We have had members of our staff participating either in person, at the meetings, or on the telephone. We are trying to solicit ideas in order to collectively come up with better ideas.

Why do we need this? We need this because we are literally at the point within another generation or two where this land is going to be so fractionated that we are not going to be able to know who owns it. We are not going to be able to account for income that comes in from it. It will become essentially almost worthless.

We have situations in Arizona where we have 10-acre allotments. Many of the allotments in Arizona were made late in the allotment period and since they are irrigated they are quite small. We have some with over 500 owners.

When we started the pilot project we selected that because one of the allotments there had over 1,000 owners which was the most in the country. We now have several allotments with over 1,000

owners. When we started the pilot project that particular reservation had 87,000 fractional interests. We have acquired 40,000 and yet we still have 87,000 fractional interests. It has grown by that much. If we had not purchased those interests, we would probably have 200,000 or 300,000 because a lot of those 40,000 would have had to be in re-probate.

In 1992, the General Accounting Office [GAO] did a report trying to assess the significance of fractionation. They went out and looked at the 12 worst reservations that probably account for 75 or 80 percent of the total fractionation problem, although the problem is on multiple reservations around the country.

We are attempting right now to generate an update to this report to show how much fractionation has grown. Because of the injunction from the *Cobell* Court, we do not have data after 2001 because our computer systems are still behind. But in the 9 years, from 1992 to the end of 2001, on these 12 reservations the number of fractional interests went up by 35 percent.

This problem is serious. It is something that needs to be addressed. One of the things that is required by the existing act and also contemplated by S. 550, and one of the things that the Supreme Court found to be deficient in the original two versions of ILCA, was that we have to provide notice to Indian country about what these provisions mean. We have to assist them in drafting wills or doing estate planning.

We have gone through and issued many of the things that are required for the Secretary of the Interior to issue that certification. One year after the Secretary certifies it, then the existing probate provisions become effective. S. 550 has a similar provision.

Because the act has so many confusing and ambiguous sections in it, the committee asked us last year not to certify the bill. We did not certify that so that we could work with the committee on S. 1340. We are still in that same position. There are provisions of ILCA that are useful that we need to implement but we have not, as yet, certified the statute.

We are hoping to work with the committee on S. 550, to create a bill that is understandable, comprehensive, and deals with this issue once and for all so we can go through a new round of notices. Anything that we do as far as an amendment will require more notices. We only want to do that one or two more times. The last time we did a mail out, there were a total of 210,000 notices issued.

Again we are waiting to certify. But if we cannot get movement on S. 550 then the Secretary will probably have to certify the bill. There are other provisions in there that we do need in order to try to address other issues.

Mr. Chairman, that is basically where the Department is right now. If you have any questions, I will be glad to answer them. Mr. Lords is here to talk about anything that OST is doing regarding the to-be process.

The CHAIRMAN. Thank you.

My morning started out pretty good until I came in here. [Laughter.]

Let me ask you a couple of questions. I appreciate your working with the committee to try to find some solutions to a very com-

plicated problem. You gave a very concise description of how complicated it is.

When we talk about total funding, what amount of funding would be required, do you think, to undertake an aggressive national campaign to buy back all fractionated land? Do you even have a ball park figure? It must be in the billions.

Mr. NORDWALL. Well, we are doing a preliminary analysis right now. We have met with the Office of Management and Budget [OMB]. The Department has been discussing something on the order of $2 billion.

What we are looking at on a per-project basis is that right now given our existing systems and what we can reasonably purchase using Land Records Information System [LRIS] and our existing computer systems, we can spend on a pilot $1 million a month, in other words, roughly $12 million a year.

If we just address the 12 reservations in this report, that would take $144 million per year times however many years it takes in order to ultimately resolve this.

The CHAIRMAN. We have already spent a lot of money on *Cobell*-related historical accounting exercises, as you probably know. What kind of a dent would $350 million make in buying back fractionated land?

Mr. NORDWALL. When we did the original projections in 1992, we estimated that with $300 million, spread out over 6 years, we could acquire virtually all of the land that I think was less than 10 percent in size. That would be all the 2 percent interests, up to 10 percent.

That constitutes over 80 percent of the record keeping. Once we have addressed that, at that point I think viable consideration, either in families or the tribes or in something else, can take place. But with that amount of money, we could probably purchase the majority of the 2 percent, and maybe up to 10 percent interest.

The CHAIRMAN. Your testimony is that an aggressive approach to fractionation needs to be taken and that the 4 million interests are going to be grown to 11 million by 2030. Given these figures, what do you call an aggressive approach?

Mr. NORDWALL. First we need to address the basic probate problems which is primarily what S. 550 was intended to do. We need to come up with a uniform probate code or something that is understandable by the majority of the people and that addresses the majority of the problem.

We realize, given the last 75 years of history, that while everybody philosophically agrees there is a problem, there is always a disagreement as to the solution. At some point we are going to have to make some hard decisions about what exactly we are going to do. There will not always be 100 percent support for this, obviously, on any piece of legislation.

We need to fix the probate process. Then we need to expand the pilot project and target particular reservations that have the most severe fractionation problems and the heaviest burden on the Department of the Interior and the number of the allottees as far as the number of Individual Indians Moneys [IIM] accounts.

We have situations right now, particularly in the Great Plains, where virtually all the leasing is done under 25 U.S.C. §380. Most

of the leasing statutes provide that the allottee can come in and lease their property subject to approval of the Secretary. But where the heirs are too numerous or they are undetermined under certain circumstances, the Secretary can issue a lease on their behalf in order to generate income and then try to distribute that.

We are in a situation in the Great Plains and in the Billings area where 90 percent of the leasing is done under §380. Basically we pass on land owner base. They all own very tiny fractional interests. It costs the Administration $200, $300, or $400 to collect $10 or $20 in income. It is counter productive.

The CHAIRMAN. You mentioned a group that you met with perhaps several times with tribal members and people of the Administration. You said someone of the committee was also there. Is that their view, too, that the most important problems are probate problems?

Mr. NORDWALL. I am sure there are many here who have their own perspectives, but I think the majority of the allottees in our region that we deal with are all concerned about this. A probate gets filed. Sometimes it takes 2, 3, or 4 years in order for it to be probated. There are a variety of reasons for that.

There are problems getting deaths reported, and getting the information that we need from the allottees. Once we receive the information then it has to go to the Office of Hearings and Appeals. We have tried to create a streamlined process now, where, if it is a money estate only, we have created these attorney decision-makers where they can adjudicate the small estates.

One of the things perhaps we can examine as part of this probate reform initiative is the way that we conduct the appraisals. How formal does it have to be? How much of a record has to be created, depending on the value of the estate? Perhaps these are some of the things we can talk about with the administrative law judges, with some of the tribal attorneys, and with the allottees in order to speed up that process.

The CHAIRMAN. According to your testimony, it costs about $1,400 on average to probate an Indian estate and that there are about 1,500 estates with a combined total value of $7,200. What ways do you propose to process or clear the books of these little tiny dollar estates ina way that does not violate the Constitution?

Mr. NORDWALL. That is the attorney decision-maker process that we came up with. For low dollar estates, it is an informal process. The way they deal with due process issues is that at any point during the process, if an allottee or an heir is concerned about the process, they can request a full blown hearing before an administrative law judge. For many of these small dollar estates, though, it has not been an issue. We have adjudicated several of those.

We are also in the process right now of trying again to update our information, and get a better idea of the total number of pending probates. The number is far larger than I had thought it was. We are probably looking at probably about 18,000 probates that are presently backlogged or pending.

The CHAIRMAN. You spoke of this working group of tribal leaders, departments, and so on. Is it the Department's position that we should wait here at the committee level until they reach some kind of a consensus?

Mr. NORDWALL. I think most of them agree the existing bill needs to be refined. I think the committee should wait until the Department has had an opportunity to prepare a bill. We will work with these groups as best we can. I think the idea that we will have a consensus is one of the reasons why we have never had reform. It seems like in the non-Indian world if you get 51 percent of the vote it is a landslide, but in Indian country you have to have a consensus. In other words, everybody has to agree. You will never get everybody to agree.

At a certain point we are going to have to work with the Committee. Some decisions will have to be made on how to address this.

The CHAIRMAN. If we expand the buy-back alone without changes in the probate law, will that accomplish anything?

Mr. NORDWALL. The way we have always looked at this is this. This is a two-part scenario. We have to consolidate the existing fractions. We have to slow or stop further fractionation. Somehow if we could get far out in front of this problem to buy the fractionated interests back quick enough, it might give us enough time to try to resolve the probate issues. They really need to go together.

It is a pilot project. The problem that we have had is that we have bought over 40,000 interests, but we are exactly where we started three years ago. We still have 87,000 outstanding interests.

So if we could jump far enough in front with a large enough program, we might be able to put enough of a delaying action in there to address these other issues. If we can consolidate enough of these things into the tribe, it might do it. We always looked at this as being a two-pronged approach.

The CHAIRMAN. Thank you.

Senator Thomas, did you have some questions?

Senator THOMAS. As I listened to your describing the history of this, I think you almost indicated that this bill is no different than what was talked about in the 1930's. Is there is a clear remedy that is different than what you talked about in the last 30 years?

Mr. NORDWALL. No; I think that is why I suggested that this memo is surprising. Virtually every single issue that we have talked about is in there. I do not know that anybody has a magic bullet. Nobody has come up with that. That is part of the problem that we have. Everybody says, "Gee, there must be a simple solution to this." The solutions are all complex.

Had we done this in the 1930's, it probably would have cost us $800 or $900 million to resolve this problem in 1930 dollars. Now it is going to cost us $2 or $3 billion to solve this problem. If we do not address it in the next 5 or 10 years, it is liable to cost us $10 or $20 billion, plus the exposure to the United States on additional *Cobell*-type litigation. It is just going to expand as rapidly as the fractionation.

Having dealt with this for years and met with lots of people, there are no magic bullets. I do not know of anybody that has thought of a solution that will address this problem cheaply, quickly, and without a lot of manpower involved. It just is not an easy thing to deal with.

Senator THOMAS. How do you divide the issue of resolving the operations in the future as opposed to settling the differences in the past? Which of those is most important?

Mr. NORDWALL. Do you mean as far as the *Cobell* litigation, the issues that are involved in that?

Senator THOMAS. Just the differences that are involved in the issue? If you took the money that I guess you and Griles are talking about and spending it here, would that solve the problem in terms of process in the future?

Mr. NORDWALL. There are some lands that are still in sole ownership. Some of the lands, such as the ones at Palm Springs have high value. Some of them have producing oil and gas wells. The families, in those cases have tended to not allow the fractionation to occur at quite the level that we have.

Up at Crow there is a competent leasing statute where as long as the family keeps the number of owners at five or less, they can lease their property without the approval of the Secretary of the Interior. In those circumstances where they have done that, the Department would not initially be interested or target acquiring those.

The other interests where there are thousands of owners in single tracks, we think the only long-term solution is to acquire them and turn them over to the tribes. At that point they cannot fractionate after the tribes own them. At that point, the tribes would issue land assignments or traditional use areas like they did under tribal law before the allotments were issued in the first place.

Senator THOMAS. What is going to be the benefit to 1,000 owners over a relatively small and productive piece of land?

Mr. NORDWALL. What we have found is that these 1,000 owners own interest in more than one allotment. When we go out and we do the evaluation for the price, we find that they own multiple interests. We create an inventory that shows the value of each interest. While each interest may only generate a few cents, the value is a little higher. Usually it is a 10-to-1 rule. If the property generates $1 in income, it is usually worth $10.

It usually adds up to a fairly significant amount of money, several hundred dollars and in some cases several thousand dollars. They get a direct benefit from this acquisition program that they would not get by getting one or two cents a year off the leasing income. They can use that for other useful purposes.

Again, hopefully once this land is revested in the tribes, then as members of the tribe they will have a right to go to the tribe in order to seek a land assignment or some use right on that property.

Senator THOMAS. I understand. It just seems like it is a waste of effort to go out and spend a lot of money and spend a lot of time where each individual gets a few dollars. It is hardly worth it.

Mr. NORDWALL. That is one of the issues that we have talked about, too. In those circumstances where the inventory is small, if somebody only has $2 worth of land, they are not even going to drive to town in order to fill in the paperwork to sell the property.

Senator THOMAS. Or in your time dealing with them?

Mr. NORDWALL. Right. And whether or not we should offer a minimum price on some of these things. That is another issue.

Senator THOMAS. Just because issues are difficult does not mean that they can be prolonged forever. Someone has to step up and do something. The Department has not done a lot, it seems to me.

Thank you.

The CHAIRMAN. We appreciate your being here. We look forward to working with you on some amendments to the bill to try to make it understandable and acceptable to everybody.

Thank you for being here, Mr. Nordwall.

Mr. NORDWALL. I will leave a couple of copies of the 1938 report here. If the staff has time to look at it, I think they will find it very interesting.

The CHAIRMAN. Good. Thank you.

Panel two will be John Berrey, chairman, Quapaw Tribal Business Committee, Quapaw, OK; Ben O'Neal, tribal council member, Eastern Shoshsone Tribe, Fort Washakie, WY; Cris Stainbrook, executive director, Indian Land Tenure Foundation, Canada, MN; and Judge Sally Willit, Indian Land Working Group, Albuquerque, NM.

All of your written testimony will be included in the record. As with the first panel, if you would like to abbreviate or divert from your written statement, that would be fine.

We will start with Mr. Berrey first. Welcome.

STATEMENT OF JOHN BERREY, CHAIRMAN, QUAPAW TRIBAL BUSINESS COMMITTEE, QUAPAW, OK

Mr. BERREY. Good morning, Mr. Chairman. Thank you for inviting me. Senator Thomas, I am very honored to be here to speak here.

I am here to give you and little idea of what probate looks like today and how the current problems regarding probate are not just probate-only problems. I will give a description of the complex interrelationships involved in the cash, the land, and the resource management processes that are currently administered by the Department of the Interior.

