S. HRG. 107–512

INDIAN LAND CONSOLIDATION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 1340

TO AMEND THE INDIAN CONSOLIDATION ACT FOR PROBATE REFORM WITH RESPECT TO TRUST OR RESTRICTED LANDS

MAY 22, 2002
WASHINGTON, DC

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INDIAN LAND CONSOLIDATION ACT

WEDNESDAY, MAY 22, 2002

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

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

Present: Senator Campbell.

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

Senator CAMPBELL. Good morning. The committee will be in session.

I want to thank our Chairman, who is out for a few days, for continuing to encourage Indian trust management reforms and for scheduling today's hearing. I also want to welcome our witnesses to discuss S. 1340, the Indian Probate Reform Act, the bill that I introduced in August 2001. During the last Congress, the committee worked very hard to develop the Indian Lands Consolidation Act Amendments of 2000 to see it signed into law on November 7 of the year 2000.

[Text of S. 1340 follows:]

II

107TH CONGRESS
1ST SESSION

S. 1340

To amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands.

IN THE SENATE OF THE UNITED STATES

AUGUST 2, 2001

Mr. CAMPBELL introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands.

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 ''Indian Probate Reform Act of 2001''.

SEC. 2. AMENDMENTS TO THE INDIAN LAND CONSOLIDATION ACT.

(a) IN GENERAL.—The Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) is amended by adding at the end the following:

"Subtitle B—Indian Probate Reform

"SEC. 231. FINDINGS.

"Congress makes the following findings:

"(1) The General Allotment Act of 1887 (commonly known as the "Dawes Act"), which authorized the allotment of Indian reservations, did not allow Indian allotment owners to provide for the testamentary disposition of the land that was allotted to such owners.

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

"(3) The Federal Government's reliance on the State law of intestate succession with respect to the descendency of allotments has resulted in numerous problems to Indian tribes, their members, and the Federal Government. These problems include—

"(A) the increasing fractionated ownership of trust and restricted land as these lands are inherited by successive generations of owners as tenants in common;

"(B) the application of different rules of intestate succession to each of a decedent's interests in trust and restricted land if such land

is located within the boundaries of different States which makes probate planning unnecessarily difficult and 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 is unfair to the owners of trust and restricted land and their heirs and devisees and which makes probate planning more difficult.

''(4) Based on the problems identified in paragraph (3), a uniform Federal probate code would likely—

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

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

''(C) facilitate inter-tribal efforts to produce tribal probate codes pursuant to section 206; and

''(D) provide essential elements of general probate law that are not applicable on the date of enactment of this subtitle to interests in trust or restricted land.

''SEC. 232. RULES RELATING TO INTESTATE INTERESTS AND PROBATE.

''(a) IN GENERAL.—Any interest in trust or restricted land that is not disposed of by a valid will shall—

''(1) descend according to a tribal probate code that is approved pursuant to section 206; or

''(2) in the case of an interest in trust or restricted land to which such a code does not apply, be considered an 'intestate interest' and descend pursuant to subsection (b), this Act, and other applicable Federal law.

''(b) INTESTATE SUCCESSION.—An interest in trust or restricted land described in subsection (a)(2) (intestate interest) shall descend as provided for in this subsection in the following order:

''(1) SURVIVING INDIAN SPOUSE.—

''(A) SOLE HEIR.—A surviving Indian spouse of the decedent shall receive all of the decedent's intestate interests if no Indian child or grandchild of the decedent survives the decedent.

"(B) OTHER HEIRS.—A surviving Indian spouse of the decedent shall receive a one-half interest in each of the decedent's intestate interests if the decedent is also survived by Indian children or grandchildren.

"(C) HEIRS OF THE FIRST OR SECOND DEGREE OTHER THAN SURVIVING INDIAN SPOUSE.—The one-half interest in each of the decedent's intestate interests that do not descend to the surviving Indian spouse under subparagraph (B) shall descend in the following order:

"(i) To the Indian children of the decedent in equal shares, or to the Indian grandchildren of the decedent, if any, in equal shares by right of representation if 1 or more of the Indian children of the decedent do not survive the decedent.

"(ii) If the decedent is not survived by Indian children or grandchildren, to the surviving Indian parent of the decedent, or to both of the surviving Indian parents of the decedent as joint tenants with the right of survivorship.

''(iii) If the decedent is not survived by any person who is eligible to inherit under clause (i) or (ii), to the surviving Indian brothers and sisters of the decedent.

''(iv) If the decedent is not survived by any person who is eligible to inherit under clause (i), (ii), or (iii), the intestate interests shall descend, or may be acquired, as provided for in section 207(a)(3)(B), 207(a)(4), or 207(a)(5).

''(2) NO SURVIVING INDIAN SPOUSE.—If the decedent is not survived by an Indian spouse, the intestate interests of the decedent shall descend to the individuals described in subparagraphs (A) through (D) who survive the decedent in the following order:

''(A) To the Indian children of the decedent in equal shares, or to the Indian grandchildren of the decedent, if any, in equal shares by right of representation if 1 or more of the Indian children of the decedent do not survive the decedent.

''(B) If the decedent is not survived by Indian children or grandchildren, to the surviving Indian parent of the decedent, or to both of the

surviving Indian parents of the decedent as joint tenants with the right of survivorship.

''(C) If the decedent is not survived by any person who is eligible to inherit under subparagraph (A) or (B), to the surviving Indian brothers and sisters of the decedent.

''(D) If the decent is not survived by any person who is eligible to inherit under subparagraph (A), (B), or (C), the intestate interests shall descend, or may be acquired, as provided for in section 207(a)(3)(B), 207(a)(4), or 207(a)(5).

''(3) SURVIVING NON-INDIAN SPOUSE.—

''(A) NO DESCENDANTS.—A surviving non-Indian spouse of the decedent shall receive a life estate in each of the intestate interests of the decedent pursuant to section 207(b)(2) if the decedent is not survived by any children or grandchildren.

''(B) DESCENDANTS.—A surviving non-Indian spouse of the decedent shall receive a life estate in one-half of the intestate interests of the decedent pursuant to section 207(b)(2) if the decedent is survived by at least one of the children or grandchildren of the decedent.

''(C) DESCENDANTS OTHER THAN SURVIVING NON-INDIAN SPOUSE.—The one-half life estate interest in each of the decedent's intestate interests that do not descend to the surviving non-Indian spouse under subparagraph (B) shall descend to the children of the decedent in equal shares, or to the grandchildren of the decedent, if any, in equal shares by right of representation if 1 or more of the children of the decedent do not survive the decedent.

''(4) NO SURVIVING SPOUSE OR INDIAN HEIRS.—If the decedent is not survived by a spouse, a life estate in the intestate interests of the decedent shall descend in the following order:

''(A) To the children of the decedent in equal shares, or to the grandchildren of the decedent, if any, in equal shares by right of representation if 1 or more of the children of the decedent do not survive the decedent.

''(B) If the decedent has no surviving children or grandchildren, to the surviving parents of the decedent.

''(5) REMAINDER INTEREST FROM LIFE ESTATES.—The remainder interest from a life estate

established under paragraphs (3) and (4) shall descend in the following order:

"(A) To the Indian children of the decedent in equal shares, or to the Indian grandchildren of the decedent, if any, in equal shares by right of representation if 1 or more of the children of the decedent do not survive the decedent.

"(B) If there are no surviving Indian children or grandchildren of the decedent, to the surviving Indian parent of the decedent or to both of the surviving Indian parents of the decedent as joint tenant with the right of survivorship.

"(C) If there is no surviving Indian child, grandchild, or parent, to the surviving Indian brothers or sisters of the decedent in equal shares.

"(D) If there is no surviving Indian descendant or parent, brother or sister, the intestate interests of the decedent shall descend, or may be acquired, as provided for in section 207(a)(3)(B), 207(a)(4), or 207(a)(5).

"(e) SPECIAL RULE RELATING TO SURVIVAL.—For purposes of this section, an individual who fails to survive

a decedent by at least 120 hours is deemed to have predeceased the decedent for purposes of intestate succession, and the heirs of the decedent shall be determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by at least 120 hours, such individual shall be deemed to have failed to survive for the required time-period for purposes of the preceding sentence.

''(d) PRETERMITTED SPOUSES AND CHILDREN.—

''(1) SPOUSES.—For purposes of this section, if the surviving spouse of a testator married the testator after the testator executed his or her will, the surviving spouse shall receive the intestate share in trust or restricted land that such spouse would have otherwise received if the testator had died intestate. The preceding sentence shall not apply to an interest in trust or restricted lands where—

''(A) the will is executed before the date specified in section 234(a);

''(B) the testator's spouse is a non-Indian and the testator has devised his or her interests in trust or restricted land to an Indian or Indians;

''(C) it appears from the will or other evidence that the will was made in contemplation

of the testator's marriage to the surviving spouse;

''(D) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

''(E) the testator provided for the spouse by a transfer of funds or property outside of the will and an intent that the transfer be in lieu of a testamentary provision is demonstrated by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

''(2) CHILDREN.—For purposes of this section, if a testator executed his or her will prior to the birth of 1 or more children of the testator and the omission is the product of inadvertence rather than an intentional omission, such children shall share in the decedent's intestate interests in trust or restricted lands as if the decedent had died intestate. Any person recognized as an heir by virtue of adoption under the Act of July 8, 1940 (54 Stat 746) shall be treated as a decedent's child under this section.

''(e) DIVORCE.—

''(1) SURVIVING SPOUSE.—

''(A) IN GENERAL.—For purposes of this section, an individual who is divorced from the 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, such individual is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife shall not be considered a divorce for purposes of this subsection.

''(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed to prevent an entity responsible for adjudicating interests in trust or restricted land from giving force and effect to a property right settlement if one of the parties to the settlement dies before the issuance of a final decree dissolving the marriage of the parties to the property settlement.

''(2) EFFECT OF SUBSEQUENT DIVORCE ON A WILL OR DEVISE.—If after executing a will the testator is divorced or the marriage of the testator is annulled, upon 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

shall be deemed to be revoked unless the will expressly provides otherwise. Property that is prevented from passing to a former spouse based on the preceding sentence shall pass as if the former spouse failed to survive the decedent. Any provision of a will that is revoked solely by operation of this paragraph shall be revived by the testator's remarriage to the former spouse.

''(f) NOTICE.—To the extent practicable, the Secretary shall notify the owners of trust and restricted land of the provisions of this title. Such notice may, at the discretion of the Secretary, be provided together with the notice required under section 207(g).

''SEC. 233. COLLECTION OF PAST-DUE AND OVER-DUE CHILD SUPPORT

''The Secretary shall establish procedures to provide for the collection of past-due or over-due support obligations entered by a tribal court or any other court of competent jurisdiction from the revenue derived from an interests in trust or restricted land.

''SEC. 234. EFFECTIVE DATE.

''(a) IN GENERAL.—The provisions of this title shall not apply to the estate of an individual who dies prior to the later of—

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

''(2) the date specified in section 207(g)(5).''.

(b) OTHER AMENDMENTS.—The Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) is amended—

(1) by inserting after section 202, the following:

''Subtitle A—General Land Consolidation'';

(2) in section 206 (25 U.S.C. 2205)—

(A) in subsection (a)(3)—

(i) by striking ''The Secretary'' and inserting the following:

''(A) IN GENERAL.—The Secretary''; and

(ii) by adding at the end the following:

''(B) TRIBAL PROBATE CODES.—A tribal probate code shall not prevent the devise of an interest in trust or restricted land to non-members of the tribe unless the code—

''(i) provides for the renouncing of interests, reservation of life estates, and payment of fair market value in the manner prescribed under subsection (c)(2); and

''(ii) does not prohibit the devise of an interest in an allotment to an Indian per-

son if such allotment was originally allotted to the lineal ancestor of the devisee.''; and

(B) in subsection (c)(2)—

(i) in subparagraph (A)—

(I) by striking ''IN GENERAL.—Paragraph'' and inserting the following:

''(A) NONAPPLICABILITY TO CERTAIN INTERESTS.—

''(i) IN GENERAL.—Paragraph'';

(II) by striking ''if, while'' and inserting the following: ''if—

''(I) while'';

(III) by striking the period and inserting ''; or'';

(IV) by adding at the end thereof the following:

''(II) the interest is part of a family farm that is devised to a member of the decedent's family if 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) RULE OF CONSTRUCTION.—Nothing in clause (i)(II) shall be construed to prevent or limit the ability of an owner of land to which such clause applies to mortgage such land or to limit the right of the entity holding such a mortgage to foreclose or otherwise enforce such a mortgage agreement pursuant to applicable law.''; and

(ii) in subparagraph (B), by striking ''207(a)(6)(B)'' and inserting ''207(a)(6)'';

(3) in section 207 (25 U.S.C. 2206)—

(A) in subsection (a)(6), by striking subparagraph (A) and inserting the following:

''(A) DEVISE TO OTHERS.—

''(i) IN GENERAL.—Notwithstanding paragraph (2), an owner of trust or restricted land—

''(I) who does not have an Indian spouse or an Indian lineal descendant may devise his or her interests in such land to his or her spouse, lineal de-

scendant, heirs of the first or second degree, or collateral heirs of the first or second degree;

''(II) who does not have a spouse or an Indian lineal descendent may devise his or her interests in such land to his or her lineal descendant, heirs of the first or second degree, or collateral heirs of the first or second degree; or

''(III) who does not have a spouse or lineal descendant may devise his or her interests in such land to his or her heirs of the first or second degree, or collateral heirs of the first or second degree.

''(ii) RULE OF CONSTRUCTION.—Any devise of an interest in trust or restricted land under clause (i) to a non-Indian will be construed to devise a life estate unless the devise explicitly states that the testator intends for the devisee to take the interest in fee.

''(B) UNEXERCISED RIGHTS OF REDEMPTION.—

"(i) IN GENERAL.—This subparagraph (B) shall only apply to interests in trust or restricted land that are held in trust or restricted status as of the date of enactment of the Indian Probate Reform Act of 2001, and interests in any parcel of land, at least a portion of which is in trust or restricted status as of such date of enactment, that is subject to a tax sale, tax foreclosure proceeding, or similar proceeding.

"(ii) EXERCISE OF RIGHT.—If the owner of such an interest referred to in clause (i) fails or refuses to exercise any right of redemption that is available to that owner under applicable law, the Indian tribe that exercises jurisdiction over the trust or restricted land referred to in such clause may exercise such right of redemption.

"(iii) PENALTIES AND ASSESSMENTS.—To the extent permitted under the Constitution of the United States, an Indian tribe acquiring an interest under

clause (i) may acquire such an interest without being required to pay—

''(I) penalties; or

''(II) past due assessments that exceed the fair market value of the interest.''; and

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

(4) 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) in subsection (f)—

(i) by striking ''After the expiration of the limitation period provided for in subsection (b)(2) and prior'' and inserting ''Prior''; and

(ii) by striking ''sold, exchanged, or otherwise conveyed under this section''.

(c) ISSUANCE OF PATENTS.—Section 5 of the Act of February 8, 1887 (24 Stat. 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, or a tribal probate code approved under such Act and regulations, shall apply thereto after such patents have been executed and delivered:''.

○

Senator CAMPBELL. The 2000 ILCA amendments addressed two pressing needs—removing the parts of the ILCA that were invalidated by the Supreme Court and updating the misinformed and sometimes simply outdated Federal laws dealing with Indian probate and the use of Indian lands. As we worked out the ILCA amendments last session we learned why it has proven so difficult for Congress to address this important work over the decades. Every issue we addressed required us to take a stand on unresolved questions and often there were no easy answers. For example, allowing a person to devise his land to any of his heirs or relatives would allow the land to pass out of trust when it is devised to non-Indians. Without easy solution or an unlimited amount of money to allow us to buy our way out of these problems, the best we can do is to try to work together and try to give this our best shot in trying to accommodate everyone's interest as well as we can. I am pleased that most of the 2000 amendments are going into effect with little or no controversy.

S. 1340 gives us an opportunity to take steps to reduce the amount of time to complete the probating of Indian estates. Currently, some 20 State laws of intestate succession apply to the inheritance of Indian allotments, which makes it nearly impossible for the U.S. Government to help allottees with probate and estate planning. The various State laws also create headaches for administrative law judges who are forced to monitor legal and policy developments in the 20 States. S. 1340 will reduce that number to one uniform law, unless the tribe decides to enact its own pobate rules.

The President's budget request includes a new and stronger emphasis on probating Indian estates by including millions more dollars for probate activities. I am also pleased that Secretary Norton is making true trust enhancement a high priority for her Administration. Congress shares responsibility for trust reforms, not only in providing adequate resources, but in taking an honest look at laws that govern the use and probate of trust lands, especially trust lands that are in individual Indian ownership. S. 1340 will allow us the opportunity to complete the work we began last Congress by establishing uniform Federal Indian rules.

With that, we will start with the witnesses. I understand, Neal, that you have an airplane out. Is that correct? So why don't we go ahead and start with you, and at the end of your testimony, if you want to put your complete written testimony in the record, that will be fine. If you have a real tight schedule, be as brief as you like, and then at that time you are sure welcome to be excused.

Mr. MCCALEB. With your permission, Mr. Chairman, I would like to invite Kathy Supernaw to join me. She is the resident expert at the Bureau of Indian Affairs on probate, and this is a little bit technical legally for an old civil engineer, so I may need a crutch to answer any questions.

Senator CAMPBELL. That will be fine.

STATEMENT OF HON. NEAL McCALEB, ASSISTANT SECRETARY OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY KATHY SUPERNAW, BUREAU OF INDIAN AFFAIRS

Mr. MCCALEB. Thank you very much, Mr. Chairman. I very much appreciate the opportunity to appear before you today and present the views of the Administration on S. 1340, as you said, a bill intended to amend the Indian Land Consolidation Act of 2000 to provide for probate reform with respect to trust and restricted lands.

Let me say at the outset, we support the bill. It is a useful bill and a needed bill. In particular, I want to commend your staff in their efforts in developing the legislation. S. 1340 will provide the American Indian people who own trust and restricted land and restricted assets with a uniform probate intestate code that can be applied throughout Indian country. The legislation is clearly the product of a lot of hard work on detailed and technical issues by departmental employees and members of your staff in order to achieve this important common goal of improving Indian probate programs.

During the tribal consultations held in July and August 2000 on the proposed probate regulations, the tribes recommended and supported a uniform intestate code. At the present time, Federal statutes provide that the law of the State where the land is located be applied in the distribution of the estate. As a result of intertribal marriage, it is not uncommon that an Indian decedent owns land on reservations in several States. The effect of applying up to 33 different State laws to the restricted and trust lands of a decedent results in disparate and unfair treatment of the distribution of the entire estate to the same heirs.

For example, in Nebraska the surviving spouse is entitled to receive the first $50,000 of the estate, and thereafter the law provides that the surviving spouse receive one-half and the children get one-half of the remainder of the estate. Minnesota law, however, provides that the surviving spouse will get the first $150,000 plus one-half of the balance of the intestate estate if all the heirs are also heirs of the surviving spouse. There are several examples here in the testimony of the disparity between the different States that exemplify this problem. I will not go through them all.

Another area of concern is the inheritance rights of adopted children and the inconsistencies in the State laws. Minnesota law provides that an adopted child may inherit from his or her natural parents, while Montana law provides that an adopted child may only inherit from the adopted parents. The enactment of a uniform intestate code for trust and restricted estates is a great benefit both to the heirs and to the Department. The benefit to the heirs is the same law will be applied to all trust and restricted estates of the decedent, no matter where the real property is located. A uniform intestate probate code will provide for the division of the shares of the entire estate and will be the same throughout the United States. The heirs may disclaim their interests or otherwise agree to the settlement to distribute the estate if a child or children want to give a larger share to the surviving parent. The Federal

Government's cost to update and maintain land records will be reduced.

This is a very important contribution to the Indian Land Consolidation Act because of the complexity of the probate. It is operating to proliferate the fractionated interests. Although it is an aside that is not in the testimony, in the Midwest we have been doing the pilot project on land consolidation. There are 120,000 individual interests. In the last three years, we have purchased 43,000, which you would think would be great headway, but because of proliferation of the fractionated interests, we are just treading water. There are now 121,000 individual interests. So this is a problem that needs an aggressive approach, and this will be a contributing factor to assist in that.

Finally, a uniform intestate code may encourage the Indian tribes adopt their own inheritance codes. The uniform intestate code will serve as a model for tribes to develop their own tribal probate codes. The proposed uniform intestate succession facilitates the consolidation of interests to remain in trust or restricted status and complements the provisions of the Indian Land Consolidation Act to minimize further fractionation of individual interests in trust and restricted land.

I would comment in terms of some comments on the bill. We recommend that S. 1340 include a provision that excepts the application of the uniform intestate code to the Five Civilized Tribes in the State of Oklahoma I am a member of one of them, until such time as the Five Nations bill is enacted. Currently, the Five Civilized Tribes are subject to the State District Courts of Oklahoma and Oklahoma probate law is applied to determine the intestate succession. Thus, the removal of the exception should be reflected in S. 2880 and the Five Nations legislation.

We have some other tweaks, really cleanup language in the bill, that is contained in the testimony that will speak for itself, and we will leave it at that.

With that, Mr. Chairman, I would just like to thank you again for the hard work of your staff in cooperation with the Department in drafting this much-needed legislation. I will be happy to answer any questions that you may have.

[Prepared statement of Mr. McCaleb appears in appendix.]

Senator CAMPBELL. Thank you.

My staff tells me it is one of the hardest bills they have ever tried to put together, by the way.

Before you run, let me ask you just a couple of questions, Neal. Is it fair to say that the land pieces that are owned by Indian people are getting smaller and smaller because of the proliferation as families grow?

Mr. MCCALEB. Oh, absolutely. That is right.

Senator CAMPBELL. And because the States, so many of them have different laws applying to inheritance, is it possible for an Indian youngster adopted by an Indian family, but is not enrolled in that tribe, to inherit that land from the parents in some States?

Mr. MCCALEB. I am going to defer to my expert here.

Ms. SUPERNAW. It depends on the State law.

Mr. MCCALEB. That's what I mean. Can that happen in some States?

Ms. SUPERNAW. Right. It is different, and State law does not address tribal membership. It is just natural parents.

Senator CAMPBELL. Yes; well, does that mean also if an Indian family adopted a non-Indian youngster in some States could that youngster inherit that land?

Ms. SUPERNAW. Yes.

Senator CAMPBELL. Yes; complicated. Well, I appreciate your willingness to work with the committee on those little glitches we have, and certainly appreciate your support of the bill, too. I have a few more questions, but I know you have a plane out, so what I will do with the last few, I think I will submit them in writing—if you could answer those in writing. They are just small questions, but I would appreciate it if you would do that.

Mr. MCCALEB. Thank you very much, Mr. Chairman.

Senator CAMPBELL. Thank you.

The next panel will be made of Tex Hall—Tex, nice to see you again—from the Three Affiliated Tribes; Maurice Lyons, chairman of the Morongo Band of Mission Indians from Banning, CA; and Benjamin Speakthunder, president of Fort Belknap's Community Council; and Austin Nunez, the president of Indian Land Working Group of Wagon Mound, NM.

We will proceed in that order, too, if it is all right. So we will just go ahead and start with you, Tex. Thank for appearing here again—twice in 2 weeks.

For all of the witnesses, if you would like to abbreviate or depart from your printed statement, we will include your complete statement in the record.

Tex.

STATEMENT OF HON. TEX HALL, CHAIRMAN, THREE AFFILIATED TRIBES BUSINESS COUNCIL, AND PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. HALL. Thank you, Mr. Chairman, and members of the committee and staff—Pat and Paul and Steve. I really appreciate the opportunity to present on behalf of the National Congress of American Indians.

I do have a chart I would like to show that really gives an example of the fractionation. I will just use my tribe as an example. The brown indicates the two percent and less. So Mr. Chairman and members of the committee, you can see. I have not done the exact math, but it appears to me in talking with our legal counsel John Dossett from NCAI, it appears it is about one-half of the two percent and less interest on Fort Berthold in that brown right there. So that is a tremendous problem as we look to develop economically for housing, for business development and so on and so forth.

As a rancher at my reservation, we all—or as a businessman—we all know that if you can block up a parcel of land for farming, for grazing, or for business development, it is in the best interest economically to do so. So this is a huge issue and I very much agree with the comments that you expressed at the outset that this is probably the most difficult bill I am sure the staff has had to work on, but it is something that we strongly encourage. We think of it almost like a work in progress, Mr. Chairman, that we may have to make some amendments later on. So I just wanted again

to show some of the—the white track is the FELA and that was the Homestead Act at Fort Berthold. So about one-third of what we call the northeast quadrant was part of the 1910 Homestead Act.

So you see the gray is the two to five percent, and then the green is the 5 to 10 percent, and the light green is the 10 to 25, and then the kind of yellow is the 25 to 50, and the lighter shade is 50 to 75, and then the off-white or the gray is 100 percent track. And so, at some point in time, I would hope that we can have a discussion with some of the tribal leaders that are very interested in this, and the committee, on looking at a mechanism to allow a buying of 100 percent allotment and how we can move forward on that issue, so we can eliminate those browns and the off-whites or the grays.

Mr. Chairman, I gave my written testimony, and I just have a few comments, and I want to talk in general and then more specific. President Roosevelt was from our country. He had a ranch out in North Dakota, in Medora. And he had a quote in his 1901 State of the Union Address on the General Allotment Act. He said it is a great pulverizing engine designed to crush the Indian mass. He went on to describe what he thought the goal of the United States toward tribes should be, and he said, we must treat the Indians as individuals, not as tribes. I think what he said summarizes nicely our problem. The Allotment Act destroyed the land-base of tribal nations, and was the basis of the General Allotment Act. It was intended to destroy the tribal land common ownership interest by splitting us into individual ownership of landowners, and each with really inadequate parcels of land. I think Roosevelt thought if we owned land, we would not be able to identify ourselves as tribal nations. So all tribes are really looking at this Indian Land Consolidation Act amendments now as we try to reduce those 2 percent.

Now, 100-plus years later and five generations, we are faced with how to fix this General Allotment Act because, as you know, it did not provide for mechanisms to escheat or to pass down to our heirs. You simply could not do it. That is why on all trust lands, we have this problem. It is just fractionation, fractionation with many of our tribal members not having wills and not having that process, or not having a uniform probate where it differs if we follow the State law, which the General Allotment Act did. As Mr. McCaleb indicated in his testimony, you may have an individual owner from several different States.

So I do have a—I wish I could have presented it in a powerpoint, Mr. Chairman, but I could leave this. This is a bar graph. This is from the Land Records Information System, which the Bureau calls the LRIS. It shows all of the 12 regions, so this is the Great Plains, and this up here indicates 1.2 million landowner interests. In the Great Plains, we have 1.1 million number of interests, and then the Rocky Mountain is next with 654,000 number of interests. This is the pie chart of the landowner interests. In the Great Plains, there are 37 percent; Rocky Mountain is 21 percent of the landowner interests, so there are 1.2 million interests.

The third chart of the LRIS is the number of trust allotments or tribal tracks. Again, the Great Plains on the pie graph is 33 percent of the tribal tracks. Rocky Mountain is 21 percent, and the Northwest is 19 percent, and so on and so forth. And then again, it shows—this is the bar graph of tribal tracks again. There are

58,000 tribal tracks; Rocky Mountain, 37,000; Northwest, 34,000. This is the nationwide IIM accounts data, Mr. Chairman and members of the committee. Again, the number of IIM accounts in the Great Plains is 67,249; in the Rocky Mountain, it is 34,462; and the Western is 29,000. And then again, this is the pie graph of the national IIM accounts that shows the Great Plains has 27 percent of the IIM accounts.

Of course, as Mr. McCaleb had indicated, there is a fee. There is a fee that has to go to administering those fractionated interests. And so clearly we have to have the funding for the—I mean, that is the goal here. So one of our recommendations is not for anything less than $33 million. We are looking at the Bureau's formula—not formula, but the amount of money it takes to administer those fractionated parcels is about $33 million. So that would be one of our recommendations, Mr. Chairman, is that we include that in our budget for fiscal year 2003, that funding base of $33 million.

Just a couple more comments, Mr. Chairman. Of course, section 207 was designed to prevent Indian lands from passing out of trust. Non-Indian heirs will generally only receive a life estate on Indian lands. But because the non-Indian heir owns less than a full interest, a remainder interest is created and this remainder interest must go on to an Indian. If there are no such heirs, a remainder may be purchased by any Indian co-owner of the parcel, and the proceeds of such a sale are made a part of the decedent's estate. If no offer is made to purchase the parcel, the remainder interest then passes on to the tribe. We greatly support this portion.

In some instances, the Indian owners of trust or restricted land may not have an Indian heir, and the general rule would deprive such people of the ability to devise more than a life estate to their heirs. The 2000 Amendments provide an exception for such people. They may devise an interest to either their heirs of the first or second degree, or collateral heirs of the first or second decree. Because these people are non–Indian, the interest would pass in fee, not in trust. This does concern us somewhat. But there is an option for these interests to be purchased by the tribe, which we definitely support. We would like to consider more technical amendments to this section.

And then finally on the section 207, it is intended to address fractionation by limiting the way the Indian land passes as a joint tenancy in common. So if a person devises interests in the same parcel to more than one person, it is now presumed to be a joint tenancy with right of survivorship, meaning that each of the decedent's heirs share a common title, so that the last surviving member of the group obtains a full interest as it was owned by the decedent. So any interest of less than 5 percent passing intestate or people without a will, succession will also be held by the heirs with the right of survivorship. The Secretary of the Interior must certify that it has the capacity to track and manage interests that are held with the right of survivor for this provision to take place. We strongly support that provision, Mr. Chairman.