Last year I was a member of the non-defunct Trust Reform Task Force. As part of that Task Force I was really fortunate to have a great opportunity to work on what is called the "As-Is" project. I spent over 204 days away from my family and tribe, traveling across the United States, interviewing nearly 1,000 people that work in the Department of the Interior or for tribal governments in all 12 regions.

We made a detailed and intricate study of how they actually do their processes. The processes that we analyzed were accounting, which is the co-actions and the management of that money, and the distribution of that money. We talked with everyone from superintendents to MMS people. We did a detailed study. We put it all down and we have a really good picture of how this works throughout the country and how there are different nuances, the way tribal laws work, tribal State laws, State regulations, and how they affect all these processes.

We also looked at appraisal. We looked at what happens when someone wants an appraisal. Who do they ask? How do they get the appraisal started? Who does the appraisal? How is it reported? How is that information managed?

We looked at what is called beneficiary services which is the contact between either a tribal member, a beneficiary, or the tribal government itself, and there interrelationship, whether it is OTFM, whether it is MMS, or BLM. How do they interrelate? How do they interact? How is that tracked?

In some locations, particularly at my agency, you used to go to the superintendent and they would give you nothing. They would just blow you off. There are some agencies and some processes out there that really try hard to track that contact and follow it through all the way to where the answer the questions. Where is my check? What is going on with the enforcement on my lease?

We also looked at the Cadastral Survey Services which is the identification of the true boundaries of any allotment or any piece of land that is managed by the Department of the Interior, of how that is ordered, how that is recorded, and how that information is managed.

We looked at probate. We looked at it in detail. We looked at the three segments of probate. There are three distinct sections that you need to understand. That is where a lot of inherent problems in probate are. There is the case preparation, which is where all the documents are gathered for the adjudicator to clearly understand the cash ownership and the land ownership of the deceased person. They are able to come up with the people that are inheriting that land through that process. There is such a tremendous backlog in these records. That is where a lot of the problem is today: In probate.

There is the adjudication process. There are three different adjudicating groups. There are the ADMs as Mr. Nordwall discussed, the ALJs, and the IPJs. We interviewed all those people. We talked with them from the very beginning from the moment a person passes away to the time the accounts closed and we documented every step of the way—what rules and regulations they follow, and the intricate processes they follow.

We also looked at surface and subsurface management. We wanted to understand in detail how a lease is developed. If someone wants to look for oil and gas on a particular piece of property, how does that relationship work when that person goes to the superintendent? They talk about what they want to do, and how they go through the process of creating the lease. They talk about the compliance and enforcement of the lease. They go all the way to the point of when they release the bonds, reclamation is done and all the cash is distributed from that lease.

We did it for timber, for agriculture, whether it was for crops or grazing. We did for the commercial businesses. We did it for surface minerals such as gravel and sand. We did it for subsurface which is oil, gas, and mining.

Finally, we looked at the title. Typically in the non-Indian world you think of title of the plat book down at the county courthouse where everything is laid out, any liens and encumbrances upon that property. But under the Department of the Interior, their title system is a lot more broad. Because of fractionalization, it is a huge problem. That where we see a lot of the problems today. The management of probate circles around the title which is the ownership information related to a particular piece of property.

There is a piece of land in the Great Plains that is 80 acres. It has over 3,000 owners. It generates $100 of income a year. It is a huge problem just to manage those names and addresses, who they are and where they are from.

We traveled all across the country. We had some people from the Department of the Interior and we had people from a group called EDS, our contract facilitators. We talked with people from BIA, MMS, BLM, OTFM, and OHA. Anybody that touched trust we interviewed them and we documented what they do. We went through 638 contracts, self-governance tribes, and direct service tribes. We went to all 12 regions. We talked with clerks, line officers, and managers. We interviewed everyone in the system if they were available. But we got to every position that was in the system.

The beauty of this whole project is that for the first time in the history of the United States, we established a comprehensive understanding of the current trust business operations. We documented these variances—the difference between how it is done in Nashville versus how it is done in Anchorage or how it is done in Phoenix versus how it is done in the Great Plains.

We have a detailed understanding of the differences between tribal laws, local laws, and State laws. We documented the way the people read the CFRs differently. We also identified all the opportunities for the re-engineering process. What does this have to do with probate? Over the years, Indian country has seen reform issues, reorganizations, plans, meetings, summits, work groups, task forces. All of these have been quick fixes, but none of it has really worked because they have never attacked the core problem, which is this fractionalization problem.

The fractionalization is making it impossible to manage this information. The General Allotment Act of 1887 was designed to destroy tribal governments. I think it is time now that we reverse that and try to give the land back to the tribes to increase their land base in their jurisdiction.

The DOI is pretty much a land management entity. If you look at their systems of record, in order for a probate package to be created, they have about 67 different title systems that they currently use. There is TAAMS, LRIS, MADS, GLADS, and TFAS. There are spreadsheets. There are different agencies. There are different software systems that agencies have developed.

But the sad part is that 30 percent of the agencies today still use handwritten A&E cards. That is a huge problem. At my agency, in particular the Miami Agency in the Eastern Oklahoma region, they update title once a year. Once a year they update these 3x5 cards. They order pizzas. They bring everybody into this room and they all sit around and they fill out these little cards. Every evening this little old lady carries the box of cards back to the closet and if she drops it, our records are going to shoot across the room.

There is a lot of overlapping and inconsistent information. Most of these systems are stand-alones. It creates a huge problem for probate. I have an analogy I like to use. I call it the Haskell effect.

If you have a Navajo man to go to Haskell Indian School. He marries an Osage woman. They move to Minneapolis. They adopt a couple of kids from Northern Cheyenne. They die in a car wreck.

The tragedy is not only the death, but the real problem is that the Department of the Interior has no way to identify that they have land in holdings in three jurisdictions. Because of the stand-alone systems, it is very difficult for them just to get the packet prepared in order for the adjudicator to make his decision.

There is a bright light here in all this. The second phase is the re-engineering. It is the "to be" process. We are taking the information we found. I brought you copies of the CD version and one bound version of our "As-Is" report. There are ways to clean up this ownership information. There are ways to clean up these systems. It is a process that evolves through neglect, poor management, and all these other problems.

But I believe that the Secretary and the Deputy Secretary are really dedicated to trying to fix these processes so you can do your job by helping us with a uniform probate code that will solve the fractionalization problem and help them get a handle on this huge title ownership problem.

There are a few recommendations that I would like to put forward. We, from the Indian side, have gone from our work with the As–Is process. We have to respect the property rights of the individual owners. But within the framework we have to do everything possible to encourage consolidation of Indian land.

That should be the single guiding light in any probate reform. Does it help consolidate the land? Does it help reduce fractionalization? Does it strengthen the tribe's land base and their sovereignty?

The tribes are making big efforts in this process. My tribe, for instance, are trying to buy individual undivided interests in allotments with money that we receive through our economic development. It is a voluntary program. We just ask tribal members if they are interested in selling their land. We try to get a fair market for it and cut a deal with them. A lot of tribes are trying to work through those kind of ideas.

We also understand that Indian land owners have the right to devise their land to whomever them want, but they must be compensated. That is where I think the key is, in making sure there is due process of compensation for these small fractional interests.

This could be a giant step forward in this process. But we believe that they need to limit the testate provisions to the immediate family who are members of the tribe. If there are no such members, the land needs to revert back to the tribe itself.

We need to promote estate planning; 95 percent of the Indians do not have wills. It is difficult for the average population to talk about their demise and to plan for it. Many of them do not even know where their land is. It makes it hard for them to divide it up. We need to work on some of those things and reduce fractionation. That would help.

We believe adjudication should be put under one roof. The ADMs and the IPJs intimately know Indian law. They know the land. They know the people. They know the fractionalization problems. We think those should be the people that are doing the adjudication. It is difficult for young Indian attorneys or people who are interested in Indian country to be part of that process. We would like

to see getting away from using the ALJs and going more to the IPJs and to the ADMs.

Perhaps most importantly, like you talked about, you need to beef up this land consolidation pilot project. We totally support that. We think it is a great idea. It has to be pushed harder. It has to be funded better. But it has to be managed better by both the DOI and the tribes that are involved.

In closing, I would like to pledge my assistance to any member of your staff or any members of this committee whenever you have issues related to the complex management of the Indian trust and Indian country, I would be more than happy to help you.

When it comes to fractionalization problems, settlement of historical claims, or any of the historical accounting problems, I have spent the last year of my life buried in trust management issues. I love it. It is crazy work. But I really think I could bring some clarity to it.

If you have any questions, I would be more than happy to answer them. I would like to submit our testimony for the record.

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

[Prepared statement of John Berrey appears in appendix.]

The CHAIRMAN. We will finish with the whole panel before we ask questions.

We will now go to Ben O'Neal.

STATEMENT OF BEN O'NEAL, TRIBAL COUNCIL MEMBER, EASTERN SHOSHONE TRIBE, FORT WASHAKIE, WY, ACCOMPANIED BY ROBERT HARRIS

Mr. O'NEAL. Mr. Chairman, Senator Thomas, and members of the committee.

My name is Ben O'Neal and I am a member of the Business Council of the Eastern Shoshone Tribe of the Wind River Reservation. I am joined by Robert Harris, also from the Eastern Shoshone Tribe. It is with great pleasure that I present this testimony today on behalf of the Eastern Shoshone Tribe. Chairman Vernon Hill regrets that he could not be here today, but pressing issues kept him at home.

The Eastern Shoshone Tribe of in Wind River Reservation is a federally-recognized Indian tribe with approximately 3,500 members. The Wind River Reservation is located in Central Wyoming and is the home of two tribes—the Eastern Shoshone and the Northern Band of Arapaho. There are also approximately 25,000 non-Indians living within the exterior boundary of the reservation.

Many members of the Eastern Shoshone Tribe are deeply concerned with the fact that they may not be able to leave their land to their heirs. Provisions within S. 550 address this problem, and it is for this reason that we strongly support its passage.

Title to land within our Reservation is held in various ways, including in trust, in fee patent, as tribal land,or as land held jointly in trust by the Eastern Shoshone and the Northern Arapaho Tribes. Our primary concern today is with property held in trust for individuals Indians. I would like to use myself as an example of one way in which S. 550 would bring relief.

In 1955, I married my wife who is non-Indian. We were both from ranching families,, and in 1972, we started acquiring land and building our own ranch. The first 200 acres we purchased is held in fee patent. It is located on the Wind River Reservation and contains the home site where my family and I have lived for more than 30 years. We also lease several allotments adjoining this property, allowing us to run enough cattle and operate a ranch in such a way we have derived our living solely as ranchers.

In 1989 we purchased an 80-acre track of trust land from an individual Indian. We paid fair market value for this land. The track adjoins our patent fee ground and adds significantly to our ranch. In 1994, my wife and I purchased 240 acres of patent fee land from my neighbors to allow for expansion and our son and daughter expressed an interest in being part of the ranching operation.

At the same time we also purchased 200 acres of adjoining Indian trust land from multiple Indian heirs. These lands are all contiguous and even contain a creek that runs right through the middle adding further value to our property.

Through additional acquisition, I currently own 1,200 acres of property within the Wind River Reservation. One-half of this property is held in trust. The other one-half is held in fee. I paid fair market value for all of it. Under current law, as a member of the Eastern Shoshone Tribe, and as a landowner, I can only will my trust property to an Indian or to my tribe; but I would like to leave to my family.

I am not alone in the fact that my wife and my children are not members of the Eastern Shoshone Tribe. Despite the fact that they have stood by me over the years and have helped our ranch become a success, current law only permits me to leave my trust property to them as a life estate. I find this unacceptable.

My only option is to remove the property from trust status and place it in fee, something I do not wish to do. Individual Indian land owners, such as myself, should have other options. We should be able to determine to whom we leave our land. Indian land owners should have the same rights as others within our country to keep property within our families for as long as we choose to do so.

This right should not be based upon race or political distinction, just as it should not be based upon religion or other similar factor. I support the passive trust provisions within S. 550 because they allow me, and all others like me, to ensure that property stays within our families for the duration of our choosing.

Let me be sure to point out that the Eastern Shoshone Tribe is not seeking to impose this option on everyone. If an Indian landowner wants to give their trust property to the tribe, they should be able to do so. Our position simply is that there should be an option added to those that current exist; that we should be able to choose who gets our land.

In the future, if my descendants determine that it is time in their best interest to sell this property, the tribe should be given a period of time in which to exercise a first right of refusal. They should, however, be required to pay fair market value for it, just as I did.

This raises another concern we have with existing law. Currently, there is little incentive for the tribe to pay anything of value for trust property. The tribe realizes that for individuals such as myself, who are restricted to leaving trust property to heirs as a life estate. It is only a matter of time before the tribe comes into possession of the property with no payment at all.

This eventual outcome serves also to discourage use and improvement of the land. Why would I invest hundreds, even thousands, of dollars to improve the land when I know, in the end, I will not be compensated for my investment. Again, I find this unacceptable, and am pleased that S. 550 works to resolve this issue as well.

As an aside, I find it important to mention our concern with the tribe's ability to purchase trust property, even if they wish to do so. While purchases on a limited basis would be feasible, financial assistance would be necessary for the tribe to make larger purchases. We encourage the Congress to ensure funds are available for this purpose.

I also support the idea that should the tribe not wish to pay fair market value for trust property, the option should be available to sell it to someone who is. It is important to note that this should not be viewed as a reduction of tribal lands. Many people hear the term "trust property" and they think of "tribal property." This, however, is not the case.

My property is trust property. It is held in trust for me, Ben O'Neal. It is not tribal property. I have spent my entire life working and saving to buy what I have; to make a life for me and for my family. I should have the right to determine to whom this property is left. My descendants and I should have the right to be dealt with fairly.

On behalf of the Eastern Shoshone Tribe, I again thank you for the opportunity to present testimony today. I encourage passage of S. 550.