We really have to do something here. I really appreciate the committee's attention to this issue because if we do not, it will just continue to multiply and multiply. It will basically render our land-

base useless for an entire—this is a one million acre reservation, Mr. Chairman.

Finally, we do have some recommendations. Again, we recognize the need for the type of amendments that are proposed in S. 1340 regarding devise to non-Indian heirs. In a general sense, we support them, but we would like to get a little bit more recommendations from other tribes as they are continuing to send us testimony and talk to us about the specifics that, number one, would keep the land in trust status and under tribal jurisdiction. We do not want to get into a situation where we are separating, like in the *Cabell* lawsuit where you have the individual IIM accountholders in a suit, and then you have the tribal assets over here, and then we are really going in separation, where we do not have the tribal government being a part of that whole mix. We think that our discussions and our amendments should include the tribal jurisdiction. I think that is probably one of the most important things that I would add today, in addition to the funding—this support for tribal jurisdiction.

And number two, take a closer look at the limitations of approval of tribal probate codes as this is a direct interference with tribal self-government. So again, it seems like we are going in conflict there on the probate code. Again, we have to have that discussion with tribal governments, and Mr. Chairman, we all know that if we work with the tribes and we have something in concert, it will work a lot better that way.

And number three, and this is just a simplification recommendation, is that somehow we have to simplify the amendments or the acts so they are more user-friendly, so the people that are doing this in the field, in reality, in the Bureau and at the tribes, are more—and of course, as we are working with our constituents with our tribal membership, are more able to use these amendments in a more easier manner, in a more timely manner.

And I did mention the need for $33 million—and I think—just to finish my thought under the tribal governments and the tribal programs, Mr. Chairman, at NCAI we are also researching some ideas. On page six of my testimony, Mr. Chairman, we have four recommendations right there. We are researching some ideas that would expand the efforts tribal land consolidation programs, including a categorical exemption from NEPA, either legislative or through Interior regulations, in order to reduce the time and expense related to land transfers. We are still waiting for—this is part of the LRIS system, and this is still locked up since December, Mr. Chairman. I just wanted to state that we have submitted a letter to the committee asking the Department of the Interior to turn the system back on because any land transactions, any housing developments are frozen right now since December. Any probate action is still frozen because the system is still shut down. So this is imperative that we reduce the time and expense and that we allow the system to get back on-line so we can continue land transfers, land exchange and leases, lease approvals, and probate information that comes through the system.

No. 2, provide tax bond financing to tribes to acquire lands for consolidations. And number three, loan programs that provide Federal funding to buy down the cost of a loan—that buys down points

on the interest rate; and four, develop a tax credit for turning in fractionated interests or other tax credit structures or incentives for owners of fractionated interest.

In most part, Mr. Chairman, if we do not have some sort of mechanism like we are seeing in our amendments, there will still be a lot of tribes that are not able to use land, and many tribes still remain landless. So again, we support in a general sense. We realize that this is a big issue, but we have to move forward on this to stop the fractionation. So we support the amendments to the Indian Land Consolidation Act, but again, we would like to provide some more technical amendments as more tribes are wanting to provide more testimony, Mr. Chairman, and I do not know if it is possible to allow a little bit more time for the record to remain open. I just offer that. I would take any questions after the speakers are done.

Thank you.

[Prepared statement of Mr. Hall appears in appendix.]

Senator CAMPBELL. Okay. Some of the suggestions I think are really good. Some of them might create a problem. We will have to work with it, because some of them might require separate legislation. We might not be able to do it because it might not come under the jurisdiction of this committee. But we will certainly look into them.

You used the word "simplify." By the way, let me tell you, in the Senate, that is an oxymoron when you try to simplify anything. [Laughter.]

Let's go on with Maurice Lyons. Nice to see you again, Maurice.

Mr. LYONS. You too, Chairman, Vice Chairman.

STATEMENT OF HON. MAURICE LYONS, CHAIRMAN, MORONGO BAND OF MISSION INDIANS

Mr. LYONS. We would like to thank the Chairman and Vice Chairman Campbell for inviting Morongo Band of Mission Indians to testify today concerning the amendments of the Indian Land Consolidation Act of 2000. We strongly encourage the committee to move forward with the problems that have become apparent under current law.

I would like to begin by thanking Senator Campbell for his request to the Department of the Interior to delay implementation of certain provisions of the act, pending further congressional review. Concerns have risen in Indian country about the consequences both intended and possibly unintended of those amendments.

Morongo Reservation is located 17 miles west of Palm Springs. Our tribal membership is 1,200. We are a small reservation compared to some of these back this way. Our reservation is comprised of 33,000 acres that is held in trust, of which 31,000 is held in trust for the tribe and 1,200 acres is allotted lands. We continue to fight—we are working right now to find out how many of our people own interests in other reservations, and how many other people own interests in our reservation. That is something we really need to find out. Myself, I own interests in three different reservations.

Senator CAMPBELL. We are not going to be able to consolidate them. [Laughter.]

Mr. LYONS. No; and they are not big interests. They are small interests.

Senator CAMPBELL. Okay.

Mr. LYONS. We at Morongo share the Congress' desire to preserve the trust status of existing allotments on Indian lands. We appreciate the committee's hard work in 1992 and 2000 to strike a balance between the Indian Land Consolidation Act Amendments of 2000, between individual property rights and interests of allottees, and the sovereign rights and interests of tribal governments. However, there may be a few unintended consequences from this legislation. For example, because of the way the act now defines "Indian," the Morongo band is faced with having to revise our enrollment to meet the needs of some of our people. There are real-life consequences under the present provisions.

Take a Morongo tribal member, Eva Giordani, she is 82 years old. She has four grandchildren. Two of them were enrolled, two could not be enrolled because they did not meet our enrollment criteria. She wants to leave her estate—she has a house and some land—she wants to leave it to all of them, but she cannot do that because it would go out of trust. One-half of it would go out of trust if she did that. And there is Yvonne Finley. She worked all her life to get her house on the reservation done, and she has two kids. One daughter has three children that cannot be enrolled because of the criteria, and they cannot inherit land because it goes out of trust.

I think we can fix this problem under current law. We have some suggestions. First, Congress should adopt the proposed ILCA the same definition of "Indian" as the Indian Health Care Improvement Act. Second, the committee should revise the concept of non-Indian estate in Indian land. That would allow the descent and distribution to non-Indians of a unique form of estate in trust in restricted lands. As you may recall, such an interest was included in a bill reported out of committee during the 106th Congress, S. 1586, but it was stripped from the bill just prior to full Senate consideration. Under the "non-Indian interest in Indian lands," a non-Indian would be eligible to continue living on lands or receive proportionate shares of revenue produced by the parcel of land, but the underlying title of the land would be held in trust for the tribe.

We believe this solution would help our tribal members who are interested in making certain lands remain in trust so the heritage of the tribe can be protected. We also provide them with the ability to transfer something of lasting value to their children. Right now, they cannot do that.

Finally, I would like to make one final comment concerning S. 1340. We believe that the proposed section 233 concerning collection of past-due and overdue child support is best addressed under separate legislation. This bill should focus only on Indian probate and trust property, not trust income.

Thank you for your consideration we know you will give to these important issues. Thank you.

[Prepared statement of Mr. Lyons appears in appendix.]

Senator CAMPBELL. President Speakthunder, please go ahead.

STATEMENT OF BENJAMIN SPEAKTHUNDER, PRESIDENT, FORT BELKNAP COMMUNITY COUNCIL

Mr. SPEAKTHUNDER. Good morning, Mr. Chairman, and members of the committee. Tex Hall, Maurice Lyons, Austin Nunez, thank you for providing the testimony here today.

I am Benjamin Speakthunder, chairman of Fort Belknap Indian Community Council. Today, I would like to present as far as being members of the Assiniboine Nation and Gros Ventre Nation, Fort Belknap. I am extremely honored to be able to address the committee on this very important complex issue, which we are able to address this committee on a very important process throughout the United States, faced on a daily basis. The issue I am speaking about all impacts our tribes, both the Assiniboine and Gros Ventre people of Fort Belknap and other Nations are respectable that is in complicating heirship, otherwise known as undivided interests.

With respect to S. 1340, the Indian Probate Reform Act of 2001, I offer the following comments on behalf of Fort Belknap Indian Reservation. Neither the General Allotment Act, Dawes Act nor the individual Allotment Acts contains any provisions for rights-of-way on or across lands to access other lands. However, we feel that this should be one of the points in advising persons who make wills to consider reservation of rights-of-way on or across lands. In addition, the title status reports need to be corrected to reflect the right-of- ways of the current status.

Section 232 relating to the interstate interests and probate and other heirs include great-grandchildren, direct lineal descendants to be included in the appropriate sections. In addition, the current definition of "Indian" must be repealed. This definition will harm Indian country and cause jurisdictional problems, or cut off far too many people who are Indian, yet not enrolled for a variety of reasons. A restrictive definition of "Indian" will reduce trust landholdings. Defining who can inherit is a tribal authority and need to be determined by each respective tribal community.

In order for true consolidation to take place, we recommend that a provision be included within S. 1340 that repeals a joint tenancy provision within the current Indian Land Consolidation Act. Creation of a joint tenancy with a right of survivorship for 5 percent of less interests prevents interests from being passed to eligible heirs, namely children.

With respect to the intent of the Indian Land Consolidation Act and subsequent amendments, we think that the tribal probate code duly passed and adopted by a tribal government should supersede not only State law, but Federal law as well as it may apply to the Reservation lands.

The Bureau of Indian Affairs has a land consolidation program funded by the Congress as implemented to our knowledge, with the tribes in the Minnesota region. As we understand this program, the BIA purchases on behalf of the tribe, shares, preferably 2 percent or less, from willing sellers. These shares are held in trust by the United States on behalf of the tribe until the rental income from the share refunds the purchase price of the share acquired.

Senator CAMPBELL. Benjamin, I have to slip out for about 2 minutes, but just go ahead and keep talking and staff will take your testimony.

Mr. SPEAKTHUNDER. Thank you, Mr. Vice Chairman.

This means that for each share acquired, an Individual Indian Money, IIM account must be maintained to account for the income and repayment of the share. To me and others, this is not really a true consolidation. True consolidation is when the share is acquired and the former owner's account is closed for that particular tract. If individuals, either co-owner or stranger, or the tribe is provided the financial backing to acquire this share and other shares in a given tract of land, then the tract is truly consolidated for the purpose of reducing administrative costs for the Federal Government.

Fort Belknap was allotted by the act of March 3, 1921, Statute 1355, whereby 1,188 members of the Assiniboine and Gros Ventre Tribes received allotment of land varying from 400 to 520 acres of land, depending upon classification of the land allotted, which includes pasture, irrigated land, homestead. As of this date, the number of individual owners has increased from 1,188 to in excess of 4,000, and the number of tracts maintained by the Bureau of Indian Affairs has increased from 1,189 to in excess of 2,970. There are presently 2,273 tracts in individual ownership and 699 tribal ownership tracts, with a total of 18,731 individual interested tracts. In addition, there are 1,931 mineral tracts in individual ownership and 44 tribal ownership mineral tracts, with a total of 24,120 individual ownerships.

At Fort Belknap, we have had a land acquisition program since the 1930's and have reacquired a little less than one-half of the allotted lands within our reservation. Currently, approximately 40 percent of the reservation is in interest trust ownership; 43 percent is in tribal trust ownership. The remaining 10 percent in fee patent, to include 19,000 acres of State school lands.

On behalf of the enrolled members of Fort Belknap Indian Community Reservation, I urge the Congress of the United States to partially fulfill the trust responsibility by funding this innovative and worthwhile project to accomplish the Land Consolidation Act at Fort Belknap. Upon completion of this project, we estimate that this will take from 7 to 10 years, and annual appropriations from $3 million to $5 million respectively.

We will be able to accomplish our goal in this process and have a program that could be replicated throughout Indian country so that other tribes and individuals can benefit. I would like to submit the Fort Belknap Land Consolidation Plan for the record. Additionally, I would like to refer to Arvel Hale's affidavit submitted to the committee. Mr. Hale, former chief appraiser for the Department of the Interior, has designed the land data model which provides appraisals, purchase and sale of fractionated interests. This model can be applied to the Fort Belknap Land Consolidation Act.

Thank you, sir.

[Prepared statement of Mr. Speakthunder appears in appendix.]

Senator CAMPBELL. Thank you.

We will finish with President Nunez.

STATEMENT OF AUSTIN NUNEZ, PRESIDENT, INDIAN LAND WORKING GROUP

Mr. NUNEZ. Good morning, Honorable Chairman and members of the committee.

I appreciate the opportunity to address this committee on these very important and complex matters relating to Indian trust allotments, specifically S. 1340, a bill to amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands.

Currently, I serve as chair of the Indian Land Working Group and also as the chair of the San Xavier District of the Tohono O'Odham Nation in Arizona. As currently written, S. 1340, the Indian Probate Reform Act and its predecessor, the Indian Land Consolidation Amendments of 2000, contains serious flaws that complicate tribal and individual land management, make administration of trust allotments more difficult, and threaten the trust status of allotted lands.

In order for true probate reform and effective management of trust allotments to occur, the following areas must be addressed with S. 1340. First, current land title information is necessary for system reform. Title documents must be corrected to reflect real ownership. It is a travesty that approximately 13,000 fractionated interests have not been returned to legal Indian heirs, which is a clear violation of the Supreme Court decision in *Babbitt* v. *Youpee.* In addition, there is a current probate backlog of nearly 8,000 cases impacting thousands of Indian heirs and landowners. This has put a huge stall on real estate transactions on Indian trust allotments. One can only imagine the public outcry which would occur if State and county entities maintained title documents in the same manner.

The next is to amend S. 1340 to provide for judicial review in section 2214. The current Department of the 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 only suggests that adversely affected property owners have no legal recourse against appraisals they do not agree with.

The next is to correct the current land acquisition program. Individual Indian landowners must be included in all acquisition pilot projects to assure consolidation of fractionated land title. Otherwise, the tribe, often a stranger to title, becomes co-owner in an allotment. This further complicates title and creates additional records. Currently, the Secretary is making indiscriminate purchases of fractionated interests within the designated pilot project reservations. Purchases are not tied to individual or tribal use plans. Tribal laws, ordinances, and land consolidation plans are not a required consideration for these purchases. We recommend that the committee incorporate the Management, Accounting and Distribution 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.

This system can also be used for other real estate- related transactions—gift deeds, sales and purchases. The system works. The DOI's Trust Asset and Accounting Management Systems does not.