Mr. Harris and I are happy to answer any questions you may have.

I would like to submit our testimony for the record.

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

[Prepared statement of Ben O'Neal appears in appendx.]

The CHAIRMAN. Is Mr. Harris your attorney?

Mr. O'NEAL. He is a member of the Shoshone Tribe. He is on the Land Committee for our tribe.

The CHAIRMAN. Thank you.

We will now go to Mr. Stainbrook.

STATEMENT OF CRIS STAINBROOK, EXECUTIVE DIRECTOR, INDIAN LAND TENURE FOUNDATION, LITTLE CANADA, MN

Mr. STAINBROOK. Chairman Campbell, thank you for extending the invitation to provide some testimony on S. 550. I would appreciate it, and my family would certainly appreciate it, if these hearings could be spread out over some time as I was here last week. The commute from here to Minnesota is getting a little strenuous.

The CHAIRMAN. Try it every week from Colorado or Wyoming. [Laughter.]

Mr. STAINBROOK. There you go.

As you will recall from last week's testimony, the Indian Land Tenure Foundation is a fairly new institution. We were created by Indian people from throughout the community that had an interest in land issues and land tenure issues throughout Indian country.

We basically function as a community foundation within the Indian community, and received our initial capital of $20 million from the Northwest Area Foundation which has now become essentially our corpus. The function and the focus of our work is in resolving land issues in a manner that really creates and maintains a higher level of self-determination in Indian country by Indian people and the tribes.

One of the basic premises of that, of course, that Indian people need to be involved in designing and carrying out effective solutions. In fact, that is what led to the creation of the Indian Land Tenure Foundation. I believe over the long haul this will lead to an effective resolution of the fractionated ownership that we are talking about today.

Last week in my testimony on S. 519, we talked some about the problems of the fractionated land base on the future economic development of Indian country. As you pointed out again this morning, it is a fundamental core piece and needs to be resolved.

Let me assure you that Indian people understand that connection. They also understand the connection between other aspects of the fractionated land base such as the limitation of their own use of the land for situations like affordable housing or even a homesite at all. There is also the basic threat to sovereignty that exists by having this fractionated land base. They want effective solutions.

The 2000 amendments to the Indian Land Consolidation Act, while they are essentially on hold at this point, they have really created a large amount of concern throughout Indian country and near panic in some situations, particularly with some of the older interest holders.

People have begun to pull their land out of trust, fearing in fact that if they do not do that shortly, they will not be able to direct where those assets are going, and especially to their relatives that are not eligible for enrollment with the tribe.

While this may reduce Federal management costs, it certainly does put Indian land in jeopardy of passing out of Indian ownership. The S. 550 amendments that are proposed here are an improvement on the 2000 amendments, we still believe that they contain some provisions that limit self determination and threatens the Indian land base.

Two of those provisions in particular are the joint tenancy and the passive trust provisions. They both contain substantial legal issues that will probably be challenged. That, of course, causes concern.

As was pointed out earlier, the provisions coming out of the Indian Land Consolidation Act, essentially through Indian country, have provided several years of discord within Indian country. When it comes to the data processing and the application of probate, you end up with considerable problems and backlog. In fact, that backlog, once the constitutionality of that provision was declared illegal,

it left Indian country with about 13,000 interests that still need to be re-probated.

Indian country basically cannot afford a repeat of that. We believe that the joint tenancy and the passive trust components have that potential.

What we would offer instead is a different route to the committee. We would certainly invite the Committee to join the Indian Land Tenure Foundation in engaging the community in the crafting of some solutions.

One of those solutions that we discussed last week with the committee was the Indian Land Capital Fund. This is a fund that we have been working to put together. It is basically designed to take the pilot project to a different scale where it can, in fact, begin to have an impact that changes the dynamic from marking time and not really getting ahead of the fractionated problems, but gets it up to a scale where, in fact, the number of ownership interests are reduced. I think Mr. Nordwall covered a fair bit of problems around that and how they continue to grow.

The fund itself has two major components, one being a very large private capital investment pool that would serve us nationally. And are a number of affiliated local land consolidation acquisition programs with the tribes. This is based largely on the Rosebud Sioux Tribes Tribal Land Enterprise program.

This is a corporate model, essentially, that has been operating on the Rosebud Sioux Reservation for approximately 50 years. It buys undivided interests from tribal members as well as alienated lands. It uses their management capability to increase the amount of leasing coming in off that property. It then uses the income from the property to make more purchases. It has grown substantially.

Tribal members, of course, maintain their interests through class A shares and others through class B shares. They are held essentially as stock in the enterprise. The shares can also be traded, bought, and used to ascertain surface use assignments from the program.

We think it has a number of advantages. One, it reduces fractionation overall and, therefore, the cost of the Federal administration. It secures the tribal land base and, in fact, even expands it through its acquisition of some of the alienated properties.

It maintains the asset and value for individuals. Indeed, we think it creates added value in that these shares are much easier to trade than if you were to do gift deeds or other pieces related specifically to land title. Therefore, consolidation becomes much easier over the long haul.

The other pieces that would apply at local levels would be some variation on the model that Rosebud uses and also an adaptation to their own local tribal planning. Probably most significant at all, with enough capitalization, these programs can, in fact, become self sufficient over the long haul.

This morning we have heard a number of people asking about the $2 billion. I was interested in that. As you will recall, last week we provided testimony where our estimate was $1.25 billion to resolve the fractionated interest. I was interested to hear that the Bureau of Indian Affairs has a little higher number.

The CHAIRMAN. That is how fast the problem is growing. [Laughter.]

Mr. STAINBROOK. Very good.

I think probably it is worth noting that in fact many resources can be brought to bear from throughout Indian country. The Federal Government does not necessarily bear the brunt of the full $2 billion. As Chairman Berrey was pointing out, their tribe, in fact, has a program of buying undivided interests.

Individual Indian people want to consolidate their land. The fact that they will be bringing their resources to bear to consolidate that land will also help offset some of that $2 billion if, in fact, there is a mechanism there that allows that.

Will the model that we have described work if S. 550 passes? We think it will, but if it passes as it is, I think there are a couple of things that will happen. One, the demand for the services of the model will go up because people will remain scared of the process and will be looking for alternatives to it.

As Mr. Nordwall pointed out, the Bureau staff simply do not understand this and the process will slow completely. That will create a problem for going forward with the model that we proposed and will be carrying out. We need those title processes to work, and work efficiently.

As just a couple of final comments, we would advocate eliminating all the joint tenancy and passive trust provisions that are in place. We would advocate adopting a uniform probate code that is attached and accompanies the Indian Land Working Group testimony.

Finally, in any piece of legislation that goes forward, we would encourage the Committee to make any action by the Secretary based on an affirmative action of 50 percent of the interest holders for any allotment as opposed to a lack of objection. This is the standard that has been applied for Indian people and the tribes in managing this land. We think the Secretary should also be held to that standard.

Thank you, Senator Campbell, for allowing me to provide some testimony. I would like to submit our testimony for the record.

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

[Prepared statement of Cris Stainbrook appears in appendix.]

The CHAIRMAN. Thank you.

Ms. Willit, I understand you will be speaking for Chairman Nunez; is that correct? Go ahead and proceed.

STATEMENT OF JUDGE SALLY WILLETT, INDIAN LAND WORKING GROUP, ALBUQUERQUE, NM

Ms. WILLETT. Thank you. I am Judge Sally Willett. I am going to borrow a phrase from one of our Working Group members. I am older than dirt. I have been doing this forever.

I would like, if at all possible, to hand charts to you that I think that will address the substantive probate code and core issues that people have referred to. I would like to give you and Senator Craig a copy, on behalf of the Indian Land Working Group, the Indian veterans calendar. I have copies for everyone on the dais.

The CHAIRMAN. Thank you. That has a solution to this complicated problem in very simple language; is that correct?

Ms. WILLETT. It has a picture. This can be as deep or as superficial as we would like.

I am going to introduce myself briefly and then I am going to make the two comments that I need to make that I have been asked to give. Then, I am going to get into the nuts of bolts of what we need to do.

I am a member of the Cherokee Tribe. I entered the threshold of Indian law 32 years ago. All but 4 of those years have been involved in Indian probate, Indian estate planning, anti-fractionation measures, and educating individual Indians. I have structured a non-fractionating estate plan within my own family that walks the fine line of benefiting heirs who are non-Indian and benefiting those who are.

I have conducted thousands of Indian probate proceedings and in each and every one of them I explained Indian land ownership and I explained how to estate plan to each and every one of the people present using charts. We cannot give information to people who have an average sixth to eight grade education in high-minded language that nobody understands.

The CHAIRMAN. Let me interrupt you for 1 moment.

Is this a descendency and ascendancy chart of a real person?

Ms. WILLETT. That is how you determine degrees of relationship.

The CHAIRMAN. Do you know anybody that fits into that category?

Ms. WILLETT. Yes; we are not going that far.

I did what Mr. Berrey did in 1999 for the Department of the Interior. I would say that many of Interior's wounds are self-inflicted. What I would like to say at this point is that progress is being made.

I listened to Wayne Nordwall whom I have known for more than 30 years. I listened to Mr. O'Neal, Mr. Stainbrook, and Chairman Berrey. It seems to me that we are all on the same sheet of music. If things were understood properly, we can get there faster.

We oppose intestate joint tenancy. We oppose passive trust interest. We oppose the confusing language of both ILCA 2000 and S. 550. People have already commented about the meat of my presentation.

I am going to restrict my comments to two areas. First, the definition of Indian and second, how to fix the problem. It requires that we stop fractionation in the future by limiting inheritance and that we acquire a Fifth Amendment protected property rights with compensation. We work from both ends toward the middle in reducting the problem.

The Indian Land Working Group, the Department of the Interior, the National Congress of American Indians, California Legal Services, and I believe the Indian Land Tenure Foundation are all working very heavily and making progress on many of these issues. We would like for you to encourage the Department of the Interior to join in this effort.

We would also like for you to ensure that they do not certify the ILCA amendments 2000 until this mixed effort has had a fair op-

portunity to reach some of the more distracting issues that are involved.

I am going to basically go to the definition of Indian and point out what Mr. O'Neal has described as Interior's influence into the ILCA Amendment 2000. It accomplished shooting the wrong horse. Anti-fractionation addresses how you approach the land. When you cut out legitimate heirs, the lineal descendants which account for 65 percent of all inheritance, you are unfairly impacting a particular population.

Probate laws are founded upon the common human experience and that is people look down to dependents. [Pointing to chart]. If none, they go up to ascendants and, then, they go to collaterals, to the side.

Lineal descendancy inheritance accounts for approximately 65 percent of all inheritance. All human beings have this expectation and rightfully so. When you make that heir pool non-Indian by giving a political definition to who is Indian, you are wiping out the legitimate heir pool for most human beings.

There are four points I wanted to make to this in this regard. A membership definition: "orphans" millions of people. There is an out-marriage rate in Indian country of 75 percent. You have most tribes pegging their membership to a blood quantum. Blessedly my tribe does not. It recognizes its people.

In 1980, 40 percent of all tribes had no approved organizational. I do not know what it is now. But there will be large numbers of tribes that do not enroll. You are orphaning them. According to the GAO report of 1992, just the northern tier, the most fractionated region, one-seventh of that population ok unenrolled land owners.

ILCA orphans them. You now have non-Indians owning trust lands. There is another problem. You have—idiosyncratically, the membership definition hurts people of high blood quantum of multiple tribes more than people of low quantum who are mixed with white or non-Indian blood.

For example, it takes three generations to get to a quarter-blood which is the most common blood quantum. If you, as in my case, have grandmother, full-blood; mother, half-blood; and me, quarter-blood. Let us say you have a Pima/Shoshone, Paiute/Sioux, they were half-bloods of each tribe, the two parents. Your first generation is quarter-blood. So people who are higher blood quantums suffer under that definition.

The more people you make non-Indian, the more jurisdictional problems you have. The more non-Indians, the more this aggressively hostile Supreme Court will apply its unusual new wave of law that has existed since *Oliphant* and *United States* v. *Montana.*

We are begging you. There is panic in Indian country. What Mr. O'Neal describes is absolutely true. They tried to reduce fractionation by eliminating who can inherit. They are taking away, in many instances—because of the high out-marriage rate—the people's right to leave property to their children.

This is not right. If you will look at the ascendancy/descendancy chart that you have in front of you, I would like for you to go to the middle where you see the term "decedent." I would like for you to count down to two and three. Then, go up one. Next go out to

two. I am sorry. I had thought the chart was with our presentation. I apologize to those in attendance.

One through three accounts for 65 percent of all inheritance. My experience in Indian probate explaining to non–Indian spouses what their inheritance meant produced 100 percent disclaimer rate, in many instances with a retention of a life estate. The life estate is inappropriate as applied to real people of real Indian blood. The problem with ILCA 2000 was the alteration of the ethnicity of real people of Indian blood, not with the life estate.

I covered Palm Springs. My territory was the Southwest. I covered the big ticket property. Do not imagine that the big ticket property was just Palm Springs. At San Xavier District of which Mr. Nunez is the District Chairman, the largest estate I ever probated had $80,000 in the IIAM account just from fractional interests in copper. It is a boom or bust proposition. Copper is hot or it is not. It was all fractionated interests.

Essentially, what I want you to know, and bring it down to a very small picture, is that we need a code that legitimately recognizes the right of people—and Indians specifically who are very lineal-descent focused—to benefit their own progeny. We think that you can go to the collateral second degree. Beyond that is where explosive fractionation kicks in. It goes wild after that point.

Look what you are cutting out on this picture. If you go through one through three, down, and go to two, out, you have cut out all of the fat, all the difficult to find and manage interests. You are very basically restricting it to a fair opportunity for ordinary human beings—and in case Indian human beings—to benefit people who legitimately have an expectancy to receive.

We have a code submitted that addresses all of these issues. The addressing fractionation chart is the next I want to refer you to. I was sitting around talking to myself, as I am inclined to do at times, and said, "Willett put up or shut up. You are always talking about not fractionating. How would you do it?"

I sat down and said the first thing I would do is that I would de-politicize it. I was in the Office of the Secretary. We were the cash cow. Indian probate did not fail. It was pushed to failure.

The next is to provide adequate resources. On the reinvention task force that I was on we provided for that. In implementation, it went nuts.

Provide cultural sensitivity. Interior got rid of all of its Indian-knowledgeable people and, now, wonders why it has problems.

Provide maximum adjudicative protections. This is where Chairman Berrey and I would disagree. I do not think holders of interest in public lands should have greater adjudicative rights than people to whom a trust responsibility is owed. That situation exists now.

The Uniform Probate Code. Under 25 U.S.C. Section 348 which was part of the General Allotment Act, they thought Indians were going to be gone and assimilated in 25 years and that the States were going to take over. That is why 50 State laws were applied. We need to get rid of that and make it simple.

Limit inheritance. I have already described that. Give people a fair opportunity for their real family to take. Do not change the ethnicity of people as an anti-fractionation device. It is inappropriate. That is what I call shooting the wrong horse.

Limit non-Indian inheritance. With an out-marriage rate of 75 percent, your herd is thinning; 100 percent of the spouses I dealt with were horrified when they realized that if they took their interest, it collapsed the trust and that it would not be restored automatically. They could not disclaim fast enough. I had to convince them to take life estates.

Maximize knowledge. I believe that I may have been the only person who ever consistently did Indian estate planning and fractionation education as a part of the probate process as an integrated system. But there were many non-Indians who did it with me. My wave was the group that did it.

Tribes need to know about it. They were not allowed to tamper with allotted land issues for a long time, especially the IRA tribes. Land owners simply have never been given information even about the 1984 amendments to ILCA.

Dollars for consolidation. If we limit fairly to the second degree at the collateral level, and we start buying up the small stuff—I was thrilled to hear Wayne Nordwall say that. Then, you can get to the point of real consolidation.

There is a lot of commonality here. I think we need to approach those things about which we have common ground. We need to quit coming up with exotica. There is no more room for exotica. A lot of money has been burned off that could have applied to good hard acquisition. There is no room for any more exotic experiments. Stick with meat and potatoes.

The CHAIRMAN. I appreciate your testimony, but we are going to run out of time in just 1 minute or 2.

Ms. WILLETT. I am done. I would like to submit our testimony for the record.

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

[Prepared statement of Ms. Willit on behalf of Chairman Nunez appears in appendix.]

The CHAIRMAN. Thank you.

I am going to submit a number of questions in writing to you, if you can answer those in writing.

Let me ask you a few questions to start with. I will also ask Senator Craig if he also has questions.

Let me just start with John Berrey. Thank you for being here.

Your testimony sounds like you are a no-nonsense kind of person. You said you did over 1,000 interviews, as I remember your testimony. If we are going to try to get away from the exotica, as Sally had mentioned, what would you say we can do to stop the hemorrhaging? What do we have to do as the central focal point to try to resolve the problem?

Mr. BERREY. I think I agree with Sally that it has to be a multi-pronged approach. I think the Uniform Probate Code is big first step. A simple, clear, unified probate code. Second, I think the resources on the Interior side need to be targeted and focused on title ownership, record cleanup, maintenance, and systems integration.

The CHAIRMAN. As I understand your testimony, you would limit heirship to tribal members?

Mr. BERREY. You have to understand that I come from a tribe that does not have a blood quantum. It is lineal descendancy. I am in agreement with Sally in that regard.

The CHAIRMAN. The Census Bureau last time estimated over 4.4 million Americans claim to be of Indian ancestry. The Bureau says that is 2.2 million. There is a big disparity of about 2 million people out there who say they are Indian.

About 15 or 18 years ago Senator Kyl and I revised the Indians Arts and Crafts Act. We were on the House side. He was from Arizona. We did some hearings on that to try to define who should be legally Indian from the standpoint of being able to market their arts and crafts as legitimately Indian rather than imported from Taiwan.

We had one man that was 100 percent Indian. He was eight-eighths. Every single one of the eights was of a tribe that required that you had to be 25 percent or more. You had to have one grandfather and grandmother as a full-blood to be included in the roll.

Here was a guy that was 100 percent Indian. He could not get on anybody's roll. I just mention that to emphasize how complicated the whole roll system is. We know for a fact that there are other people on rolls, because they were put on rolls during a time when there was not very much detail given to authenticating. There are people on the rolls now who are not Indian at all. But legally they are Indian, as you probably know.

I do not know how to fix that. It is a very big complicated problem that we are having with Interior now. In fact, in the last Administration, they wanted to put a moratorium on any more tribes being enrolled until they found a better way of determining who is and who is not Indian. I do not know if anybody knows since each tribe determines their own membership.

This is something with fractionated land the *Cobell* case and so on that is going to get worse. With the advent of so much casino money, we are getting more people that want to be enrolled as tribes, as you probably know. Sometimes there are only two or three people and they want to have their own tribe. That is really not uncommon now.

We had a disagreement between some family members here in front of the committee about 6 months ago. After 1 hour of listening to the attorneys on both sides, and the people on both sides, I asked them how many members there were in the tribe and they said "12." Just recently one member was found in California who did not know she was Indian. She was the only one left of her tribe who is going to be included in the new millionaire list since she has already signed a deal with some casino development company to build a casino for them, but she will be the front, so to speak.

The advent of all the money that is now out there floating around in casino businesses, certainly complicated how we look at enrollment. Believe me, I do not have the answer and I do not think anybody else does either, that is fair and impartial and gives those people who are really Indian an opportunity to be reinstated if they want to and still have a system by which the people who want to be Indian because it is convenient or lucrative, making sure that they do not. We know the answer to that.

John, do you favor a system that relies on purchase of the shares by either the tribe or the government for tribal members only?

Mr. BERREY. In Oklahoma there is a lot of undivided interest owned by non-Indians that is interrelated and restricted fee with fee-simple land. I think those people should have the opportunity as well to have their land purchased by the tribe.

The CHAIRMAN. Was it your testimony that mentioned 3,000 members in an 80-acre piece of ground?

Mr. BERREY. Yes, sir.

The CHAIRMAN. That sounds like something out of control by "pi squared". I do not know how in the world we ever get to a point to resolve it. It sounds to me like it is getting almost too big to do anything about. If we wait another generation or two, it might be so out of control that we might not be able to do anything about it. Would you like to comment on that?

Mr. BERREY. There are two ways to look at it. It is either your cup is one-half full or one-half empty. I think if you sat down and really looked at that piece of property, a lot of those people, like Mr. Nordwall said, have multiple fractionated interests and multiple allotments. Many of them do not really care about it. They do not get much income. It is more of paying for them.

I think if someone would actually sit down and go through the work and the process to contact them and give them the fair market value and assured them that it is helping protect the land base of the tribe, that their families are members of or once were members of, then it is not as big a problem as it really sounds. I think money talks. If it is targeted right, it will work.

The CHAIRMAN. I have one last question. You probably know from hearing me speak in the committee before that I am on record as favoring some kind of a voluntary buy-back program or an opt-out program. The *Cobell* case and the fractionated lands are certainly related. Do you support that concept?

Mr. BERREY. I do support any concept that tries to bring some closure to *Cobell.* My tribe, for instance, is suffering worse from *Cobell* than probably anybody that is working at the DOI or any members of the attorneys for the plaintiffs' class.

Last quarter, 80 percent of the FTEs in realty were spent on document production for litigation. That means that 80 percent of the money that my tribe relies on for realty functions, like economic development, getting land put into trust, acquisitions—all that is not happening.

The two parties that are there say they represent me. Stephen Griles gets his paycheck every week or every 2 weeks. I think Dennis Jengold has been getting his check. The people that both of them represent are not getting anything. I think this era of throwing rocks at the Department of the Interior needs to come to an end. We need to try to resolve this using an open mind. I think that the plaintiffs' counsel need to have full input in any kind of solution. I just do not see them coming to the table right now. It is very frustrating.

The CHAIRMAN. I tend to agree with you. I do not think it is in their best financial interests to come to the table. I have been criticized a couple of times for saying that. We have Indian people out there who are dying, waiting for fairness and waiting for the

money the Federal Government owes them. We do not have it to them yet because of all this ongoing litigation.

Senator Inouye and I and Mr. Griles met the other day. I think we are going to frame up a bill that does let people opt out of that *Cobell* decision.

Mr. BERREY. My tribe currently has a huge piece of litigation in the Northern District of Oklahoma. Our land once had the largest mining operations in the United States. It is now the home of the largest superfund site in the United States.

Even though we are in litigation, we have stayed our lawsuit. We have actively pursued alternative dispute resolution with the Department of the Interior and the Department of Justice.

We believe that because of *Cobell,* there are better ways to solve these problems than just burning down the house. We are willing to do everything that we can to be open-minded and work with the Department of the Interior and the Department of Justice. Stephen Griles has been very impactful on our attempt. We are the only tribe in the United States currently involved in a formal alternative dispute resolution process.

The CHAIRMAN. Thank you.

Mr. O'Neal, as I understand your testimony, your children are not eligible to enroll. Under the 2000 ILCA amendments, you can only leave them a life estate in the trust land portion of your land. You could put that land in fee status; is that correct?

Mr. O'NEAL. That is right.

The CHAIRMAN. Why would you oppose to be putting it in fee status as opposed to trust status? Is it because of jurisdictional problems, or taxes, or something else?

Mr. O'NEAL. Yes; taxes on our land. I do not pay them now. I want that to continue as my land base on my ranch. The kids ought to have that.

The CHAIRMAN. Is that a common situation on your reservation?

Mr. O'NEAL. Yes; it is.

The CHAIRMAN. What would you guess is the number of people who are in the same position that you are at Wind River?

Mr. O'NEAL. At Wind River right now, I think there were 105 who filed for fee patents right away.

The CHAIRMAN. How many?

Mr. O'NEAL. I think 110, or somewhere around in there, that filed automatically. Those are just families that I know of.

The CHAIRMAN. Well, if changes are not made in the ILCA amendments, and if they go into effect, have you thought about what you are going to do so that your children can inherit your whole ranch?

Mr. O'NEAL. That is what I am saying.

The CHAIRMAN. Are you familiar with a man named Abraham Spotted Elk up there?

Mr. O'NEAL. No.

The CHAIRMAN. Mr. Stainbrook, you talked about a private fund. We visited with it a little bit about it the last time you were here. Is this in some way going to rely on Federal funds, a private fund? You mentioned a land capital fund?

Mr. STAINBROOK. I think there is the potential that Federal funds will be needed to at least subsidize those deals that won't

cash flow immediately. On the other hand, once the initial capitalization was put in place at Rosebud, that was all that was really needed to kick it off.

One of the drawbacks in not having some Federal dollars, at least in the initial capitalization to cover those subsidies, is that the pool grows much slower. As you have pointed out, all of the discussion today has been that if something does not happen on a scale now, this thing is over.

The CHAIRMAN. Your testimony mentioned the Native American Bank as perhaps becoming involved someday in land reconsolidation. Have they been involved in it at all yet?

Mr. STAINBROOK. We have been working with the Native American Bank, CDC, the Community Development Corporation. If you will look on the back of the written testimony, there is a rough schematic there of bringing in the CDFI to help with affordable housing financing. That is the role that CDC will be playing.

The CHAIRMAN. All right. I will look at that.

You also mentioned $1.25 billion perhaps to purchase all fractionation lands. Who did that analysis for you or for your committee?

Mr. STAINBROOK. Our consultant, Gerald Sherman, did that for us.

The CHAIRMAN. Do you have a map for that?

Mr. STAINBROOK. I could probably get you one of those.

The CHAIRMAN. I would appreciate it if you would.

Sally, you gave me so much extensive testimony between your written comments and the little scribblings I have made. I am not quite sure where to start. You are certainly a wealth of information.

Have you worked with other groups or organizations that have been working on these same problems that we are discussing?

Ms. WILLETT. Yes.

The CHAIRMAN. Did you reach any kind of a consensus with those other groups?

Ms. WILLETT. Yes; that a uniform probate code is essential. It has to be simple and usable. It has to be fair.

The CHAIRMAN. Have you reached any accord with tribal organizations?

Ms. WILLETT. We are doing that now with NCAI and individual tribes who have members attend. There is a larger working group that is a consolidated group of multiple interests.

The CHAIRMAN. I understand from your testimony that you think that S. 550 is too complicated and might be difficult to understand by the average person; is that correct?

Ms. WILLETT. It is too difficult to understand by the average lawyer who specializes in the subject matter.

The CHAIRMAN. Okay. Then hopefully you will offer some suggestions. I know you did in your testimony. You will continue to work with us to try to make it a little easier to understand.

Your organization advocates the right of lineal descendants to inherit land in trust status even if the descendants are not members or even eligible for membership in an Indian tribe.

Under new Federal law, that would deem them to be Indians for the purpose and require the Secretary to manage the land. Does that create jurisdictional problems?

Ms. WILLETT. No, sir; it did not. From 1887 to 1934, there had never been a membership requirement. Then, from 1934 to 1980, membership was only for IRA tribes as to Indian wills.

These jurisdictional issues that we are seeing are coming from the aberrant strain of Indian law that is being crafted by the Supreme Court. We are in free-fall now. Essentially, part of our proposal is having the Congress declare fractionation a preempted subject matter. When you balance State and tribal interests, tribes lose. We want consolidation declared a preempted subject matter so that we can keep all the inappropriate interests out. I agree that consolidation has to include the interest of non-Indians. Otherwise, it is incomplete.

The CHAIRMAN. Your organization is on record as stating that the pilot program being carried out by the Department, "Provides for random purchase of fractionated lands from willing sellers."

How should the program work if it is not based on willing seller provisions?