I would also like to submit for the hearing record the ILWG position in regards to the reorganization of the Department of the Interior, specifically our support of the NCAI resolution, JUN 00043 demanding the return of press records to local agencies. Full tribal access to records is necessary for self-government and establishment of a negotiated rulemaking committee to develop trust reform regulations, with full participation of Indian tribes and individuals they are intended to benefit.

In closing, I would like to submit the following documents for the record. First is "Amendments to S. 1340," a summary and analysis of S. 1340, prepared by Sally Willet, former Administrative Law Judge, OHA–DOI, April 2002; "The Indian Land Working Group's Points and Concerns" regarding the November 7, 2000 ILCA Amendments, and S. 1340 and associated trust "Reform" Reform Measures, May, 2002; "Fractionated Interests in Land That is Held in Trust for Native Americans," by Arvel Hale, former Chief Appraiser, DOI–BIA, May, 2002; and the last is, Oklahoma Supreme Court, "Sovereignty Symposium, an Overview of Indian Probate Past and Present," Judge Sally Willet, Cherokee Tribe, March, 2002.

We will use the testimony we have given today, as well as the aforementioned documents, as a basis for further discussion with members of this committee and staff as we seek the much-needed reform related to Indian ownership, use and management of Indian trust allotments.

Our lands and our future generations on these lands are our lifeblood. We will no longer stand for being land-rich and dirt poor, detached from our lands as your laws have tried to make us. As members of the Indian Land Working Group, we seek to reverse this trend. We are taking a stand on our Indian land. We seek responsible use management and control of our land resources. We hope that you will work with us.

Thank you.

[Prepared statement of Mr. Nunez with attachments appears in appendix.]

Senator CAMPBELL. Thank you.

Well, we do have the support of the Administration, and most, with some minor glitches, tribal support, too. Staff tells me we have a pretty good chance of getting this passed this year, and hopefully we will.

Let me ask you a few questions, maybe starting with Maurice. As the chairman of a tribe within a Public Law 280 State, does the State try to assert jurisdiction over Indians on your reservation if they are not members of your tribe?

Mr. LYONS. Only if we invite them in. They can come in if it is a felony of any kind, but if there is a member of another tribe on our reservation and they are doing something, we can call them and they come in.

Senator CAMPBELL. Within the boundaries of the reservation?

Mr. LYONS. Yes.

Senator CAMPBELL. Yes; now, if I understood your testimony, it endorses a proposal the committee considered last Congress that would allow individuals to maintain the trust status of their land by having underlying legal title held by the tribe, but which would allow successive generations of lineal descendants to devise a unique interest. You spoke about the two ladies. Do you feel that approach balances tribal interests and individual interests?

Mr. LYONS. Yes; I really do, because in the end, the tribe owns it. Sooner or later, the lineal descent will be gone.

Senator CAMPBELL. I do not know if all tribes support that or not. Would you consider allowing an opt-in provision in this bill, where the tribes that believe in that could opt in; other ones that did not would not have to?

Mr. LYONS. Yes.

Senator CAMPBELL. President Speakthunder, you suggested repealing of the definition of "Indian" but current law allows Indian tribes to decide who can inherit trust land because they can decide whether a person is a member of that tribe or eligible to become a member of the Indian tribe. Since literally every tribe can determine their own enrollment and their own members, why would we need to repeal the definition of "Indian"?

Mr. SPEAKTHUNDER. Today, sir, we have—approximately 1½ years ago we had a secretarial election and reduced our enrollment—the community voted and reduced our enrollment from one-quarter to one-eighth. And it brought on the interest of, as far as challenges go, of a lot of fractionated land. From that standpoint, we——

Senator CAMPBELL. Did that resolution pass your Council?

Mr. SPEAKTHUNDER. Yes; we did, sir. And from standpoint, we came up with a lot of issues as far as fractionated land goes, and so this is why we brought up this issue here today with the provisions of the testimony.

Senator CAMPBELL. Maybe let me ask all of you, on your reservations—maybe start with Tex—are there lands owned within your reservation that are State lands or school lands?

Mr. HALL. Go ahead.

Mr. SPEAKTHUNDER. Yes; as far as we are concerned, yes, we have multiple acres, sir, is State land and school sections.

Senator CAMPBELL. There is some State land within the boundaries of the reservation?

Mr. SPEAKTHUNDER. Yes; and we do pay taxes on that.

Senator CAMPBELL. Would the State be interested in transferring that land for an exchange of other Federal lands? Has anybody ever approached them about that?

Mr. SPEAKTHUNDER. No; we have not, sir.

Senator CAMPBELL. Mr. Nunez, how about your reservation?

Mr. NUNEZ. No, sir; the San Xavier Indian Reservation does not.

Senator CAMPBELL. There is none.

Mr. LYONS. No; we do not have any that are owned by the State, but we have some that are out of trust, and we have to pay taxes on individual tribal lands.

Senator CAMPBELL. They are out of trust, but tribal members pay taxes on them.

Mr. LYONS. It belonged to—somebody bought it a long time ago and it was out of trust. I bought it back, specifically me, and I have to pay taxes on that. And I have been trying to get it back into trust.

Senator CAMPBELL. Yes; that is the process, isn't it?

Mr. LYONS. Yes.

Senator CAMPBELL. Tex?

Mr. HALL. Mr. Chairman, we do not have per se within the exterior boundaries, but just adjacent to the reservation we have 15,000—well, it is actually 10,000 acres of tribal land we acquired in fee. This is former treaty land, but there is 5,000 acres that are part of this ranch that we purchased—4,000 BLM and 1,000 State school lands. We did ask about purchasing that, and the State is reluctant to do it, and the BLM says——

Senator CAMPBELL. Purchase or trade?

Mr. HALL. Purchase or trade, they are reluctant to do it. And the BLM at first said no, but they are becoming interested in a trade.

Senator CAMPBELL. What was the resistance from the State? Why wouldn't they want to trade it?

Mr. HALL. Evidently, they had some moratorium that they were dealing with. But we presented it to the State Land Committee and talked about for jurisdictional purposes, since we own this ranch that is adjacent to the reservation now, that it would be in the best interests if the tribe could purchase or trade. They have not gotten back to us, but it has been a year now. So there has been some reluctance, but I think they are starting to see that it would be in the best interests of everyone concerned if the tribe could acquire those lands.

Senator CAMPBELL. Well, put your NCAI hat on for 1 minute, instead of the tribal hat.

Mr. HALL. All right.

Senator CAMPBELL. Some of the testimony presented to the committee requests that we hold land in trust for individuals even if they are not treated as an Indian for any other purpose under Federal law. Does NCAI share the concern that that may be watering down the Federal Government's trust responsibility?

Mr. HALL. Yes; I believe so, Mr. Chairman. We have deliberated that for quite some time, and many tribes are now calling us about it. So we have not passed a resolution because of just that. And of course, we have to get the consent. I am thinking we should bring this up in our mid-year conference next month, Mr. Chairman, and really talk about this and have maybe a presentation to the tribes. Then we could look at some resolution to that effect.

Senator CAMPBELL. Do you feel that it would open up an opportunity for States to try to regulate activities of such individuals within the reservation, or they might challenge tribal jurisdiction even over trust lands if that happened?

Mr. HALL. Definitely. When you even think about lands that you are talking about, or even right-of-ways, we all know that the Supreme Court in A–1 Straight did that. They gave fee land or right-of-ways that were on a State highway and tribes did not have jurisdiction in that Supreme Court case decision, so we feel that would lead to what you are saying, and further erode tribal sovereignty.

Senator CAMPBELL. Your testimony recognized that the 2000 amendments to ILCA tried to give Indian tribes the tools to become partners in consolidating the fractionated interests. I think it is really a step in the right direction. Can you give me maybe one or two specific examples of how we can do this without taking money away from other Indian programs in a very tight budget year?

Mr. HALL. We have our budget meetings, Mr. Chairman. Neal McCaleb is heading down for the Bureau of Indian Affairs. We are working with the Department of the Interior, of course, with the trust reform. This is a major part of the initiative for trust reform. So we know that in fiscal year 2002 I believe there was $300 million that was allocated for trust reform. I believe it was one-half for the Bureau and one-half for the Office of Special Trustee.

We feel that, and I have been a part of the BIA budget process now for 4 years, Mr. Chairman, and we have never really—well, I will just say it. We never dealt with fractionation. So we need to put this and include it in our budget somewhat, even if it means taking a part of that $300-plus million and allocating a portion of that money for fractionation. Because when I asked the government officials specifically how they came up with $300 million, there was really no—I think it was just a projection and there was really no clear-cut formula. So I think there is possible room in that allocation to do just that.

Senator CAMPBELL. I hope so. I hope so. It is pretty clear to me and ought to be clear to anybody, when you have land that is fractionated that much, the loss of opportunities for jobs or economic development or farming or anything, it just goes down the drain. And although it might cost money, some investment to consolidate, I would think the long-range result would be there would be a heck of a lot more economic viability on the land, on the reservations, which would offset anything you spent up front to do it.

Mr. HALL. Absolutely, Mr. Chairman. There will be a point at some time when we get around this curve, but right now we are behind the curve until we pass some amendments, such as we are talking about today on S. 1340, and then put the adequate funding. So the amendments and the funding are critical for getting around that curve, and so we are in support of doing that, Mr. Chairman.

Senator CAMPBELL. Thank you, Tex.

President Nunez, can any lineal descendant inherit trust land on your reservation?

Mr. NUNEZ. Yes, sir; they can.

Senator CAMPBELL. And you propose in your testimony that the Federal Government should hold trust land for anyone who can demonstrate documentable Indian blood, even if they don't meet the definition of "Indian" for any other Federal program. Is that correct?

Mr. NUNEZ. Yes, sir; that is correct.

Senator CAMPBELL. Give me an example of how you would document?

Mr. NUNEZ. Well, first and foremost, it would depend on the specific tribes' normal policy. But in terms of others who may have been alienated from their specific tribes and that may have been not recognized, but they still would have some sort of documentation stating that they did belong to a certain indigenous group.

That should be honored as well because it is not so much by blood quantum as it is also lineage, as you mentioned previously. There are a lot of Indian people that know that they are Indian, but some really cannot prove it as well. So it is a difficult task.

Senator CAMPBELL. Yes; up at the Northern Cheyenne Tribe we had a baby that was not enrolled and the parents were killed years ago. The baby was adopted and later on, years later, 35 or 40 years later, she came back to the reservation and wanted to reestablish ties and be enrolled. And there was no record. They could not find anything. But interestingly enough, some of the older people remembered that the baby had a birthmark, and this lady had the exact same birth mark and they enrolled her based on what she had heard from her adopted parents and that birthmark. So I guess there is different kinds of proof about how you come home. In the old times, there were so many people left under bad circumstances, it is hard to track ancestry sometimes.

The committee spends a lot of time hearing from people, as you might guess, and people who feel Indian tribes should not exercise jurisdiction over them because they cannot participate in tribal elections. All of you have heard that.

Austin, your proposal allows people who are not eligible for membership in Indian tribes to own trust lands, but would you suppose those people will at some time challenge tribal jurisdiction over them or want to run for tribal government or something of that nature?

Mr. NUNEZ. I suppose that they would, sir, but I would think that they would probably honor the specific respective tribe that they have their interest in and would abide by their rules and regulations.

Senator CAMPBELL. Well, I hope so too, but apparently at least on one documented case somebody that was almost in that exact same position on the Yakima Reservation had inherited tribal land and subdivided it. He went as far as the Supreme Court—went all the way up the court system to try to break that bond.

Well, I have no further questions, but I certainly do appreciate your appearing today. The normal process is that we leave the record open for 2 weeks. So if you have any additional comments or comments of your tribes, if you could get them in within 2 weeks, I would appreciate it.

Thank you very much for appearing here today. This committee is adjourned.

[Whereupon, at 11:04 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

Thank you, Mr. Chairman. It is good to be here today to discuss Indian Land Consolidation and probate reform. The Eastern Shoshone General Council from my home state recently created a special committee to discuss this very important issue. I would like to submit the statements of Ben O'Neal and Will O'Neal, two members of the Eastern Shoshone Indian Land Consolidation Committee, for the record and thank this committee for listening to their concerns.

The committee has spent this session of Congress addressing many problems facing Indian country. We know that developing infrastructure is necessary for businesses to prosper, and for economic opportunities to flourish. We know that improving telecommunications will give young children more access to information. Without computer training, we will see another generation of Native Americans struggling to compete in our fast-paced technological age. We know that building roads and improving transportation opens markets and allows tribes to develop their resources. On the Wind River Reservation, these needs are often stifled by fractionated lands. The process for obtaining rights of way is complicated and time consuming. Further, the Bureau of Indian Affair's Wind River Agency continues to face a tremendous backlog in managing these parcels of land.

Looking at the big picture, the need for consolidated land is clear. However, the realities of our actions have rippling effects for thousands of Indian families. From a Federal perspective, the government has a unique trust obligation to two very unique constituencies—those of the individual Indian land owners and those of the tribes. It is important to hear the perspectives of both of these groups, particularly with probate laws. I will be interested to hear the concerns of our witnesses on probate reform efforts and look forward to working with my colleagues to address this issue.

Thank you Mr. Chairman.

PREPARED STATEMENT OF NEAL MCCALEB, ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good Morning, Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you today to present the views of the Administration on S. 1340, a bill to amend the Indian Land Consolidation Act of 2000 to provide for probate reform with respect to trust or restricted lands. We support the bill.

In particular, I want to commend your staff for their efforts in developing this legislation. S. 1340 will provide the American Indian people who own trust and restricted assets with one uniform probate intestate code that can be applied throughout Indian country. The legislation is clearly the product of a lot of hard work by Departmental employees and members of your staff in order to achieve the common goal of reforming the Department's Indian probate program.

During tribal consultations held in July and August 2000 on the proposed probate regulations, many tribes recommended and supported a uniform probate intestate code. At the present time, Federal statutes provide that the law of the State where the land is located be applied in the distribution of the estate. See 25 U.S.C. Section 348. As a result of inter-tribal marriage, it is not uncommon that an Indian descendent owns lands on reservations in several States. The effect of applying up to 33 different State laws to the restricted and trust lands of a decedent results in disparate and unfair treatment of the distribution of the entire estate to the same heirs.

For example, in Nebraska a surviving spouse is entitled to receive the first $50,000 of the estate. Thereafter, the law provides that the surviving spouse receive one-half and children get one-half of the remainder of the estate. Minnesota law provides that a surviving spouse's share is the first $150,000 plus one-half of the balance of the intestate estate if all of the heirs are also heirs of the surviving spouse. In contrast, Wisconsin law provides that a surviving spouse receive 100 percent of the estate unless one or more children are not the children of the surviving spouse, then the surviving spouse receives only one-half. New Mexico law differs from the previous examples in that a surviving spouse gets all the community property, then one-fourth of the estate if there are descendants of the decedent.