Ms. WILLETT. I was speaking with Gila River about this. It is not the willing seller side of it. It is the random selection. The ILCA Act of January 12, 1983, provides for land consolidation plans. Tribes today have not really become heavily involved in true ILCA consolidation plan planning. They need to.

Then, what they would do is possibly target zoned areas of importance rather than willy-nilly buying little tiny interests everywhere that might not produce a return that would help them pay it off.

What we are saying is do consolidation planning as provided by ILCA and make it real. Right now the pilot project is focused on particular areas, which I agree is appropriate. But acquisition is random. We think that people need to look at it as a genuine exercise.

The CHAIRMAN. Okay. Thank you. I appreciate it. I have no further questions, but I may submit some in writing as others may, too. If you could answer them, we would appreciate it.

We will keep the record open for 2 weeks. If anybody in the audience would like to provide comments in writing, if you will submit that to the committee, we will also review that and include that.

The CHAIRMAN. With that, thank you once again. This hearing is adjourned.

[Whereupon, at 11:41 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

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 to improve provisions relating to probate of trust and restricted land. The Department commends the efforts of this Committee in the work that you and your staff have done over the years concerning the trust reform activities. We appreciate the support you have provided us. However, much work remains to be done.

While we support many of the concepts embodied in S. 550, specifically the creation of a uniform probate code, we would like to work with you to further refine the bill. In particular, we believe more work must be done on the bill to ensure that the probate provisions of ILCA are clear, concise, predictable and comprehensive. The history of fractionation legislation has been that key provisions are deleted because of minority opposition. Hard decisions must be made that will benefit the majority of Indian country.

Addressing the many problems associated with fractionated lands is a high priority within this Administration. We must find better ways to consolidate Indian land ownership in order to restore full economic viability to Indian landowners of their assets, and to reduce the tremendous administrative burden for the management of these assets. In fact, the President's fiscal year 2004 budget proposal includes a request for $21 million for Indian land consolidation, an increase of $13 million.

We welcome the opportunity to work closely with the Committee to craft legislation that would better meet the dual goals of probate reform and the consolidation of fractionated land.

The Department has responsibility for 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 accounts, and about $530 million per year are collected for approximately 1,400 tribal accounts. In addition, the trust 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 transactions of less than $1,000. Interior maintains thousands of accounts that contain less than $1, and has a responsibility to provide an accounting to all account holders. 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 accounts do not apply to the Indian trust.

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 4 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 0.000002 percent of the whole interest.

In 1983 and 1984, 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. The United States Supreme Court held the escheat provision contained in ILCA as unconstitutional. See *Hodel* v. *Irving* (481 U.S. 704 (1987)) and *Babbitt* v. *Youpee* (519 U.S. 234 (1997)). 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.

The 2000 amendments established uniform rules for the descent and distribution of interests in allotted lands. The amendments contained provisions preventing lands from being taken out of trust when inherited by non-Indians by creating a life estate for those beneficiaries with a remainder in interests going to close Indian family heirs (with conditions depending on the percentage of interest) or, if none exist, the tribe having jurisdiction over the parcel. The legislation also contained provisions for the consolidation of fractional interests. Tribes and individual allotment owners can consolidate their interests as well as purchase, sell, or exchange them. The legislation also enhanced opportunities for economic development by laying out a formula specifying the percentage of owners of fractional interests that must consent to leasing agreements. Finally, the amendments extended the Secretary's authority to acquire fractional interests through the Indian land acquisition pilot program, establishment of an Acquisition Fund, and the authorization of annual appropriations to help fund the acquisitions. Under ILCA, the Secretary is required to certify that she has provided certain notices about the probate provisions of the 2000 amendments before they become effective.

There is a clear need for probate reform. As it currently stands, the Department applies 33 different State laws when probating individual trust estates. By using 33 separate State laws, there is a lack of consistency and predictability in administering probates in Indian country. In addition, we must probate for all interests regardless of the size of the account. For example, we have to probate a decedent's estate (at an average cost of $1,400 a probate) and identify and locate all heirs regardless of the value of the estate. As of December 31, 2002 there were 1,522 open estate accounts where the funds derive only from per capita or judgment payments (and not income from land interests) with a combined, total value of $7,194. This averages out to under $5 per account.

Last Congress, former Assistant Secretary Neal McCaleb testified in support of the enactment of a uniform intestate code for trust and restricted estates. However, because of the complexity that S. 550 would build into the proposed uniform code, we would like to work with the Committee to try to simplify these provisions. The Department's employees are expected to administer the provisions of ILCA and to encourage tribal members to draft wills, and eventually to probate those wills and estates. Therefore, the provisions must be clear.

The benefit to the heirs of a uniform probate code for trust and restricted estates is that the same law will be applied to all the trust and restricted estates of the decedent no matter where the real property is located. A uniform intestate probate code will allow the entire estate to be probated under one set of laws, and those laws will be the same throughout the United States. The Indian tribes and individuals holding interests in allotted lands in the 33 States will benefit from the clarity, consistency and predictability of using a uniform probate code. A uniform probate code, built upon current State probate practices and the Model Uniform Probate Code, will help the Department decide cases and issue orders in a more timely manner, resulting in fewer appeals. If a uniform probate code is enacted, the Department will no longer need to research the laws and legal decisions of 33 individual States. It will therefore take less time to issue an order determining heirs. Finally, a uniform probate code will serve as a model for tribes to develop their own tribal probate codes.

The Indian Land Consolidation Pilot Program is a high priority for this Administration. The President's 2004 Budget requests $20.98 million for Indian land consolidation through the acquisition of fractionated ownership interests. This $13.1 mil-

lion increase will support our plans to expand the program to new Indian reservations.

The BIA has been conducting the pilot program since fiscal year 1999 in the Midwest region. These pilot projects have successfully demonstrated that large numbers of owners are willing to sell fractionated ownership interests, and that a purchase program can be administered at a reasonable cost. When the projects started, there were approximately 87,000 interests on three reservations. To date, we have purchased over 40,000 interests on those three reservations. However, because of the runaway growth of fractionation we still have the same number of outstanding interests as when the projects began. Without this pilot program, the number would be far higher than 127,000 since the interests purchased would have further fractionated. As reflected in the Administration's Program Assessment Rating Tool (PART) review, the pilot program has taught valuable lessons about the need to target purchases to maximize the return of the land to productive use and to reduce the number of Individual Indian Money (IIM) accounts.

This year, the Department is developing a strategic plan to guide program expansion, target purchases to reduce future costs of trust administration, and enhance tribal economic development opportunities. A national program office has been established to coordinate and oversee the program expansion and standardize business practices, which may use contractual arrangements with Tribes or private entities to purchase individual interests on behalf of the Department. The fiscal year 2003 budget, together with carry-over balances, will provide approximately $20 million for the BIA to put in place the necessary infrastructure and contractual arrangements to support our planned expansion in fiscal year 2004. Our strategic plan, including legislative proposals, will be provided to the Committee later this summer.

Last year, the Department held a 2-day meeting of a subgroup of the DOI/Tribal Task Force on Trust Reform to address the Indian Land Consolidation Act and to encourage a dialog on potential solutions to the fractionation issue. Participants were encouraged to develop creative ideas, and a number of possible legislative and administrative solutions were discussed. Many of the ideas developed merit further, serious consideration by the stakeholders.

To provide a forum to continue this dialog, the Department published a notice in the Federal Register on April 22, 2003 requesting nominations for Tribal officials to participate in a Working Group on Land Consolidation (Working Group). We are seeking participation by Tribal officials from tribes with highly fractionated lands or those who have a strong interest in resolving the problem of fractionated lands to discuss the problems caused by fractionation and to examine the universe of possible solutions. This Working Group will meet throughout the summer. We anticipate that the Working Group will provide important input on recommendations for legislative action to address solutions to fractionation.

Thank you, Mr. Chairman, Mr. Vice Chairman and Members, for taking the lead on these important issues for Indian people and the trust reform. This concludes my statement. I will be happy to answer any questions you may have.

PREPARED STATEMENT OF JOHN BERREY, CHAIRMAN, QUAPAW TRIBE

Mr. Chairman and distinguished members of the committee thank you for the invitation to speak to you today on such a critical problem in Indian country. My name is John Berrey, I am the Chairman if the Quapaw Tribe of Oklahoma and Vice Chairman of The Inter-Tribal Monitoring Association. I have been asked to describe the current problems regarding Indian probate and the complex interrelationships involved in the cash, land and resource management processes administered by the Department of the Interior.

I have had the great opportunity to be part of a historic project, under the direction and guidance of Secretary, The "As Is" Business model now complete, identified in detail the current DOI Trust Business Processes. The processes that are the subject of this scientific analysis are:

- Accounting (collections, management and distribution of cash)
- Appraisals (ordering, practice, reporting)
- Beneficiary Service (Tribal and Individual contact with DOI)
- Cadastral Survey Services (identification, recording and management of land boundary information)
- Probate (case preparation, adjudication, case closing)
- Surface Asset Management (lease development, compliance, enforcement) Timber, agriculture, commercial businesses, surface minerals

- Subsurface Management (lease development, compliance, enforcement) Oil, gas, mining
- Title (acquisitions & disposals, rights of ways, title management)

"As Is" Overview. I was the leader of the five Tribal Representatives selected by last years Tribal Task Force working with a project team with DOI process experts and contract facilitators from EDS. I traveled over 200 days last year crossing the country interviewing nearly 1,000 individuals involved in all the activity that is Indian Trust business management and documenting in detail the work that is performed at every level, every day. We interviewed employees from BIA, MMS, BLM, OTFM, OHA, Direct Service Tribes and tribes with 638 contracts, and Self-governance tribes.

We interviewed every level of staff from all 12 BIA Regions, numerous BIA agencies and several Tribal Reservations. We talked to clerks, line officers, managers and directors, if an office had any activity regarding Indian Trust Management we studied it in some form. This intense project has had the following benefits:

- Established a comprehensive understanding of current Trust business operations
- Documented variances among geographic regions, and their causes (e.g., due to Federal, tribal, state or local laws, treaties, court rulings, local practices)
- Identified current issues and opportunities for improvement so as to provide a basis for a "To-Be" process reengineering of the Indian Trust.

Over the decades Indian tribes have witnessed a multitude of trust reform initiatives, reorganizations, plans, meetings, summits, work groups, task forces, computer systems, software, out sourcing contracts, and other efforts to fix the problems with management of Indian trust funds. To date, none of these efforts have proven successful. The reason, we believe, is that we have been seeking quick fixes rather than focusing on the root of the problem. And the root of the problem is: The fractionation of title ownership is making the system impossible to manage. The General Allotment Act of 1887 was designed to destroy tribal governments, that did not work and it is time we reverse the act and protect and restore tribal land bases and jurisdiction.

The DOI is pretty much a land management entity and any land title and ownership information system is the most fundamental aspect of the trust system. DOI cannot accurately collect and distribute trust funds if it does not have correct information about the beneficial owners of the trust assets. This is the starting point for any effort to fix the trust system. Currently, the BIA is using as many as 67 different ownership title systems in the various Land Title Record Offices, regional offices, agencies and tribal locations around the country, both manual and electronic. There is TAAMS, LRIS, MADS, GLADS, TFAS and several individualized spreadsheets and other software systems, the sad thing is over 30 percent of all agencies, still use the old paper 3X5 A&E cards.

At my agency, The Miami Agency in Miami, Oklahoma they update Title once a year. They order Pizza and the whole gang sits around and updates these little cards. Each night a little old lady carries the records back to the closet, God forbid she drops the box and our records shoot across the floor.

These systems contain overlapping and inconsistent information. The systems are largely "stand alone" in that they do not automatically reconcile the ownership information in the agency offices, in tribal records, or in the lease distribution records that are used for daily operations. Because records management standards and quality control procedures are lacking, there is no assurance that title records are accurate. These inaccuracies result in incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative procedures such as probate. Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds.

What does this mean? I like to describe what I call the Haskell effect. If a Navajo man goes away to Haskell Indian School and meets a Woman from Osage, they marry and move to Minneapolis where they adopt a couple of young children from Northern Cheyenne and they all get killed in a car wreck. Besides the obvious tragedy the added problem is the DOI has no way to know that there is land in three separate regions managed with systems that do not communicate. It creates a nearly impossible Probate case preparation nightmare.

Cleaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need

for the Indian trust system. However, the BIA will never be able to complete this task if Congress does not address the fractionation problem. In 1998, just 5 years ago, the BIA reported that it was managing just over I million fractionated ownership interests on trust lands in Indian country. Just last month, the BIA reported that it is now managing over 4 million ownership interests. This explosion in the number of ownership interests comes when the land passes from one generation to the next generation of children by the automatic operation of state intestacy laws.

The fractionation problem has already grown wildly out of control. But if Congress fails to act now to address it, it will continue to compound.

Even if we built a wonderful computerized system to keep track of all the millions of ownership interests, we would soon have to scrap it and build a newer, bigger one. In a couple of generations we could have billions of interests. How many people, how much time would it take to keep track of all of those interests?

The As-Is Study and its findings show that we need to focus our trust reform efforts on the title system. That means that Congress needs to focus on reducing fractionation, as the single most important thing in order to address trust reform:

My recommendations would be:

No. 1. We have to respect the property rights of the individual owners. But within this framework, we have to do everything possible to encourage the consolidation of Indian land. That should be the single guiding principle for judging each and every provision in S. 550. Does it help us consolidate land and reduce fractionation?

No. 2. The tribes are making huge efforts on consolidation. This bill needs to make sure that tribes have the tools to write their own probate codes.

No. 3. Indian landowners must have the right to devise their land to whomever they want, or they must be compensated if they are not able to. The Uniform Federal In testate Code that is proposed in S. 550 could be a giant step forward to reduce fractionation but it needs focus. I would like to see us limit the in testate provisions to immediate family who are members of the tribe, and if there are no such members, then it should pass to the tribe itself.

No. 4. Promote Estate Planning; provide adequate funding and training to get individuals to write wills. 95 percent of Indians die without a will.

No. 5. Put adjudication under one roof. Create an Office of Indian Probate made up of Indian Probate Judges (IPJ's) and Attorney Decision Makers (ADM's) removing the Administrative Law Judges (ALJ'S)

No. 6. Finally, and perhaps most importantly, Congress should beef up the Indian Land Consolidation Pilot Project and make it permanent.

In closing, I would like to pledge my assistance to the Indian Affairs Committee and its members in any issues related to the complex management of the Indian Trust, if it is fractionalization, settlement of mismanagement claims, or historical accounting, I can provide an clear science-based description and understanding of the multi-agency cash and resource management provided to Native people by the United States.

Thank you

PREPARED STATEMENT OF BEN O'NEAL, MEMBER, SHOSHONE BUSINESS COUNCIL, EASTERN SHOSHONE TRIBE

Mr. Chairman members of the committee. My name is Ben O'Neal and I am a member of the Business Council of the Eastern Shoshone Tribe of the Wind River Reservation. It is with great pleasure that I present this testimony today on behalf of the Eastern Shoshone Tribe. Chairman Vernon Hill regrets that he could not be here today, but pressing issues kept him at home.

The Eastern Shoshone Tribe of the Wind River Reservation is a federally recognized Indian tribe with approximately 3,500 members. The Wind River Reservation is located in central Wyoming, and is home to two tribes, the Eastern Shoshone and the Northern Band of the Arapaho. There are also approximately 25,000 non-Indians living within the exterior boundary of the Reservation.

Many members of the Eastern Shoshone Tribe are deeply concerned with the fact that they may not able to leave their land to their heirs. Provisions within S. 550 address this problem, and it is for this reason that we strongly support its passage.

Title to land within our Reservation is held in various ways, including in trust, in fee patent, as tribal land, or as land held jointly by the Eastern Shoshone and the Northern Arapaho Tribes. Our primary concern today is with property held in trust for individual Indians, and I would like to use myself as an example of one way in which S. 550 would bring relief.

In 1966, I married my wife, who is non-Indian. We were both from ranching families, and in 1972, we started acquiring land and building our own ranch. The first

200 acres we purchased is held in fee patent. It is located on the Wind River Reservation and contains the home site where my family and I have lived for more than 30 years. We also lease several allotments adjoining this property, allowing us to run enough cattle and operate a ranch in such a way as to have derived our living solely as ranchers.

In 1989, we purchased an 80 acre tract of trust land from an individual Indian. We paid fair market value for this property. This tract adjoins our patent fee ground and added significantly to our ranch. In 1994, my wife and I purchased 240 acres of patent fee land from our neighbors to allow for expansion as our son and daughter expressed an interest in being a part of the ranch operations. At the same time, we also purchased 200 acres of adjoining Indian trust lands from multiple Indian heirs. These lands are all contiguous, and even contain a creek that runs year round, adding further to the value of our property.

Through additional acquisitions, I currently own 1,200 acres of property within the Wind River Reservation. Half of this property is held in trust; the other half is held in fee. I paid fair market value for all of it. Under current law, as a member of the Eastern Shoshone Tribe, and as a landowner, I can only will my trust property to an Indian or to my Tribe; but I would like to leave it to my family.

I am not alone in the fact that my wife and my children are not members of the Eastern Shoshone Tribe. Despite the fact that they have stood by me over the years, and have helped our ranch become a success, current law only permits me to leave my trust property to them as a life estate. I find this unacceptable. My only other option is to remove the property from trust status and place it into fee; something that I do not wish to do.

Individual Indian landowners, such as myself, should have another option. We should be able to determine to whom we leave our land. Indian landowners should have the same right as others within our country to keep property within our families for as long as we choose to do so. This right should not be based upon race or political distinction, just as it should not be based upon religion, or any other similar factor. I support the passive trust provisions within S. 550 because they allow me, and all others like me, to ensure that property stays within our families for a duration of our choosing.

Let me be sure to point out that the Eastern Shoshone Tribe is not seeking to impose this option on everyone. If an Indian landowner wants to give their trust property to the Tribe, they should be able to do so. Our position simply is that there should be an option added to those that currently exist; that we should be able to choose who gets our land.

In the future, if my descendants determine that it is in their best interest to sell this property, the Tribe should be given a period of time in which to exercise a first right of refusal. They should, however, be required to pay fair market value for it, just as I did.

This raises another concern we have with existing law. Currently, there is little incentive for the Tribe to pay anything of value for trust property. The Tribe realizes that for individuals such as myself, who are restricted to leaving trust property to heirs as a life estate, it is only a matter of time before the Tribe comes into possession of the property, with no payment at all. This eventual outcome serves also to discourage use and improvement of the land. Why would I invest hundreds, even thousands, of dollars to improve the land when I know, in the end, I will not be compensated for my investment. Again, I find this unacceptable, and am pleased that S. 550 works to resolve this issue as well.

As an aside, I find it important to mention our concern with the Tribe's ability to purchase trust property, even if they wish to do so. While purchases on a limited basis would be feasible, financial assistance would be necessary for the Tribe to make larger purchases. We encourage the Congress to ensure funds are available for this purpose.

I also support the idea that should the Tribe not wish to pay fair market value for trust property, the option should be available to sell it to someone who is. It is important to note that this should not be viewed as a reduction of Tribal lands. Many people hear the term "trust property" and they think of "tribal property." This, however, is not the case. My property is trust property. It is held in trust for me, Ben O'Neal. It is not Tribal property. I have spent my entire life working and saving to buy what I have; to make a life for myself and for my family. I should have the right to determine to whom this property is left. My descendants and I should have the right to be dealt with fairly.

On behalf of the Eastern Shoshone Tribe, I again thank you for the opportunity to present testimony today and I encourage passage of S. 550.

PREPARED STATEMENT OF THE INTERTRIBAL MONITORING ASSOCIATION

Good Morning, Mr. Chairman, Vice Chairman and honorable members of the Committee. I am honored to be here on behalf of the 54 federally recognized Tribes that comprise the InterTribal Monitoring Association (ITMA). ITMA was established in 1990 to monitor the trust reform efforts of the United States Department of Interior. In the last year and a half, ITMA has been actively involved in the Tribal/DOI Task Force, has drafted trust reform legislation in coordination with NCAI and has entered into a dialog with DOI to develop a settlement process for Indian Tribes who have claims against DOI for trust fund and asset mismanagement. ITMA has been actively monitoring S. 550 as the organization believes that trust reform cannot effectively occur without addressing tribal land issues including fractionated ownership and consolidation of tribal and individual lands. Further, the continued diminishment of tribal lands results in the continual diminishment of tribal governance authority.

The vast array of problems created by fractionated land ownership, as a result of the General Allotment Act of 1887 and individual Tribal Allotment Acts, for Tribes, individuals and the DOI have been well-documented. The Indian Land Consolidation Act (ILCA), attempting to curtail the devastation of the allotment era, was amended in 2000 to address the significant amount of Indian land passing out of trust during the probate process. The 2000 amendments to the ILCA limited non-Indian heirs and beneficiaries to life-estates only. However, this limitation resulted in an unexpected backlash of individuals converting trust lands to fee lands in order to devise more than life-estates to non-Indian spouses and children.

S. 550 attempts to further amend the Indian Land Consolidation Act to allow trust landowners to devise more than life-estates to non-Indian heirs and devisees through the creation of a "passive trust". A passive trust is a new form of land ownership, a creative remedy to the life-estate restriction. The passive trust provision would allow land to remain in trust, free from state tax liability, remain within tribal jurisdiction and remain within the BIA probate system. A holder of a passive trust would be able to lease the land without BIA approval, would be able to mortgage land without BIA approval, could devise the land to the Tribe or to Indians or other eligible descendants of the original holder of the land. In essence, the intent of the passive trust is to retain the land in trust yet allow the holder to manage the land as if it were fee. The passive trust is proposed as an alternative to trust landowners converting trust lands to fee. For Tribes, the passive trust would prevent a diminishment of landbase acreage totals.

However, numerous unanswered questions arise about the passive trust concept. First, the passive trust is a newly created form of land ownership, no precedent for such a form of long-term ownership exists. Thus, no data regarding passive trusts exists to allow a knowledgeable assessment of problems that may occur. Second, serious questions arise about tribal jurisdiction over the non-Indian holders of a passive trust. Although the land is to remain within tribal jurisdiction, the Tribe's jurisdiction over the non-Indian holder of the passive trust is questionable. Third, the BIA currently has welldocumented problems tracking current owners of trust land including joint tenants of land, restricted fee holders, and other forms of ownership. A question arises regarding how the BIA will track non-Indian holders of passive trusts to keep the land within the BIA probate system. Although the BIA would not have approval obligations for passive trust uses, it would have to record them to effectively probate the land. The general complexity and costs of recording holders of passive trusts, including the encumbrances of the land and disposition, render the passive trust a questionable alternative. Further, no guarantee exists that states will give non-Indian holders of passive trusts a tax exemption. Finally, a concern exists that the passive trust may devalue Indian land since no investigation has occurred regarding whether a title company would issue title insurance if a passive trust was in the chain of title. Similarly, any taxation issues that are litigated for any length of time may result in a devaluation of Indian land .

Although the passive trust concept appears a creative remedy to the problem of land passing out of trust status at probate when the spouse and children of the Indian land owner are non-Indian, many questions exist about its viability. Until more of the questions raised above can be answered, ITMA cannot support the passive trust concept. ITMA has been focused on the improvement of DOI land title and recordation systems as a starting point for effective trust reform. A new form of land ownership that would complicate the recordation process further causes concern for ITMA.

S. 550 promotes the development of a uniform probate code for use in Indian country. The concern has been the application of state laws to Indian probates and with different states, different laws apply, resulting in no uniformity throughout In-

dian country. However, the reality is that most states have adopted the Uniform Probate Code, thereby probating cases uniformly from State to State. The real problem appears to be that the application of the State adopted Uniform Probate Code does not protect Tribal land bases when an Indian dies intestate and when no restrictions exist as to disposition of land by will. Therefore, the application of the State laws result in further fractionation and land passing out of trust either by intestacy or by will. A uniform probate code for Indian country will protect Tribal land bases only if it adopts the above questionable passive trust concept or limits the devisees and heirs to enrolled Indians. Frankly, since the passage of ILCA, few tribes have developed probate codes with disposition and intestacy restrictions that would protect Tribal land bases. If Indian country accepts the passive trust concept or is willing to limit heirs and devisees to enrolled Indians, then a uniform probate code for Indian country would be viable.

S. 550 provides a mechanism to partition undivided fee interests for purchase by Tribes. Currently, no process exists for a Tribe to request that the BIA partition out undivided fee interests since the BIA has no responsibility to manage fee interests. The undivided fee interests limit Tribes from encumbering the land and selling or purchasing other undivided:interests. The provision in S. 550 would allow the fee interest to be partitioned out from the other undivided trust interests promoting a purchase of the fee interest. Further, partitioning the fee interest would allow the Tribe or individuals to encumber, sale or purchase the remaining trust interests. The proposed language in S. 550 is necessary to promote land consolidation via tribal or tribal member purchase of fee interests.

In conclusion, ITMA believes that tribal land consolidation is critical to trust reform. ITMA is unable to support the complex passive trust concept and believes that Tribes must respond to heir and devisee limitations before a uniform probate code for Indian country will be viable. ITMA does support the language in S. 550 for partitioning undivided fee interests as a necessary step to land consolidation. Finally, ITMA believes the most viable solution to land consolidation is sufficient funding for Tribes to purchase the fractionated interests. In addition to the allotment of Indian lands, Indians were not allowed to devise lands through wills until 1910, thereby creating the framework for the fractionation problem. Sufficient funding should be available for Tribes to purchase undivided interests at fair market value. The current BIA budget falls short of a realistic attempt to address the fractionation problem. More funds for this purpose are critical for land consolidation and true trust reform.

Thank you.

TESTIMONY OF CRIS E. STAINBROOK, PRESIDENT OF THE INDIAN LAND TENURE FOUNDATION (ILTF)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

May 7, 2003

Regarding S. 550, the American Indian Probate Reform Act of 2003

Chairman Campbell, Vice Chairman Inouye, and distinguished members of the Senate Committee on Indian Affairs:

My name is Cris Stainbrook and I serve as the President of the Indian Land Tenure Foundation (ILTF). On behalf of the ILTF Board of Directors and the community that ILTF serves, I thank you for this opportunity to present some perspectives and thoughts on S. 550 and also provide you with some information about our organization and work.

The Indian Land Consolidation Act of 1982, the ILCA Amendments of 2000, and the bill before us today are of great importance and substantial concern to the Indian land owning community that we serve. Each piece of this legislation deals with the very essence of Indian Country—land. It is Indian peoples' concern for retaining the remaining Indian owned and controlled reservation and off-reservation lands, as well as reacquiring the tracts of land once guaranteed by treaties, executive order or other means for the exclusive occupation and use by Indian people but now in alienated ownership that led to the creation of ILTF. These concerns shape our mission and purpose. In testimony last week before the Committee for S. 519, I provided a brief background about the Indian Land Tenure Foundation and our acceptance of a $20 million start-up grant from Northwest Area Foundation. Rather than repeat the information here, I will attach the S.519 testimony for your review (Attachment A).

In the testimony a week ago, I pointed to undivided ownership interest or fractionated ownership as the most insidious outcome of the General Allotment Act. This pattern of ownership has effectively rendered millions of acres of Indian land unused, unmanageable, and in constant jeopardy of being taken out of Indian ownership. This, of course, says nothing of the large administrative costs borne by the federal government and the tribes in maintaining ownership records and distributing income from the allotments to the correct owners. And so today's hearing is rather timely given that probate and inheritance provide the basic mechanism for creating and furthering the amount of land ownership fractionation.