Another area of concern is the inheritance rights of adopted children and the inconsistencies in state laws. Minnesota law provides that an adopted child may inherit from his/her natural parents, while Montana law provides that an adopted child may only inherit from the adopted parents.

The enactment of a uniform intestate code for trust and restricted estates is of great benefit to both the heirs and the Department. The benefit to the heirs is that the same law will be applied to all the trust and restricted estate of the decedent no matter where the real property is located. A uniform intestate probate code will provide for the division of shares of the entire estate and will be the same throughout the United States. The heirs may disclaim their interests or otherwise agree to a settlement to distribute the estate if the children want to give a larger share to their surviving parent. The Federal Government's cost to update and maintain land records will be reduced. The Department will be able to decide cases and issue orders in a more timely manner. A new body of Federal law will be created and decisions will be more consistent across the Nation, resulting in fewer appeals. The necessity of thoroughly researching state laws will no longer exist, it will take less time to issue an order determining heirs. Finally, a uniform intestate code may encourage Indian tribes to adopt their own inheritance codes. The uniform intestate code will serve as a model for tribes to develop their own tribal probate codes.

The proposed uniform intestate succession facilitates the consolidation of interests to remain in trust or restricted status and complements the provisions of Indian Land Consolidation Act to minimize further fractionation of Individual Indian interests in trust and restricted lands. For estate planning purposes, one uniform intestate code will provide a foundation to encourage the execution of wills for disposition of trust or restricted assets.

For example, the proposed section for pretermitted spouses and children will necessitate specific estate planning if the decedent marries after the execution of a will but intends to leave nothing to the new spouse. S. 1340 at section 232(d). Similarly, if the testator divorces after executing a will and has left property to the former spouse, the devise is revoked by law unless the will provides otherwise. S. 1340 at section 232(e)(2).

State probate laws are often amended and likewise affect long-term estate planning. A change in State law may also necessitate the execution of a new will. Thus, frequent amendments of state laws frustrate the purposes of promoting estate planning among Indian landowners. There will obviously need to be considerable community education on the new sections of the proposed uniform intestate law that will require more comprehensive estate planning.

We recommend that S. 1340 include a provision that excepts the application of the uniform intestate code to the Five Civilized Tribes of Oklahoma until such time as the Five Nations bill is enacted. The Five Civilized Tribes are subject to the state district courts of Oklahoma and Oklahoma probate law is applied to determine intestate succession. Thus, the removal of the exception should be reflected in S. 2880, the Five Nations legislation.

We would like to suggest amendments to portions of existing Federal statutes relevant to inheritance prior to the passage of S. 1340. The amendments are:

25 U.S.C. section 348—After the second *"Provided,"* strike the words, "That the law of descent in force in the State or Territory where such lands are situate shall apply thereto after patents therefore have been executed and delivered, except by

the" and insert "the Indian Land Consolidation Act, as amended, shall apply where such trust or restricted assets are located". See S. 1340 at section 234(c).

25 U.S.C. Section 372—Insert before the word "hearing" in the words "upon notice and hearing", the words "opportunity for a". Insert the words "probate the decedent's trust estate, and pay valid creditor's claims out of funds in such estate or funds that may accrue up to the date of death of the decedent" after the word "decedent,". Insert "Provided, That in the payment of claims, 31 U.S.C. section 3713(a)(1)(b) shall not apply." after"section 373 of this title." 25 U.S.C. section 373—Insert "Provided also, that the Secretary shall pay valid creditor's claims out of funds in such estate or funds that may accrue up to the date of death of the decedent except that 31 U.S.C. section 3713(a)(1)(b) shall not apply:" after the words "or use it for their benefit:"

With that Mr. Chairman, I would just like to say thank you, again, for the hard work of your staff in drafting this much needed piece of legislation. I would be happy to answer any questions you may have for me.

PREPARED STATEMENT OF TEX G. HALL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Good morning, Mr. Chairman and Vice Chairman and members of the committee. My name is Tex Hall. I am the president of the National Congress of American Indians and the chairman of the Mandan, Arikara & Hidatsa Nation. Thank you for inviting NCAI to testify before you on S. 1340, a bill to amend the Indian Land Consolidation Act. The National Congress of American Indians [NCAI] was established in 1944 and is the oldest, largest, and most representative national American Indian and Alaska Native tribal government organization. We appreciate the opportunity to participate on behalf of our member Indian nations in the legislative process of the U.S. Congress and to provide this committee with our views.

The problem of fractionation and fragmentation of Indian land is rooted in a history that is familiar to members of this committee. In the late 191 and early 20th century, the Federal Government began a push to acquire tribal land and assimilate Indian people through reservation "allotment" programs. The General Allotment Act of 1887 was the most broadly applicable of the allotment statutes, and between the years of 1887 and 1934 the tribes lost more than 90 million acres, nearly two-thirds of all reservation lands. In 1934, Congress passed the Indian Reorganization Act of 1934 [IRA], in order to stop allotment and the abrupt decline in the economic, cultural and social well-being of Indian tribes caused by allotment. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "the land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship. "(78 Cong. Rec. 11727–11728, 1934.)

The damage to the tribes and their members from allotment has been enormous, and the purpose of the Indian Land Consolidation Act is to specifically address some of these problems. First, because of the inheritance provisions in the allotment acts, the ownership of many of the trust allotments that have remained in trust status has become fractionated into hundreds or thousands of undivided interests. According to the BIA, the 56 million acres of trust and restricted land under its supervision are divided into 170.000 tracts of land with 350,000 Indian owners and most important, 2 million different owner interests. Fractionation has created an accounting nightmare for the Federal Government and enormous difficulties in putting the land to beneficial use. Second, the inheritance provisions also have created a situation where allotted land interests pass to heirs who are not members of Indian tribes, and the interest then is no longer in trust status. For many tribes far more Indian land passes out of trust than into trust each year through this process. This loss of trust land is a continuation of the disgraceful legacy of the allotment era, and compounds the jurisdictional and management difficulties in dealing with Indian land. Even more disgraceful is the fact that in many cases the heir is not aware that they are required to begin paying county taxes when the land goes out of trust, and after a period of 1 year, the county acquires the interest in tax foreclosure. The tribe provided all the services for 100 years and then after 1 year the county acquires the land interest as a complete windfall and the minerals or timber that reside on that land.

Finally, allotment left many tribes with scattered parcels and often rendered the tribal land base essentially unusable from a practical standpoint. It was not just the

loss of land, but also the manner in which the remaining land was separated and divided which has created such ongoing hardship for the tribes:

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

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

In sum Mr. Chairman, I do not think that I can overemphasize the importance of land consolidation in Indian country. Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent have been reacquired in trust status since the IRA was passed sixty-five years ago. Still today, some tribes have no land base, many tribes have insufficient lands to support housing and self-government, and most tribal lands will not support economic development. Further improvements to the Indian Land Consolidation Act are vital to the future of Indian communities.

The Indian Land Consolidation Act

Congress passed the Indian Land Consolidation Act [ILCA] in 1984 in order to address fractionation and provide for tribal land consolidation. ILCA authorized new powers for tribal land consolidation, the buying, selling and trading of fractional interests, and perhaps most importantly for our purposes Section 207 of the ILCA prevented the devise or descent of certain small interests in trust and restricted lands. Specifically, any interest that is 2 percent or less of the total acreage of a tract would not pass to a decedent's heirs or devisees if the interest realized less than $ 100 in income during the preceding year. Such interests escheated to the reservation's tribal government. Congress amended this provision the next year. The 1984 amendment altered the income generation test to take into account a 5-year earning-history of each interest. The amendment also allowed an owner to prevent an interest's escheat by devising the interest to another owner in the same parcel of land. The original version of section 207 of the Act was found to be an unconstitutional taking of property in 1987 (*Irving* v. *Hodel*). In 1997, the Supreme Court also ruled against the constitutionality of the 1984 version of section 207 (*Youpee* v. *Babbitt* (1997)).

The 2000 ILCA AMENDMENTS

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

Tribal Probate Codes and Descent and Distribution Rules

In particular, the 2000 amendments addressed tribal probate codes and both testate and intestate succession of Indian land. Section 206 was rewritten to remove procedural impediments that discouraged Indian tribes from enacting their own probate codes. In the absence of such tribal codes, the new version of section 207 provides uniform rules for the descent and distribution of interests in Indian lands. Before these new rules apply to any estates, the Secretary must provide the notice required by section 207(g) and a 1-year waiting period must then pass. These new rules will only apply to the estate of those Indians owning trust property who die after that 1 year after the Secretary's certification, and to date they have not yet taken effect.

Section 207 is intended to encourage the consolidation of interests and prevent the loss of trust or restricted land when it is inherited by non-Indians. The new rules are applicable to both testate (with a will) and intestate (no will) Indian estates. To prevent Indian lands from passing out of trust, non-Indian heirs will generally only receive a life estate in Indian lands. Because the non-Indian heir owns less than the full interest, a "remainder interest" is created, and this remainder interest must go to an Indian. If there are no such heirs, the remainder may be purchased by any Indian co-owner of the parcel. The proceeds of such a sale are made a part of the decedent's estate. If no offer is made to purchase the parcel, the remainder interest passes to the tribe.

In some instances where the Indian owners of trust land may not have an Indian heir and the general rule would deprive them of the ability to devise more than a life estate to any of their heirs, the 2000 amendments provide an exception. They may devise an interest to either their Heirs of the First or Second Degree or Collateral Heirs of the First or Second Degree. Because these people are non-Indians, the

interest would pass in fee, not in trust. There is also an option for these interests to be purchased by the tribe.

Finally, section 207 is intended to address fractionation by limiting the way that Indian land passes as a "joint tenancy in common." If a person devises interests in the same parcel to more than one person, unless there is language in the will to the contrary, it is presumed to be a "joint tenancy with right of survivorship," meaning that each of a decedent's heirs share a common it title, so the la surviving member of the group obtains the full interest as it was owned by the decedent. An interest of less than 5 percent passing by intestate succession will also be held by the heirs with the 'right of survivorship." The Secretary of the Interior must certify that it has the capacity to track and manage interests that are held with the right of survivorship before this provision take effect.

NCAI supported the 2000 ILCA amendments because we believed that overall they had a lot of very positive provisions in them. Without amendments to ILCA, the 2 million existing ownership interests in allotted Indian lands will continue to not grow exponentially and Indian land will continue to go out of trust status. At the time, we also recognized that there are a lot of difficult tradeoffs and that no bill could come to a perfect resolution. We relied on the assurances of the committee that the 2000 amendments would not be the last word on this topic, but that we could expect to be able to come back with technical amendments to continue to correct and improve the statute as we gain more experience with it.

For that reason we were also comforted by the provisions that ensured that the descent and distribution provisions would not take effect until 1 year after the secretary provided notice to all Indian landowners. We believe that S. 1340 is taking the right approach in changing some parts of the 2000 Amendments before they do take effect. In particular, concerns have been raised by Indian landowners that some provisions could limit their ability to devise their land to their heirs, whether they are Indian or not, and that the ability to devise land to your heirs is an inherent part of a property right that, under the U.S. Constitution, cannot be taken without compensation.

History has dealt this committee an almost impossible hand—either allow Indian land to be devised out of trust and continue the unconscionable loss of Indian land, or restrict the rights of inheritance so that it causes undue harm to the owners. This is an issue that has been ignored, and we greatly respect the committee's attempt to wrestle with this issue to find an appropriate accommodation. S. 1340 demonstrates that you are willing to continue working on this thorny issue. There isn't going to be an easy obvious answer, but only tough choices that will respect tribal government and won't cause undue harm to Indian landowners.

We recognize the need for the type of amendments that are proposed in S. 1340 regarding devise to non-Indian heirs under Federal law and in a general sense we support them. We would like to hear from the other tribes and continue to talk with you about the specifics to see if there is a way to keep the land in trust status and under tribal jurisdiction. We also think it is important to simplify the provisions so that they will be more readily understandable for the Indian landowners, the tribes, and the BIA realty offices that must provide advice on these matters. Certainly these are complex property law issues, but our concern is that we must make the law clear and understandable to those who will be affected. Some clarifications on the effective date of both the new provisions and the 2000 Amendments also seems to be necessary.

We have very serious questions about the provisions of S. 1340 that place limitations on Federal approval of tribal probate codes. One of the powers of tribal government is the power to control the devise and descent of property. This inherent tribal power is not constrained by the constitutional provisions that limit Federal and State authority. We would like to discuss with the committee whether it would consider amendments to the ILCA that would not undermine tribal jurisdiction over land, but instead would be carefully crafted to utilize inherent tribal authority and tribal probate law as a mechanism to address the issues of fractionation and land loss. We should be reminded that the fundamental trust relationship is with the tribe as a whole and the allottees' interests exist solely because of their status as members of Indian tribes. In this instance, where the Federal trustee has already violated its trust responsibilities to the tribe by allotting the land and is in a position where Federal law must allow Indian land to move out of tribal control, the use of tribal probate law to restrict the inheritance of fractionated interests should be considered as a tool for tribal governments to consider in addressing the problems of fractionation and the hemorrhaging loss of Indian lands.

Pilot Program for the Acquisition of Fractional Interests

In 1994 the BIA started a consultation process to solicit input on how to address land fractionation. More than a majority of the individuals who participated indi-

cated that they would be in favor of a program that allowed them to sell their fractionated interests for consolidation in the tribe. Interior's fiscal year 2000 budget included $5 million for this pilot project, and under section 213, the Secretary is required to continue this project for 3 years and then report to Congress on the feasibility of expanding the program to provide individuals and greater tribal involvement.

If I have one point to make, it would be that this pilot program must be expanded and adequately funded. Failing to deal with land fractionation is like failing to fix a leaking roof. You may think you are saving money, but in the long run it will cost you plenty in both money and grief. We believe that the Federal Government must make the investment in land consolidation now in order to prevent land fractionation, and all of its attendant difficulties for both the Federal Government and tribal governments, from growing into an exponentially greater problem. For the fiscal year 2003 budget, I believe that we should target $33 million. I would note that $33 million is the amount that the Administration calculates that it spends on an annual basis to administer those highly fractioned interests that are of less value than the costs of administration. This investment of equal amount would quickly repay itself in later years.

TRIBAL LAND CONSOLIDATION PROGRAMS

I would like to emphasize that the primary actor in Indian land consolidation is not the Federal Government, but the Indian tribes who have developed land consolidation programs on their own initiative. Just as in every other area of Indian policy, Federal efforts on land consolidation will only be as successful when they work in partnership with the tribal governments in a government-to-government relationship. Tribes have acquired hundreds of thousands of fractionated ownership interests in order to further their own land consolidation and land recovery goals, and every one of these transactions works to the benefit of the Federal Government.

The only way that fractionation is going to be addressed on the necessary scale is if tribes have ownership in the process and the Federal Government assists tribes with that effort. *Cobell* gives Congress the reason to get serious about this effort. We are asking for the development of a partnership between the Federal Government and tribal governments that will provide tribes with the tools and incentives to acquire fractionated interests and consolidate their lands.