As I testified last week, the Indian Land Tenure Foundation strongly holds to the principals of self-determination by the tribes and Indian people. Those principals were at the basis of the Foundation's founding and will guide our work into the future. It is also those principals that compel us to provide testimony on S. 550. For, like the Act this bill seeks to amend and the preceding amendments of 2000, it is our conclusion that the amendments proposed in S. 550 will do little to return self-determination to either the tribes or individual Indians. Indeed, some of the provisions in S. 550 continue to winnow away at self-determination as well as the individual rights of Indian people that others in this country enjoy. We also believe that provisions contained in S. 550 will not accomplish the goals of this measure as alluded to by the findings outlined in Section 2. Probate or estate planning will become more difficult for Indian trust land owners, record keeping and administrative costs will likely increase or at best remain the same, and most importantly, Indian land ownership of these lands will be jeopardized.

Before addressing the specific issues of S. 550, I would beg your indulgence to consider a different possibility. That possibility being, there are resources, capacities and energies throughout Indian Country that could be mobilized to address the issue of fractionated ownership on allotted and restricted lands but have not been brought to bear on the issue.

Since the passage of the General Allotment Act in 1887, the federal government has maintained a trust relationship with the tribes and Indian people based on the premise that Indian people were incompetent to handle their own affairs. In fact, that basic relationship is hammered home even today as people seeking to have their land holdings converted from fee status to trust status often find the most expedient method to gaining approval is to declare themselves incompetent. While in reality, their reasons may be for jurisdictional or financial purposes. Nonetheless, the paternalistic relationship between the federal government is continued and has continued for the past 115 years.

The relationship between the federal government and the tribes took a dramatic shift during the Nixon Administration with the declaration of tribal self-determination as a federal policy. Today we can see the advances many tribes have made in the intervening years including the implementation of self-governance compacts that many tribes now work under. These agreements did not reduce the overarching trust responsibility of the federal government to protect tribal rights but did allow the tribes to determine for themselves the directions they would move on many fronts such as economics, resource management, and governance. The tribes have taken advantage of the ever increasing skills and capacities of Indian people to inform and direct their advances. These skills and capacities were honed not just in the culture and teachings of the various tribes but also in the surrounding non-Indian culture and educational institutions. Today, there are many, many Indian people that are the drivers behind tribal programs and enterprises that compete well with non-Indian institutions and businesses.

A similar transformation in the relationship between individual Indians and the federal government has never occurred. Why this is this case is purely a matter of conjecture but I would posit to you that there has simply never been a consolidated movement for Indian people to be recognized in the main as competent to handle their affairs. The probate and land issues before this Committee are a manifestation of this relationship over the many years and what has amounted to attempts by one side, the federal government, to resolve issues of primary importance to the other side, Indian people, without engaging as equals. It is my personal opinion and the position of ILTF, that Indian people, given the chance to resolve probate and fractionated ownership interests, have the skills, abilities, and wherewithal to accomplish the feat faster than the federal government through legislative dictates.

Earlier this year, we had the opportunity to discuss land issues with members of the Committee's staff. With only a modicum of frustration showing, they suggested that perhaps it was time to engage in a complete overhaul of the federal government-Indian land relationship. We would agree, it is time. As demonstrated during the planning process which created the Indian Land Tenure Foundation, Indian people throughout the community are interested in resolving the same issues that we are discussing here today. Further, because it is their assets and they are living in the situation day-to-day, they are willing and capable of engaging the discussions necessary for a new relationship. The Committee should consider working with Indian people anew to resolve fractionated ownership and probate issues.

During my testimony last week, I briefly described ILTF's work on developing the Indian Land Capital Fund (ILCF). This Fund is envisioned to be a private capital investment mechanism aimed at consolidating undivided interests and recovery of alienated land within reservation boundaries.

In many ways the development of this investment fund could be the start of the new land relationship. For instance, the Indian Land Capital Fund is designed to be an equity investment pool and as such will provide Indian Country with a relatively new model of financial investment in Indian land. To date, most financial investment related to Indian land has been through debt financing. The benefit of the equity investment is that it would help to leverage debt and would allow the Fund to develop more rapidly and larger. However, understanding and applying debt equity to Indian land will take new understandings on the part of investors as wells as tribes and Indian people.

In addition, ILTF has begun to engage several other Indian organizations in the creation of ILCF and clearly defining the activities that will be carried out in support of the fund. Through our developing relationship with the Native American Bank Community Development

Corporation, the investment mechanism will also include opportunities for private and public capital resources to be brought to bear in the development activities on Indian land. Affordable housing development will be of primary concern initially. We will also be working with national and regional Indian organizations such as the Indian Land Working Group to provide training at local sites for individual landowners. A computer data specialist that is intimately familiar with the Indian land records system will bring title record tracking components to the Fund as well.

ILCF will be a national investment program but with full recognition that the actual deals are made at the local tribal level (Attachment B). The design of the local elements of the Capital Fund will incorporate aspects of the BIA's Consolidation Pilot Projects and the Rosebud Sioux Tribe's Tribal Land Enterprise system of land ownership, management and use. The former program having a longstanding success record in consolidating fractionated interests while maintaining the ability of individual Indians to use land for their pursuits. Utilization of the Fund will be aided by the application of the cooperating partner organization's non-profit activities including but not limited to estate planning, financial counseling, and technical assistance. Other significant aspects of the Indian Land Capital Fund include:

- Initially capitalized through a combination of philanthropic, tribal, government and private sources.
- Allows the tribes to own title to their land.
- Will work with all holders of undivided interests not just those with less than 2 percent interests to prevent further fractionation from occurring.
- Provides for a network of local sites that receive common technical assistance and training.
- Makes provisions for recognizing the individual ownership rights of Indian people and provides technical assistance and guidance in consolidating undivided interests while preventing future fractionation of ownership.
- Allows Indian people and tribes to build ownership interests in the investment pool.
- Adds value to the land through development.
- Becomes a long-term, self-sustaining, for-profit concern.

The financial vehicle we are proposing and constructing will not be without cost to the federal government. Indeed the undivided interests of Indian Country are of the federal government's making and it will need to provide resources to resolve that problem. However, the Capital Fund that is being created will be able to leverage between 5 and 10 dollars of philanthropic, tribal, or private capital to every federal dollar. Federal contributions to the Capital Fund could come in several forms including the provision of seed capital, tax credits for investors, or a program similar to the Energy Savings Performance Contracts already in use by the federal government. In the case of the latter, it would be the savings that accrue to the BIA administrative costs that could be shared with the Indian Lands Capital Fund. When successfully implemented, the mechanism would provide a scale of activity in reducing fractionated ownership throughout Indian Country that the BIA is unable to achieve with the current budget allocations for the Consolidation Pilot Projects.

Also in the earlier testimony, I cited a consultant's estimate that it would require approximately $1.25 billion to buy every fractionated ownership interest that existed in Indian Country. We believe that while that figure is large, particularly in light of the amounts budgeted for the Land Consolidation Pilot Projects, it is not insurmountable. This is particularly true if federal funds are leveraged with private funds and Indian people are engaged in the process rather than treated as problems or adversaries.

We have had some very preliminary conversations with the BIA and several tribes regarding the Indian Land Capital Fund. It is our intention to continue those discussions with the intent of obtaining at least some portion of the funds dedicated to the Pilot Projects for next fiscal year for the partial capitalization of the Capital Fund. If successful in obtaining these funds, the Indian Land Capital Fund will become operational during the Fall of 2003 at a minimum of four tribal sites.

Ultimately, we believe this model investment program will return decision making and control over their land asset to the tribes and Indian people. Currently the control and management of the asset is subjected to changes in federal policy, law and regulations. These

changes seemingly are driven more by exasperation and expedience to resolve the overwhelming size and growth of the fractionation problem rather than resolving the problem with the welfare and concerns of Indian people in mind.

If Indian people and resources are to be engaged in helping correct the problems related to probate and fractionated interests, the opportunity must be made available. To that end, we recommend that the Land Consolidation Pilot Project language be amended to allow the Secretary to procure the services of appropriate and qualified contractors to provide tribes with the technical assistance and financing necessary to establish tribal land consolidation and acquisition programs.

Having now provided the Committee with a possible alternative to S. 550 allow me to comment briefly on the provisions in the bill which are of most concern to the ILTF community.

Land Title Records

The land title records for Indian land must be updated and verified as accurate before the provisions of S. 550 or the ILCA Amendments of 2000 are implemented. It would be unjust to subject Indian owners to the types of remedies suggested in this bill without being able to first inform them of what interests they hold and allowing them opportunity to take alternative action.

Symptomatic of the problem of inaccurate records are the more than 10,000 undivided interests that have not been returned to the rightful heirs under the Supreme Courts ruling in Babbitt v. Youpee. Also indicative of the problem is the probate backlog which a year ago was estimated to be nearing 9,000 cases and has not been appreciably reduced since. Some of these estates yet to be probated date back to the 1940's.

While recognizing that this is not an appropriations bill, we would recommend to the committee that the BIA's regional and agency staff budgets be examined and sufficiently increased to bring the records up to date. This will especially important if other provisions in S. 550 remain in place as those provisions will necessitate additional administration of trust allotments.

Joint Tenancy Provision

This is an untested provision and while it is innovative and intriguing in its uniqueness, it most likely will be tested in court with its first application. This provision will likely result in a Youpee-type resolution and will cost the federal government considerably more in time and funds to correct than any potential benefit it may offer on the front-end.

This provision will also create considerable discontentment within Indian Country and along with the provisions defining who is Indian and the passive trust, many land owners have and will continue to remove their land from trust status. This action of course jeopardizes the trust land base and ultimately tribal jurisdiction and sovereignty.

Definition of Indian

Perhaps no other proposed amendment in S. 550 draws as much attention as the definition of who is Indian and therefore eligible to inherit Indian land in trust. While we are appreciative of the expanded version of the definition contained in S. 550, a preferred alternative has been drafted by several other organizations testifying today and ILTF would be supportive of that language. Particularly as it relates to the definition contained within the Indian Reorganization Act and pertains to current owners of trust land, two significant additions.

Passive Trust

As with the provisions for joint tenancy, the establishment of "passive trust" status for "non-Indians" raises many concerns about jurisdictional issues between tribes and the states and counties. This clearly puts the land base at risk and it is difficult to see how the trust responsibility to the beneficiary is being served by such an action.

We have been informed anecdotally that relatively few people of no Indian blood would be included in such a construct. The primary recipients of passive trust status would be Indian people that no longer fit under the definition of Indian. Should the definition issues be worked out, passive trust may have some application that could benefit many people.

It is a bit surprising to see this provision contained in this bill. The administration of trust lands with passive trust interests contained within those allotments would be greatly increased. It would be especially difficult to exercise management practices on these allotments without the potential of representing passive trust holders by default. In those instances, the line between passive and active trust becomes blurred and the courts may be asked to intervene.

Partitioning of Land

We have not yet had sufficient time to examine the effects that the amendments related to partitioning of the allotments may have on ownership patterns, tribal or individual interests. I would ask the Committee to remain open to receiving additional comment on these provisions from ILTF.

Uniform Probate Code

ILTF has had the opportunity to review the Uniform Probate Code drafted and presented to the Committee by the Indian Land Working Group with support from the California Indian Legal Services and National Congress of American Indians. This Code provides the necessary components that the Committee seems in search of in terms of providing a uniform basis for intestate probates across Indian Country. We would recommend that the Committee adopt the Uniform Probate Code as presented by ILWG.

Additional Suggestions

Should the Committee proceed with S. 550 as written, ILTF would recommend that an amendment be added that directs the Secretary to procure legal advise relating to probate matters and make those services available to all undivided interest holders prior to implementation of the provisions of the Indian Land Consolidation Act 2000 Amendments and those contained within S. 550. This will ensure that Indian people will have knowledge about their options and assist them in understanding the complexity of this probate process.

Thank you for the opportunity to appear before you today and have this discussion. The Indian Land Tenure Foundation stands ready to assist the Committee and Congress in further development of S. 550 or subsequent legislation directed toward resolving Indian land issues.

ATTACHMENT A

TESTIMONY OF CRIS E. STAINBROOK, PRESIDENT OF THE INDIAN LAND TENURE FOUNDATION (ILTF)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

April 30, 2003

Regarding S. 519, the Native American Capital Formation and Economic Development Act of 2003

Chairman Campbell, Vice Chairman Inouye, and distinguished members of the Senate Committee on Indian Affairs:

My name is Cris Stainbrook. I am Lakota and I serve as the President of the Indian Land Tenure Foundation (ILTF). The Indian Land Tenure Foundation is a relatively young non-profit organization that was created by a community of Indian people concerned with Indian ownership and management of land. Our mission, as directed by the community, is to strategically work toward a goal of having all land within the boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest in Indian ownership and management.

On behalf of the ILTF Board of Directors and community, I thank you for this opportunity to present some perspectives and thoughts on S. 519 and also provide you with some information about our organization and work.

Four years ago a community planning process began with Indian people that had been working on Indian land issues for many years. The impetus for this planning process was the Community Ventures Program of the Northwest Area Foundation. The Community Ventures Program was designed to allow communities to develop 10-year strategic plans for reducing poverty and provide each community with substantial funding to assist in implementing the plan. In the case of the Indian Land Tenure Community, the Northwest Area Foundation drew the direct connection between the ownership and effective management of land and poverty on many of the country's Indian reservations.

The community planning process took place throughout the eight-state region of the Northwest Area Foundation but involved Indian people from throughout the nation as well. In total, several hundred Indian people participated in the planning process by providing input, writing sections of the plan, and providing comments on the initial drafts. Ultimately, the three-year process culminated in a strategic plan that the community felt would solidify the land holdings of Indian tribes and people, allow a greater self-determination, and would allow their most basic asset, land, to once again become a source of sustenance.

The community plan describes a course of action for the community to follow. The initial step was to create the Indian Land Tenure Foundation (ILTF), an institution that functions as a community foundation but with a very specific focus on resolving Indian land issues and creating land-based businesses. It is the role of ILTF to recruit resources and distribute those resources in a manner that will effectively accomplish the mission. In certain instances, the Foundation will operate programs when there is a lack of existing land programs in Indian Country.

In addition to the mission statement mentioned earlier, the community identified four strategies for the Foundation and the community to work on. Those strategies include:

- Educate every Indian landowner about land management, ownership and transference issues so that knowledge becomes power when decisions about land assets are made.

- Increase economic assets of Indian landowners by gaining control of Indian lands and creating financial models that convert land into leverage for Indian owners.
- Use Indian land to help Indian people discover and maintain their culture.
- Reform legal mechanisms related to recapturing the physical, cultural and economic assets for Indian people and strengthening sovereignty of Indian land.

The completed strategic plan allowed the Indian Land Tenure community to enter a 10-year partnership agreement with the Northwest Area Foundation. The community agreed to meet a series of benchmarks that included measures regarding the return of alienated reservation lands to Indian ownership and the reduction of the number of undivided interests in the allotments. In return, Northwest Area Foundation provided a grant of $20 million to the Indian Land Tenure Foundation for operating costs, grants to local tribal efforts, and research and development of new methods to resolve this complex of land issues in Indian Country.

Not surprisingly, many in the community pointed toward, and much of the work of ILTF is directed toward, resolving Indian land issues that arose from two specific federal policies—allotment of the reservations and termination of tribal status. In both cases, substantial land holdings that had been guaranteed by treaties and executive orders for the exclusive use and occupation by Indian people were lost to non-Indian ownership. Through the provisions of the General Allotment Act of 1887 and subsequent Acts, more than 90 million acres of Indian land passed out of Indian ownership. The termination of tribal status led to the loss several million more acres of Indian land.

The loss of this land has created great difficulties for the tribes over the past 115 years. The checkerboard pattern of land ownership on reservations continues to foment jurisdictional battles between the tribes and the states and counties. And, the lost revenue that could be generated from the lost land base is substantial. In the Great Plains Region the tribes lost approximately 5,112,000 acres of land between 1887 and the passage of the Indian Reorganization Act in 1934. Simply leasing the lost land for grazing and receiving the Department of Agriculture's cash rent estimates for grazing land, the tribes would have received an additional $51 million in 2002 and nearly $3.5 billion since 1934. If even one-quarter of the land were leased at the higher cropland rates, the lost revenue in 2002 would be nearly $100 million.

As devastating as the loss of land has been, the more insidious outcome of the General Allotment Act has been the creation of the undivided interest or fractionated ownership of the Indian allotments. This pattern of ownership has effectively rendered millions of acres of Indian land unused, unmanageable, and in constant jeopardy of being taken out of Indian ownership. This, of course, says nothing of the large administrative costs borne by the federal government and the tribes in maintaining ownership records and distributing income from the allotments to the correct owners.

The Committee members are well aware of the fractionated ownership issues and have heard testimony on several occasions over the past several years about the magnitude of the problem. The total number of interests in the 183,000 existing allotments or tribal tracts now totals more than 3 million. A number of allotments have ownership patterns which are now dividing at exponential rates every few years.

Anecdotally it is estimated that as many as 10 percent of the allotments are either completely unused or illegally used without lease payments to the owners because the properties ownership is so fractionated that tracking is virtually impossible. Beyond this are additional allotments that could be used for relatively advanced economic development but the difficulties in reaching agreement among so many owners remains an impediment. These are particularly distressing conditions when every opportunity for appropriate development in Indian Country is so important.

The cost to the federal government is staggering. Over the past several months, ILTF has tried to estimate the federal administrative costs of managing each ownership record. The best estimate that we could arrive at is $71 per year per ownership interest. Our discussions with Bureau of Indian Affairs (BIA) field staff suggest that this is an extremely conservative estimate.

The costs may well exceed $100 per interest. The figures would put the total costs of administration between $213 million and $300 million per year.

As the Committee is aware, the BIA has operated a pilot project for land consolidation since 1998. While the project has had some qualified success, it is clearly not at a scale that can keep pace with the rate of increase in fractionation of the land ownership. The $21 million projected for the pilot projects in the next fiscal year is but a drop in the bucket as to what is needed to resolve the problem. To that point, an ILTF consultant recently calculated that it would require $1.25 billion to buy out all the existing undivided interests throughout Indian Country. This figure should in fact be considered very conservative.

It is in this context that ILTF would agree with the findings outlined in S. 519. The land issues in Indian Country must indeed be resolved if economic development is to occur on a significant scale. And further, that additional capital must be brought to bear to achieve a scope and scale of enough significance to be effective. However, Indian self-determination is a fundamental core value of ILTF and that self-determination is not limited to the political sector but also includes economic aspects. Therefore, while we very much appreciate the intent of S. 519, we do not see the need for the federal government to create the vehicles for investment in Indian Country. The creation of such entities is better left to the Indian communities that can adapt the disciplines of the private capital market to their own cultural settings. This is not to say that there is not a role for the federal government in fostering the economic development and capital investment in Indian Country through the application of monetary resources. Indeed, those resources certainly are important to address some of the failures of the capital market system in Indian Country as they have been in addressing similar failures in other communities.

Indicative of our concurrence with the findings and land-related goals of S. 519 is ILTF's work over the past year to develop a private capital investment mechanism that could be applied to the consolidating of undivided interests and limited recovery of alienated land within reservation boundaries. Through our developing relationship with the Native American Bank Community Development Corporation, the investment mechanism will also include opportunities for private and public capital resources to be brought to bear in the development activities on Indian land. Affordable housing development will be of primary concern initially.

The Indian Land Capital Fund is designed to be an equity investment pool and as such will provide Indian Country with a relatively new model of financial investment in Indian land. To date, most financial investment related to Indian land has been through debt financing. The benefit of the equity investment is that it would help to leverage debt and would allow the Fund to develop more rapidly and larger.

The design of the Capital Fund will incorporate aspects of the BIA's Consolidation Pilot Projects but will be assisted through the application of ILTF and NACDC's non-profit activities including but not limited to estate planning, financial counseling, and technical assistance. Other significant aspects of the Indian Land Capital Fund include:

- Initially capitalized through a combination of philanthropic, tribal, government and private sources.
- Allows the tribes to own title to their land.
- Will work with all holders of undivided interests not just those with less than 2 percent interests to prevent further fractionation from occurring.
- Provides for a network of local sites that receive common technical assistance and training.
- Makes provisions for recognizing the individual ownership rights of Indian people and provides technical assistance and guidance in consolidating undivided interests while preventing future fractionation of ownership.
- Allows Indian people and tribes to build ownership interests in the investment pool.
- Adds value to the land through development.
- Becomes a long-term, self-sustaining, for-profit concern.

The financial vehicle we are proposing and constructing will not be without cost to the federal government. Indeed the undivided interests of Indian Country are of the federal government's making and it will need to provide resources to resolve that problem. However,

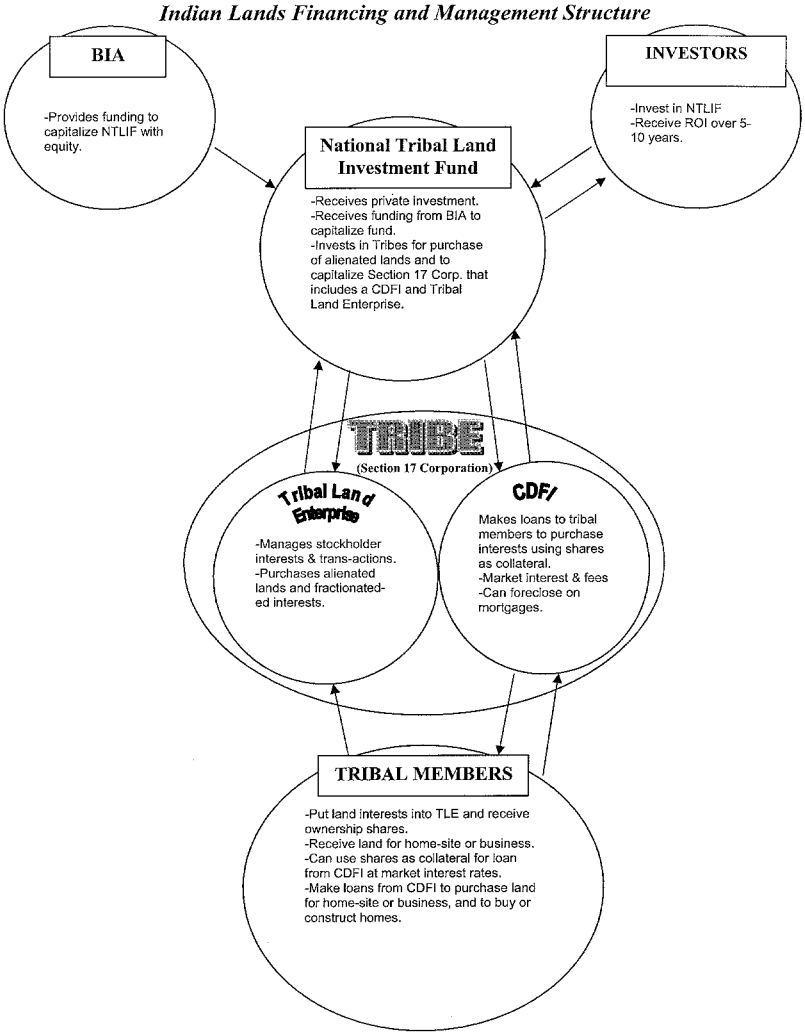
the Capital Fund that is being created will be able to leverage between 5 and 10 dollars of philanthropic, tribal, or private capital to every federal dollar. Federal contributions to the Capital Fund could come in several forms including the provision of seed capital, tax credits for investors, or a program similar to the Energy Savings Performance Contracts found in the recent energy bill. In the case of the latter, it would be the savings that accrue to the BIA administrative costs that could be shared with the Indian Lands Capital Fund. When successfully implemented, the mechanism would provide a scale of activity in reducing fractionated ownership throughout Indian Country that the BIA is unable to achieve with the current budget allocations for the Consolidation Pilot Projects.

We have had some very preliminary conversations with the BIA and several tribes regarding the Indian Land Capital Fund. It is our intention to continue those discussions with the intent of obtaining at least some portion of the funds dedicated to the Pilot Projects for next fiscal year for the partial capitalization of the Capital Fund. If successful in obtaining these funds, the Indian Land Capital Fund will become operational during the Fall of 2003 at a minimum of four tribal sites.

Ultimately, we believe this model investment program will return decision making and control over their land asset to the tribes and Indian people. Currently the control and management of the asset is subjected to changes in federal policy, law and regulations. These changes seemingly are driven more by exasperation and expedience to resolve the overwhelming size and growth of the fractionation problem rather than resolving the problem with the welfare and concerns of Indian people in mind.

Thank you for the opportunity to appear before you today and have this discussion. The bill that is the subject of today's hearing has appropriately targeted two significant issues in the economic development of Indian Country—lack of investment capital and broadly applied analysis of the impediments. The Indian Land Tenure Foundation stands ready to assist the Committee and Congress in pursuing the goals of S. 519 through the Indian Land Capital Fund and our many other activities.

Indian Lands Financing and Management Structure



INDIAN LAND WORKING GROUP

ILWG Officers/Regional Contacts

Austin Nunez – Chair, *Tohono O'odham*
2018 W. San Xavier Rd.
Tucson, AZ 85746
Tel: 520-294-5727
Fax: 520-294-0613

Helen Sanders - Vice-Chair, *Quinault*
53 Howanut Road
Oakville, WA 98568
Tel: 360-273-7137
Fax: 360-273-5548

Jim Parris - Secretary, *Osage-Cherokee*
880 Tula Drive
Rio Rancho, NM 87124
Tel:505-2398591
Fax: 505-892-5646

Theresa Carmody –Treas., *Seneca*
2401 12th St., NW - Rm. 206N
Albuquerque, NM 87104
Tel: 505-247-9561
Fax: 505-247-9561

Ernie Werelus, *Shoshone-Bannock*
PO Box 847
Ft. Hall, Idaho 83203
Tel 208-238-3960
Fax: 208-238-3961

Deb Louie, *Colville*
PO Box 150
Nespelem, WA 99155
Tel: 509-634-2212
Fax: 509-634-4116

Tom Conroy, *Oglala Lakota*
PO Box 752
Pine Ridge, SD 57770
Tel: 605-2WI851
Fax 605-867-5044

Del LeCompte, *Standing Rock Sioux*
Box 268
Fort Yates, ND 59538
Tel: 701-854-7448
Fax: 701-854-7582

Annabell Kingbird, *Leech Lake*
6530 Highway 2, NW
Cass Lake, MN 56601
Tel: 218-335-7416
Fax: 218-335-7430

Clarysa Mandan, *Mandan*
PO Box 70
New Town, ND 58763
Tel: 701-627-3249
Fax: 701-627-3821

Peggy Doney, *Assiniboine Sioux*
RR 1, Box 39
Harlem, Mt 59526
Tel: 406-353-2205
Fax: 406-353-2797

Sally Willet, *Cherokee*
P.O. Box 56975
New Orleans, LA 70156
Tel:504-899-1943
E-mail: snwillet@yahoo.com

GeorgeRussell *Saginaw-Chippewa*
9027N.CobreDrive
Phoenix, AZ 85028
Tel: 800-835-7220
Fax: 602-493-4691

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.

The Indian Land Working Groups opposes S. 550 for the following reasons:

- 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
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.

(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	
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
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
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
18	Reconcile Agency and Bank reports

Bank	
Step	**Process**
7	Collect rental payments from lessees
8	Prepare schedule of daily collections
9	Send collection schedule to BIA
13	Electronically transfer each owner's rental payment to their bank account
17	Prepare internal bank audit and reconciliation 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.

○