We also believe that the committee should consider amending S. 1340 to include a mechanism for tribes to partition non-Indian interests in Indian land that are held in common with the Indian owners. Tribes are acquiring fractionated interests because they want to use the underlying land for a purpose, to build a school, or housing or for agriculture or any of a number of important purposes. But a tribe does not have a ready mechanism to acquire or partition the non-Indian interest that is not held in trust. The tribe may have 98 percent of the interests, but no mechanism to acquire the final 12 percent if they are in fee status.

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

No.1. Create categorical exemption for NEPA either legislatively or through Interior regulation, in order to reduce the time and expense related to land transfers;

No. 2. Provide tax-exempt bond financing to tribes to acquire lands for consolidation;

No. 3.Loan program that provides Federal funding to buy down the cost of a loan, thus buys down points on the interest rate; and

No. 4. Develop a tax credit for turning in fractionated interests or other tax credit structure that would have incentives for owners of fractionated interests.

We believe that the best thing that can happen in the near future is two things, first, move a variation of S. 1340 on the issues that are ready for inclusion in the bill and are within the jurisdiction of this committee and second, develop a collaboration between Interior, Congress and the tribes in creating new incentives for land consolidation that may take longer to develop or require the involvement of a broader range of Congressional committees. This second step could perhaps take the form of an amendment to section 213 that would direct the Department of the Interior to begin its study of coordination with tribal governments immediately.

We are also aware that the Department of the Interior is thinking of expanding its efforts in land consolidation. There are different issues and interests that tend to shape the land consolidation strategies of tribes versus the Federal Government. We need to understand these issues and interests in order to craft the best possible short-term and long-term strategies that will promote tribal land consolidation efforts and tribal trust assets management while reducing Interior's management an administrative oversight and transferring the cost savings to further tribal land con-

solidation efforts or other trust services. We believe that allotment-by-allotment land acquisition and consolidation strategies that have the necessary funding and human resources will be necessary. We want to set up some talks with Interior and the committee to explore these issues further.

UNEXERCISED RIGHTS OF REDEMPTION

We would also like to strongly endorse the provisions in S. 1340 that would allow Indian tribes to exercise a right of redemption for interests in Indian land that have passed out of trust that would be subject to a tax sale or tax foreclosure proceeding. As I noted above, the inheritance provisions allow allotted land to pass to non-Indians, meaning that for many tribes far more Indian land passes out of trust than into trust each year. In many cases the heir is not aware that they are required to begin paying county taxes when the land goes out of trust, and after a period of 1 year, the county acquires the interest in tax foreclosure. The tribe provided all the services for 100 years and then after 1 year the county acquires the land interest as a complete windfall and the minerals or timber that reside on that land. This is a severe injustice and we are glad to see that S. 1340 has a provision to address it. We would like some clarification on the notification procedures to the tribe, and would also note that this provision is dependent on providing adequate resources for tribes to be able to exercise the right of redemption.

INDIAN PROBATE REFORM

We would also like to support the creation of a uniform Federal probate code for interests in Indian land, with the understanding that it would serve as a default only when the tribal government had not developed its own probate code. As the findings in S. 1340 outline, one of the major problems with the General Allotment Act is that it did not allow Indian allotment owners to provide for the disposition of their land, and it mandated that allotments would descend according to State law of intestate succession.

Once again we would ask the committee to reach out to the tribes and consider their views on the specific provisions of the uniform Federal probate code proposed in S. 1340. NCAI has not adopted a resolution on these provisions and they raise a number of new issues, so we are interested in hearing more from the tribes. One thought that we have is that there is a general sense among Indian tribes that an allotment would pass to the lineal descendants of the original allottee, rather than to any unrelated heirs of a surviving spouse. We would like to discuss this and other specifics in more detail with tribal leaders and with the committee.

CONCLUSION

Thank you for the opportunity of appearing before you today. We greatly appreciate the work of the Senate Committee on Indian Affairs, and would like to thank you especially for your attention to this most important Issue.

PREPARED STATEMENT OF ARLYN HEADDRESS, CHAIRMAN, ASSINIBOINE AND SIOUX TRIBES, FORT PECK RESERVATION

I am Arlyn Headdress, chairman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I thank the committee for the opportunity to submit testimony on S. 1340, the Indian Probate Reform bill. I think it is important that the record for this important bill reflect the history of the Fort Peck Reservation and why we are where we are today.

The Fort Peck Reservation was set apart for the exclusive use and occupancy of the tribes under an Agreement of 1888 between the tribes and the United States. Unfortunately, the promise to keep these lands for the permanent use of the tribes was not kept by the United States. Instead, the United States implemented its Fort Peck allotment policy in 1908—leading to the massive loss of lands, and a host of land-related problems that continue to this day.

The allotment policy arose for two different notions. On the one hand, allotment was supported by the philanthropists of the day, who thought that breaking up tribal landholdings into separate parcels held by individual Indians would help to "civilize the Indian." The idea, in essence, was to destroy the Indian way of life, and make the Indians adopt the ways of the white man. On the other hand, a substantial impetus for allotment also came from non-Indians eager to take Indian lands. Sometimes, the pressure for lands came from local frontiersmen near the reservations. In other instances, it was a more general pressure from railroads and easterners hoping to head west.

These two forces combined to bring about the allotment policy contained in the General Allotment Act of 1887, 24 Stat. 388. This measure reflected both purposes of allotment. It authorized the President to break up tribal lands into allotments of 160 acres each for individual Indians. These allotments were to be held in trust

by the United States for individual Indians for a period of 25 years. At the same time, the General Allotment Act authorized the United States to dispose of the lands in excess of those used for allotments to individual Indians. These lands often referred to as "surplus" lands—were authorized to be made available to non-Indian homesteaders.

The policy reflected in the General Allotment Act was generally implemented on a reservation by reservation basis, through enactment of specific allotment acts addressing each covered reservation. At Fort Peck, the allotment policy was implemented through a 1908-act. This act authorized the breaking up of tribal lands—lands promised to the tribes forever—into allotments to individual Indians. The acts also authorized the sale to non-Indians of reservation lands not selected for allotments.

The allotment policy proved a dismal failure in many respects. Nevertheless, it did succeed in its avowed goal of transferring Indian lands to non-Indian homesteaders, not just at Fort Peck, but on reservations nationwide: The majority of Indian lands passed from native ownership under that allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained in 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934...Cohen's Handbook of Federal Indian Law, p. 138 (1982 ed.). By 1934, however, Congress realized the disastrous consequences of allotment. As Indian lands were lost, Indian social and economic conditions worsened considerably. These conditions, documented on a nationwide basis by the Meriam Report of 1928—a comprehensive survey of the conditions of Indian life—led to a major change in Federal Indian policy.

The Indian Reorganization Act ("IRA") was one of the most important pieces of Indian legislation in American history. Based in considerable measure on the findings of the Meriam Report, the IRA altered the basic thrust of the allotment policy that immediately preceded it. Where the allotment policy sought to remove lands from the Indians, and destroy tribal life and institutions, the IRA sought to rebuild the reservations and the tribes, and to provide new opportunities for economic growth and self-government on the reservations.

To reverse the allotment policy and permit the rebuilding of tribal land holdings, the IRA contains what remains today the principal statute authorizing the Secretary to acquire lands in trust for a tribe or individual Indian, section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465.

Today, the Fort Peck Reservation consists of over 2,000 square miles of land in northeastern Montana. The tribes and individual Indians own about 1 million acres of land. About 550,000 acres on the reservation are held in trust by the United States for Indian allottees, and another 450,000 are held in trust for the tribes. Trust and fee lands are commonly interspersed in the "checkerboard" ownership pattern.

Because of this checkerboard pattern on the reservation, land restoration has been a priority for the Fort Peck Tribes for several years. In fact, the Fort Peck Tribes were the leaders in securing the passage of the Submarginal Lands Act, the most significant effort since the IRA to restore tribal land bases. In 1976, Congress enacted the Submarginal Lands Act, returning to tribal ownership lands on specified Indian reservations—including Fort Peck Reservation—that had gone out of trust and had been classified, during the Depression, as "submarginal," because of their limited ability to support farming and ranching. These lands were returned to trust status, without cost to the tribes. This effort took over 10 Congresses and obviously a great deal of dedication and commitment on our part to see our lands restored. Our commitment to this issue remains the same today.

In the last 7 years, approximately 10,000 acres of land have gone out of trust on the Fort Peck Reservation. This is largely due to probates and land passing to children, who are not enrolled in any tribe. Thus, the tribes understand and support the committee's effort with the 2000 Amendments to ILCA to seek to prevent the further erosion of tribal trust land bases. Nevertheless, we recognize that the right of a child to inherit from his parents is a right that most believe is fundamental and should be protected. Thus, we support the committee's renewed effort in S. 1340 to ensure this right is protected. Nevertheless, this means that land on the Fort Peck Reservation will pass out of trust faster than it will pass into trust.

The Tribes believe that the only way to stem the loss of trust lands, is to fund land acquisition programs and expedite the process for restoring fee interest in allotments to trust status. As other witnesses have shared with the committee, the Fort Peck Tribes support a concerted effort to fund land consolidation efforts. Without this effort, the disastrous Federal policies of the nineteenth century will supersede the policies and efforts of Congress in the twentieth century. In the 21st Century, we need Congress to make a renewed commitment to overturning the policies

of allotment and assimilation and seek to restore what was guaranteed my tribes and other tribes throughout this country.

The tribes support the committee's effort to enact a uniform intestate and probate code for reservations. This is particularly important for places like Fort Peck, where our Tribal Constitution prohibits the tribes from enacting any laws regarding the probate of allotted lands.

In the area of probate, the tribes would like to suggest one change to the law that involves estates of minimal trust cash balances. At Fort Peck, we have a number of these cash only estates, where the estate is less than $100 and the beneficiaries are in excess of 100. Thus, checks in the amount of $1 or less are issued to beneficiaries. We have found that while these checks arc delivered, sometimes they are not cashed. Therefore, the account remains open and in fact draws interest. Because these checks are never cashed we cannot close these probates.

We suggest that the law specifically provide that any probate check of less than a certain minimal amount (perhaps $10) must be cashed within 365 days of receipt, otherwise the proceeds of the checks will be deposited in a special account in the Federal treasury that would be for tribal trust and acquisition efforts. This will allow the accounts to be closed and this minimal amount of money to be put to beneficial purposes. Furthermore, this change would be consistent with the law regarding commercial paper and with certain states' practices regarding unclaimed accounts.

The Tribes would also like to express our concern with the provision in S. 1340, that would allow for child support orders from any jurisdiction to be paid from IIM trust accounts. While we support enforcement of child support orders, the law at Fort Peck is that for an order to be enforced it must be perfected in Fort Peck Tribal Court. This preserves tribal authority over the people and property within the Fort Peck Reservation. S. 1340 as introduced is inconsistent with this principle. Thus, we would ask the committee to strike this provision from the bill.

We thank committee for the opportunity to submit this testimony.

PREPARED STATEMENT OF BENJAMIN SPEAKTHUNDER, PRESIDENT, FORT BELKNAP COMMUNITY COUNCIL

Good morning, I am Benjamin Speakthunder, president of the Fort Belknap Community Council; a member of the Assiniboine Nation of the Fort Belknap Indian Reservation. I am extremely honored to be able to address this committee on a very important and complex issue that we in Indian country throughout the United States face on a daily basis. The issue that I am speaking about impacts ALL members of our tribes, both the Assiniboine and Gros Ventre of Fort Belknap, and other Nations and that is the "COMPLICATED HEIRSHIP" otherwise know as Undivided Interest.

With respect to S. 1340 "INDIAN PROBATE REFORM ACT OF 2001" I offer the following comments on behalf of the Fort Belknap Indian Reservation. Neither the General Allotment Act (Dawes Act) nor the individual Allotment Acts contain any provisions for Rights-Of-Way on or across other lands for access to other lands. We feel that this should be one of the points in advising persons who make wills to consider reservation of rights-of-way on and across their lands. In addition, title status reports need to be corrected to reflect the right-of-ways that currently exist.

Section 232. RULES RELATING TO INTESTATE INTERESTS AND PROBATE (b) (1) (B) OTHER HEIRS: Include Great-grandchildren and other "DIRECT LINEAL DESCENDANTS" to be included in other appropriate sections. In addition, the current definition of "Indian" must be repealed. This definition will harm Indian country, cause jurisdictional problems, and cutoff far too many people who are Indian, yet not enrolled for a variety of reasons. A restrictive definition of Indian will reduce trust landholdings. Defining who can inherit is a tribal authority and needs to be determined by each respective tribal community.

In order for true consolidation to take place we recommend that a provision be included within S. 1340 that would repeal the joint tenancy provision within the current Indian Land Consolidation Act. Creation of joint tenancy with right of survivorship for 5 percent or less interests prevents these interests from being passed to eligible heirs, namely children.

With respect to the intent of the "INDIAN LAND CONSOLIDATION ACT" AND SUBSEQUENT AMENDMENTS, a Tribal Probate Code duly passed and adopted by a Tribal Government should supersede not only State Law, but FEDERAL LAW as well as it may apply to that Reservation.

The Bureau of Indian Affairs has a "LAND CONSOLIDATION PROGRAM" funded by Congress that is implemented, to our knowledge, with tribes in the Minnesota

Region. As we understand this program, the BIA purchases, on behalf of the tribe, shares, preferably 2 percent or less, from "willing sellers". These shares are held in Trust by the United States on behalf of the tribe until the rental income from the share refunds the purchase price of the share acquired. This means that for each share acquired, an Individual Indian Money (IIM) account must be maintained to account for the income and repayment of that share. To me, and others, this is not true consolidation.

True consolidation is when the share is acquired and the former owner's account is closed for that tract. If individuals, either co-owner of stranger, or the tribe is provided the financial banking to acquire this share and other shares in a given tract of land, then the tract if truly consolidated for the purpose of reducing the administrative costs of the Federal Government.

Fort Belknap was allotted by the act of March 3, 1921 (41 Stat. 1355) whereby 1,188 members of the Assiniboine and Gros Ventre Tribes received an allotment of land varying from 400 to 520 acres of land depending upon the classification of the land allotted (ie: pasture, irrigated, homestead, etc.). As of this date the number of individual owners has increased from 1,188 to in excess of 4,000 and the number of tracts maintained by the BIA has increased from 1,189 to in excess of 2,970 tracts. There are 2,273 tracts in Individual ownership and 699 tribal ownership tracts with a total of 18,731 individual interested. In addition, there are 1,931 Mineral tracts in Individual ownership and 44 tribal ownership mineral tracts with a total of 24,120 individual interests.

At Fort Belknap, we have had a land acquisition program since the early 1930's and have re-acquired a little less than one-half of the allotted lands within our reservation. Currently, approximately 47 percent of the reservation is in Individual Trust ownership, 43 percent is in tribal trust ownership and the remaining 10 percent is fee patent, to include 19,000+ acres of State school lands.

On behalf of the enrolled members of the Fort Belknap Indian Community (Reservation) I urge the Congress of the United States to partially fulfill their trust responsibility by funding this innovate and worthwhile project to accomplish true LAND CONSOLIDATE at Fort Belknap. Upon completion of this project, which we estimate will take from seven (7) to ten (10) years with annual appropriates of from $3 million to $5 million we will be able to accomplish our goal and have in place a program that can be replicated throughout Indian country so other tribes and individuals can benefit. I would like to submit the Fort Belknap Land Consolidation Plan for the record. Additionally I would like to refer to Arvel Hale's affidavit submitted to this committee. Mr. Hale, former chief appraiser for the Department of the Interior has designed a land data model which provides for appraisals, purchase and sale of fractionated interests. This model could be applied within the Fort Belknap Land Consolidation Plan.

MORONGO
BAND OF
MISSION
INDIANS

11581 Potrero Road
Banning, California 92220
909-849-4697

Statement of the Honorable Maurice Lyons
Chairman of the Morongo Band of Mission Indians
on S. 1340, the Indian Probate Reform Act of 2001
Before the
Committee on Indian Affairs
United States Senate
May 22, 2002

Thank you Mr. Chairman and Vice Chairman Campbell for inviting the Morongo Band of Mission Indians to provide you with our testimony concerning proposed amendments to the Indian Land Consolidation Act Amendments of 2000. We strongly encourage the Committee to move forward to correct problems that have become apparent under current law.

I would like to begin by thanking Senator Campbell for his request to the Department of Interior to delay implementation of certain provisions of the Indian Land Consolidation Act Amendments of 2000 (the Act) pending further Congressional review of concerns and confusion that have arisen in Indian country about the consequences – both intended and possibly unintended—of those amendments.

As required by the Act, the Department sent out a series of notices to individual tribal members alerting them of expected changes to the rules of intestate succession and inheritance that will constrain the devising of interests on trust and restricted land to non-Indians.

This past February, the Department published in the Federal Register the first of the two notices required before the start of the one-year countdown to application of the Act to the estates of deceased allottees. This notice announced the expected changes to the definition of "Indian" and the rules for passing interests in trust and restricted lands to persons not meeting the new definition of "Indian." Apparently, based upon incorrect information from the BIA, some of our members were given the impression that these rules would begin applying this year, and this was very upsetting and confusing to them.

Although we now agree that further review of these rules is needed, the notices sent to tribal members have had a detrimental impact on our tribe's ability to plan for the future and manage our tribal lands effectively and our tribal members' ability to pass their land down to their children and grandchildren.

The second of the two required notices that must be published in the Federal Register before the start of the 365-day countdown to the application of the new rules is the Secretary's certification that the BIA is prepared to fulfill its responsibilities under the amendments. This certification has not yet been published in the Federal Register. Nonetheless, the BIA in Riverside sent out letters to all allottees informing them that the new rules would apply effective February 19, 2003.

Although this information clearly was incorrect, it, too, has caused widespread confusion and upset among our members. For these reasons, we hope that the Department of Interior will abide by your request and defer the implementation of these provisions until Congress has had an opportunity to consider the changes to the Indian Land Consolidation Act that we are going to talk to you about today.

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

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

For example, because of the way that the Act now defines "Indian," the Morongo Band is faced with having to revise its own membership criteria in order to enable some of our enrolled members to pass their interests in trust allotments to their own children. We should not be forced to amend our membership criteria in order to protect the right of our members' children to continue having interests in their family lands.

There are real life consequences under the present provisions:

Take Morongo tribal member Eva Giordani who is 82 years old. She has two older grandchildren who are enrolled tribal members. They live in Utah. She has two younger grandchildren who are not enrolled. They were born on the reservation, lived here their whole lives and grown up with her. It is breaking her heart that she cannot leave her non-enrolled grandchildren any of her property as it would pass out of trust and that she cannot devise her estate in a way that is fair to her descendants. Eva is very sick these days. She wants to see things resolved so that she knows she can leave her house and land to her youngest granddaughter without seeing it lost as trust land.

Or take Morongo tribal member Yvonne Finley who has worked hard most of her life to build the home she now has on the reservation. She told us: "This has been a nightmare for me and for my family. I was a widow at 29 and have lost my two brothers. My daughter Tina has three children – Cherie, Derek and Vanity but they do not meet the tribe's blood quantum requirements so they are not enrolled. But they are my lineal descendants. They were born and raised here on the rez and they are my life.

I want to leave the home I have worked years to build to them. Why should an unfair regulations take away what is rightfully theirs? I grew up poor and had to work two jobs to realize the dream of my own home. I had to leave the reservation for awhile but it was always my dream to come home and have a real home I could give to my grandchildren. My mother is 74 years old and she saved her own money t o put into my house as well because she has the same dream I do. She is so worried she loses sleep over this. I tell her," Mama, don't worry -- we're going to fix this."

I believe we can fix this. We suggest two solutions to the problems created by the 2000 amendments:

First, Congress should adopt for the purposes of ILCA the same definition of "Indian" as it adopted in the Indian Health Care Improvement Act, 25 U.S.C. Sec. 1603:

(c) "Indian", unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (d) of this section, except that, such term shall mean any individual who (1), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or (2) is an Eskimo or Aleut or other Alaska Native, or (3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary.

Second, the Committee should revive the concept of a "non-Indian estate in Indian land" that would allow the descent and distribution to non-Indians of a unique form of life estate in trust and restrict lands. As you may recall, such an interest was included in the bill reported out of this Committee during the 106th Congress (S. 1586), but was stripped from the bill just prior to full Senate consideration. Under the "non-Indian interest in Indian lands," a non-Indian would be eligible to continue living on the lands or receive a proportionate share of the revenue produced by the parcel of land, but the underlying title to the land would be held in trust for the tribe.

The adoption of a provision allowing even non-Indian devisees to receive a unique estate in Indian lands would leave unimpaired the right of our members and their heirs to devise interests in their trust allotments to whomever they might choose, while preserving the underlying trust status of the land for future reversion to the tribe.

We recognize that this system of devise could potentially lead to greater fractionalization of possessory interests in Indian lands, but at least the underlying ownership would not be further fragmented. Once the BIA's record-keeping and data processing capabilities have been restored to proper functioning, there should be no insurmountable difficulties in tracking these unique estates.

We believe this solution will help our tribal members who are interested in making certain that lands remain in trust so the heritage of the tribe can be protected, but also provides them with the ability to transfer something of lasting value to their family members.

Thank you for the consideration we know you will give to the Morongo Band's concerns about this important issue.

Yvonne D. Finley
P.O Box 255
Banning Ca, 92220

June 6, 2002

The Honorable Daniel K.Inouye
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye:

I am a Tribal Member of the Morongo Band of Mission Indians, I've been a widow since I was 29 years old, raising two children as a single parent always working two jobs refusing to raise my children on welfare.

Sir, I am now fifty-five years of age and have lost most all my family, my father, two brothers within two weeks of each other and my husband. The only family left my mother who is seventy five years old and in very poor health, a 56 year old sister, a son, daughter and three grandchildren.

I have worked sixteen – eighteen hours a day, six days a week with one goal in mind--to build a home for my children here on the reservation, keeping in mind after I'm gone, at least my children will have their home and security. My children grew up on this reservation, this being the only home they have ever known since birth and the same for my grandchildren.

Due to the Land Consolidation Amendments – Probate Act, my children will only receive a life estate, the property will then revert to the tribe because they do not meet with the "proposed definition of an Indian." They will be stripped of their land, homes and their identity due to a legal oversight. A legal oversight that can be corrected.

Due to the Probate Amendment Act my children and others will lose their inheritance rights by stripping us of our "Lineal Descent." It should not be possible for our homes and lands to be taken away from us and our children's inheritance rights be denied. The Morongo Legacy is who we are.

I'm sure you have children and grandchildren and you have worked very hard in your lifetime insuring a home and security for your children. If you were placed in this same situation you would be very upset and scared for your children and their future.

Sir, I've had many sleepless nights in constant worry over this probate issue. It feels as though we have been advised of a death sentence and we are awaiting a pending date. Our ancestors were from this reservation land, our immediate family members are buried here

on this reservation. We belong here and no one should ever have the right to deny us our heritage and our lineal descent. This is so very unfair to all concerned facing this new definition of an Indian.

We urge you and the committee to please include a provision in the amendments of the Probate Act to protect our lineal descent and allow our children to keep their homes, land and their identity.

Please write to me to keep me informed as to the action you take and what it will mean for my family.

Thank you sincerely for your consideration of this critical matter,

Yvonne D. Finley Yvonne D. Finley

CC: The Honorable Ben Nighthorse Campbell

The Senate Committee Members on Indian Affairs

Scott Dacey, Pace Capstone, Morongo Lobbyist

Lucille Rice
P.O Box 51
Banning Ca, 92220

June 7, 2002

The Honorable Daniel K. Inouye
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C 20510

Dear Senator Inouye:

I am a member of the Morongo Band. I'm very concerned over the Probate Act Amendments for this if passed as is, will leave my children without their home here on the reservation.

I have three children, nine grandchildren who will be deprived of their home because they are not enrolled here at Morongo due to not meeting the enrollment requirements or the new definition as an Indian.

Morongo is our home and always has been for generation's. We ask for the Senate Committee to please make a provision in the Probate Act protecting our **Lineal Descent** ensuring my children will be able to inherit my home and the home they grew up in.

I'm really scared and in constant worry over my children's right of inheritance being taken from them. They should have the right to inherit my home, the house and land they have always known as home.

Thanking you in advance,

Lucille Rice

Lucille Rice

CC: The Senate Committee on Indian Affairs

The Honorable Ben Nighthorse Campbell

Inez Waite
11935 Laws Rd
Banning, Ca 92220
Morongo Reservation

The Honorable Daniel K. Inouye
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

June 7, 2002

Dear Senator Inouye:

I am a member of the Morongo Indian Band and I've lived on the reservation all my life. I've raised my children on this reservation and my grandchildren.

My children are not enrolled on this reservation, But I certainly want my children and my grandchildren to inherit my home and property here on Morongo because this has been their home all their lives.

I am the only survivor of my immediate family, the only one left to watch over and protect my children. I'm in very poor health with asthma, since this issue on the Land Consolidation Probate Act I've been very ill with asthma attacks due to the constant worry and pressure over my children's inheritance rights being taken from them .

I have not found any where in the proposed probate amendments that protects our lineal decent insuring my children of their inheritance rights.

We ask you to please reconsider the definition of an Indian and to also include a provision in protecting our linel descent.

Thank You,

Inez Waite
Morongo Tribal Member

Inez Waite

CC: The Senate Committee on Indian Affairs

The Honorable Ben Nighthorse Campbell

June 7, 2002

Laurel Waite
47271 Foothill Road
Banning, Ca, 92220

The Honorable Daniel K. Inouye
Chairman, Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington D.C. 20510

Dear Senator Inouye:

I am a member of the Morongo Band of Mission Indians. I've built a house on my property here on the reservation. I am the last survivor of my immediate family with no children.

I do have a niece and two nephews of whom I would like to leave my property to at my demise, as it stands with the pending Probate Act my niece and nephews will only receive a life estate. I want my loved ones to inherit my home and property and their children.

We have had the option in the past to leave our property and homes to a family member of our choice thru lineal descent. If a provision is not included in the proposed probate amendments my loved ones will lose their home and property.

We ask that you recognize lineal descent, by including lineal descent in the proposed probate amendments protecting our inheritance rights.

My ancestors, my family have always been here and we certainly should be allowed to remain thru lineal descent.

It seems very unconstitutional to take anyone's home and property away from them, also seems discriminatory in doing so.

Thank You,
Laurel Waite

Laurel Waite

CC: The Senate Committee on Indian Affairs
The Honorable Ben Nighthorse Campbell

TESTIMONY
OF THE
STANDING ROCK SIOUX TRIBE
TO THE
COMMITTEE ON INDIAN AFFAIRS
OF THE
UNITED STATES SENATE
S - 1340 "The INDIAN PROBATE REFORM ACT OF 2001"

June 20, 2002

Mr. Chairman and Members of the Committee:

The Standing Rock Sioux Tribe located in North Dakota and in South Dakota is herein submitting written Testimony on S. 1340, the Indian Probate Reform Act of 2001 which is anticipated to be made and included as a part of the official record.

The District Planning Commission of Fort Yates which is the largest district within the Standing Rock Sioux Indian Reservation have been engaged to develop this Tribal Testimony on behalf of the Standing Rock Sioux Tribe and its members. We believe that S. 1340 must be expanded to address to some extent the areas which we believe affect the Standing Rock Sioux Tribe which are being addressed below.

Public Law 96-274:

Although S. 1340, the Indian Probate Reform Act, if passed may impact the members of the Standing Rock Sioux Tribe, we believe that the provisions of S. 1340 are inconsistent with Public Law 96-274, the Standing Rock Sioux Tribe's Inheritance of Trust or Restricted Lands Act (copy attached as Attach #1) which we believe will supercede this proposed legislation. However, the provision in Section 2(c).."otherwise recognized as Indians by the Secretary of the Interior (hereinafter the "Secretary") shall be entitled to

receive by devise or descent any interest in trust or restricted land within the boundaries of the reservation as defined by the Act of March 2, 1889 (25 Stat. 888) except as provided in Section 4 of this Act." needs to be removed. We do not believe it should be the Secretary of the Interior who determines membership into the Standing Rock Sioux Tribe but the Standing Rock Sioux Tribe through its laws.

We urge the Congress to include in the amendments proper provisions to protect and retain all lands into trust as our ancestors originally intended under Article 12 of the Fort Laramie Treaty of April 29, 1868 in which it states: "..**(N)o treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or forced as against the said Indians...and no cession by the Tribe shall be understood or construed in such manner as to deprive without his consent any individual member of the Tribe to his rights to any tract of land selected by him as provided in Article 6 of this treaty.**

We further elaborate and quote Article 6 of said Treaty as **"If any individual belonging to said tribes of Indians , or legally incorporated with them, being the head of the family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selected it, and of his family, so long as he or they may continue to cultivate it."**

"Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed."

For each tract of land so selected, a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Sioux Land Book.".

The President may, at any time, order a survey of the reservation, and when so surveyed, Congress shall provided for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. It is further stipulated that any male Indians, over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or Territory not

included in the tract of country designated and described in this treaty for the permanent home of the Indians...".

These statements are excerpts from the Treaty of April 29, 1868 and ratified by the Congress of the United States on February 16, 1869. They must be adhered to by the administrators of the Federal government as trustees for the Indian people as this treaty is legally binding upon the United States in the same manner as the Constitution of the United States and according to the basic tenets of International law to which the United States subscribes. Treaty law requires, as its basic premise, the mutual consent of both parties for any adjustment in the relationship between those parties. Our 1868 Treaty did not change or alter this basic treaty principle and clearly defined the rights and responsibilities of the two parties.

Furthermore, it is our intent to suggest to the Congress to amend Public Law 96-274 to indicate that "only the Standing Rock Sioux Tribe of North Dakota or South Dakota or persons who are enrolled members of the Tribe shall be entitled to receive by devise or descent any interest in trust or restricted land within the reservation". We believe such a provision would limit the inheritance of land by non-enrollees and eventually increase the land holdings of our Tribe and its members.

Definition of "Indian":

We do however dispute the definition of "Indian" as defined by the Bureau of Indian Affairs in its "Notice to Indian Land Owners" which defines Indian as "***..you will be considered an Indian under the new law if you are enrolled (or eligible to be enrolled) in a federally recognized Indian tribe, or if you are considered an Indian under certain other federal laws***". It is vague and not definitive in its applicability to treaty and large land based tribes, but refers to a "..new law.." or "..certain other federal laws" which are not cited.

The 25 CFR Sub-chapter M --Indian Self-Determination and Education Assistance Act Program (Self-Determination Act) 25 CFR 273.2 under **Definitions** defines "Indian" as "..a person who is a member of an Indian Tribe", but does not elaborate.

We submit for the record a Solicitor's Opinion dated September 20, 1989 (copy attached as Attach. #2) upon which the Bureau of Indian Affairs, Standing Rock Agency has been relying upon to determine the devise or descent of an interest in trust lands from an estate.

The Standing Rock Sioux Tribe urges Congress to redefine this Opinion into legislative language in which the Tribal Council is the only forum to determine membership into a Tribe for inclusion into the new legislation.

Trust Lands Beneath the Missouri River:

S-1340 fails to address trust lands nor trust assets which were 'taken' under the 5th Amendment of the United States Constitution but not compensated. Public Law 89-915, the Oahe Dam Act, did provide language to flood 56,000 acres more or less located within the Standing Rock Sioux Indian Reservation which were mostly individually-owned trust lands. It also preserves the rights of any claims under any treaty, law or

Executive Order as well as right of return and first preference for the lease or sale of the taken area land inside or outside the boundaries of the Standing Rock Reservation. It further provides for just compensation! Additionally, the mineral rights to these lands are retained in trust status and still owned by the original owners. There is approximately 22,000 acres, more or less, of trust lands still under the Oahe Dam which were never taken out of trust nor compensated for. The United States of America continues to this day receives an annual income from the sale of hydropower without including the owners of these lands which are being trespassed upon nor does the Standing Rock Sioux Tribe.

The Bureau of Indian Affairs located at the Standing Rock Agency in Fort Yates, North Dakota have retained detailed records of ownership as well as inheritance of these lands and the mineral rights located beneath the Oahe Dam.

The Army Corps of Engineers retains the flowage easements and jurisdiction over these lands as well, but the landowners still do not benefit in any degree from the marketing of the hydropower nor the development recreational facilities on lands adjacent to the Dam.

The proposed legislation must include a provision in which trust lands and assets which are "taken" be addressed; case in point, is the 22,000 acres, more or less, of the trust lands which were never compensated for but were still flooded lying adjacent to the Standing Rock Sioux Indian Reservation.

Lands into Trust:

In November 2001, the Bush Administration rescinded a Clinton-era rule that would have made it easier for Tribes to restore lost land to our reservations or homelands with the indication that a new rule would be developed from scratch. We have yet to see a draft of any such rules. The Standing Rock Sioux Tribe did purchase fee lands which are awaiting to be transferred into trust status and urge the Administration to move forward aggressively with this endeavor. Currently the Bureau of Indian Affairs, Standing Rock

Agency did provide a listing of more than twenty-one names of ranchers or farmers whom are interested in selling to the Standing Rock Sioux Tribe of more than 56,551 acres of land at a cost of $150 to $165 an acre totaling at the time for $10,161,100.00. If the Tribe were to purchase all of these lands, we would still have to combat the Counties of Sioux and Corson for their tax base; however, the Counties do not speak with the non-Indian landowners whom are taking the initiative to approach the Tribe to whom they want to sell their land. The non-Indian ranchers and farmers are applying to the Standing Rock Sioux Tribe without any requests from the Tribe; and the counties are the ones opposing the Tribe from purchasing these lands and putting the land into trust status. We believe the farmers and ranchers whom are losing their possible income are opposed to the opposition from the counties.

However, we do question why Tribes have to demonstrate that lands being acquired and requested to be placed into trust would not harm the non-Indian community. The Tribe is saddled with the burden of proving a negative as it was they who began taking our lands initially at times illegally.

Uniform Federal Probate Code:

If such mandatory legislative language is approved as a part of a Federal law, Indian Tribes would be addressing and enacting its probate codes for both testate and intestate succession of Indian lands and that these lands remain in trust status. It is critical for Tribal governments to develop its own Probate Codes and Courts. Once approved, the law must be interpreted in a way that would be understandable by our people within their communities.

We believe that there is a need for the opportunity to continue to amend the regulations as we proceed forward.

CONCLUSION:

The Standing Rock Sioux Tribe gracefully acknowledges and appreciates the opportunity to be authorized to submit testimony for the record. We further realize that the recommendations which we offer may not be included into this legislation; however, we would inform the Committee that eventually these amendments or individual legislative initiatives would continuously be brought to our Senators and Congressmen for introduction or consideration. Additionally, it is our intention to proceed forward rapidly in conducting a "Tribal Lands Conference" in which we will be addressing Probate, Inheritance, definition of Indian and Indian Tribes, as well as other factors which we as Indian people are faced with today. The Committee members or your staff are invited to attend this Conference if you are available. Thank you.

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▸ 2

To Allen From Mary

Dept./Agency Phone #

Fax # 702 Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

1980

INHERITANCE OF TRUST OR RESTRICTED LAND

An Act pertaining to the inheritance of trust or restricted land on the Standing Rock Sioux Reservation, North Dakota and South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to the extent that the laws of descent and distribution of the State in which trust or restricted land is located on the Standing Rock Indian Reservation in North Dakota and South Dakota (hereinafter the "reservation") are inconsistent with this Act, the provisions of this Act shall govern the right to inherit such trust or restricted land.

Standing Rock Sioux Reservation, N. Dak.-S. Dak.

SEC. 2. Only the Standing Rock Sioux Tribe of North Dakota and South Dakota (hereinafter the "tribe") or persons who are (a) enrolled members of the tribe, (b) members of a federally recognized Indian tribe, or (c) otherwise recognized as Indians by the Secretary of the Interior (hereinafter the "Secretary") shall be entitled to receive by devise or descent any interest in trust or restricted land within the boundaries of the reservation as defined by the Act of March 2, 1889 (25 Stat. 888), except as provided in section 4 of this Act.

Inheritance of trust or restricted land.

SEC. 3. (a) Whenever any Indian dies possessed of any interest in trust or restricted land within the reservation and the trust or restricted land has not been devised by a will approved by the Secretary pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373) and which is consistent with the provisions of section 2 of this Act, such interest shall descend to the following persons, subject to their being eligible heirs pursuant to section 2 of this Act:

Order of eligible Indian heirs left by Indian decedent dying intestate.

(1) one-half of the interest shall descend to the surviving spouse and the other one-half shall descend in equal shares to the children of the decedent and to the issue of any deceased child of the decedent by right of representation;

(2) if there is no surviving spouse, the interest shall descend in equal shares to the children of the decedent and to the issue of any deceased child of the decedent by right of representation;

(3) if there are no surviving children or issue of any child, the interest shall descend to the surviving spouse;

(4) if there is no surviving spouse and no surviving children or issue of any child, the interest shall descend to the surviving parents or parent of the decedent;

(5) if there is no surviving spouse, and no surviving children or issue of any child, and no surviving parent, the interest shall descend equally to the brothers and sisters of the decedent; and,

(6) if there is no surviving spouse, no surviving children or issue of any child, no surviving parent, and no surviving brothers or sisters, the interest shall escheat to the tribe.

(b) Any interest which descends in accordance with this section shall be subject to the right of a non-Indian surviving spouse as provided in section 4(a) of this Act.

(c) As used in this section, the words "children" and "issue" include adopted children and children of unwed parents where the Secretary

"Children" and "issue."

determines that paternity has been acknowledged or established, except that (1) a child may not inherit by intestate succession from or through a parent whose parental rights with respect to said child have been terminated pursuant to lawful authority and (2) a parent may not inherit by intestate succession from or through a child with respect to which such parent's parental rights have been so terminated.

Non-Indian surviving spouse, lifetime interest in trust or restricted lands.

SEC. 4. (a) Notwithstanding the provisions of section 2 of this Act, the non-Indian surviving spouse of an Indian decedent who dies possessed of any interest in trust or restricted lands within the reservation shall be entitled to take not more than an undivided one-half interest in all such trust or restricted lands during his or her lifetime, but the remainder of such interest shall descend as provided in section 3 of this Act.

Tribal payment to Secretary of fair market value on behalf of devisee.

(b) If a decedent has devised an interest in trust or restricted land located within the reservation to a person prohibited by section 2 from acquiring an interest in such trust or restricted land and the consequence of such prohibition is that the interest in land would escheat to the tribe pursuant to section 3(a)(6) of this Act, the devise shall be prohibited only if, while the estate is pending before the Secretary, the tribe pays to the Secretary on behalf of such devisee the fair market value of such interest as determined by the Secretary as of the date of the decedent's death. The value of any life estate reserved to a surviving spouse under the provisions of subsection (a) of this section shall be reflected in the Secretary's determination. The interest for which such payment is made by the tribe shall thereafter be held by the United States in trust for the tribe.

Life estate value reserved to a surviving spouse.

SEC. 5. The provisions of this Act shall apply only to estates of decedents whose deaths occur on or after the date of enactment of this Act.

Approved June 17, 1980.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 96-748 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 96-752 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 126 (1980):
Mar. 3, considered and passed House.
May 22, considered and passed Senate, amended.
June 9, House concurred in Senate amendments.

United States Department of the Interior

IN REPLY REFER TO:

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

BIA.TC.1452

September 20, 1989

RECEIVED
SEP 2 5 1989
ABERDEEN AREA OFFICE
BRANCH OF REALTY

Area Director
Bureau of Indian Affairs
Aberdeen Area Office
115 4th Avenue, S.E.
Aberdeen, South Dakota 57401-4382

Attn: Real Property Management

Re: Pub. Law 96-274 - Pertaining to the Inheritance of Trust of Restricted Land on the Standing Rock Indian Reservation

Dear Sir:

By memorandum your office posed some questions regarding the above referenced Act of June 17, 1980, which limits inheritance of trust or restricted land located on the Standing Rock Indian Reservation. The questions, with our responses are set out below:

1. Is a nonenrolled individual of less than one-fourth (1/4) degree Indian blood who is the child of an enrolled member of the Tribe considered eligible to receive by devise or descent an interest in trust land from the estate of the parent?

Yes. Section 2 of the Act states "[o]nly the Standing Rock Sioux Tribe of North Dakota and South Dakota (hereinafter the "tribe") or persons who are (a) enrolled members of the tribe, (b) members of a federally recognized Indian tribe, or (c) otherwise recognized as Indians by the Secretary of the Interior . . . shall be entitled to receive by devise or descent any interest in trust or restricted land within the boundaries of the reservation . . . ." [Emphasis added.]

For probate purposes, the Secretary recognizes persons who have at least one Indian ancestor or whose ancestry can be traced to a federally recognized tribal or native entity. See Garrett v. Assistant Secretary of Indian Affairs, 13 IBIA 8, at 18, 91 I.D. 262, at 268 (1984), wherein the Board quoted a statement from the Assistant Secretary as follows: "It is the Department's long-standing policy to continue the trust or restricted status of inherited property so long as the heir or devisee is of Indian descent, even though such person may not be entitled to membership in any Indian tribe nor be eligible for services provided by the Bureau of Indian Affairs." The Board also stated

in Garrett: "The federal trust responsibility runs to Indians, not merely to members of Indian tribes." Therefore, the Secretary continues the trust or restricted status of inherited property for these persons.

2. Can an enrolled member of the Tribe devise trust land to a member of another Tribe as long as the recipient is recognized as Indian by the Secretary?

Yes. See Section 2 of the Act, quoted above, and Section 4(b) of the Act which provides:

> If a decedent has devised an interest in trust or restricted land located within the reservation to a person prohibited by section 2 [non-Indians or members of a nonrecognized tribe, fall under this category as being persons prohibited from inheriting except as provided for in Section 4 of the Act] from acquiring an interest in such trust or restricted land and the consequence of such prohibition is that the interest in land would escheat to the tribe pursuant to Sec. 3(a)(6) of this Act, then such devise shall be prohibited only if, while the estate is pending before the Secretary, the tribe pays to the Secretary on behalf of such devisee the fair market value of such interest as determined by the Secretary as of the date of decedent's death. [Emphasis added.]

See also Estate of Theodore LeCompte, IP BI 71C 83-1; and Estate of Philomene Splintered Horn/Sjostrom, IP RC 30Z 85.

In reference to the statement made in the last paragraph of your memorandum, you were under the impression that a non-Indian step-son can retain his interest when a non-Indian spouse and nonenrolled children can only hold a life estate. However, this is not correct. Nonenrolled children (who have at least one Indian ancestor) fall under Section 2 of the Act as persons who are "recognized as Indians by the Secretary." As to a non-Indian spouse receiving only a life estate (one-half), this would occur only if the decedent dies intestate or is devised a life estate under the will. Again, in this situation, the non-Indian spouse, as with the non-Indian step-son, is eligible to take under a will pursuant to Section 4(b), which gives the tribe the right of first refusal. If, as in the estates of LeCompte and Sjostrom, supra, the tribe does not exercise the option to purchase the devised interests within sixty (60) days of the date of the order of distribution, the non-Indian devisees then become the owners of the property in fee status.

If I can be of further assistance to you in this matter, do not hesitate to contact me.

Sincerely,

Jean W. Sutton
For the Field Solicitor

ILWG Officers/Regional Contacts

Austin Nunez, Chair
2018 W. San Xavier Rd.
Tucson, AZ 85746
Tel: 520-294-5727
Fax: 520-294-0613

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

Theresa Carmody, Sec./Treas.
ILWG
2401 12th St., NW - #206N
Albuquerque, NM 87104
Tel: 505-247-9561
Fax: 505-247-9561

Emie Wereks
PO Box 847
Ft. Hall Idaho 83203
Tel 208-478-3960
Fax: 208-478-3961

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

Tom Conroy
PO Box 752
Pine Ridge, SD 57770
Tel: 605-867-1106
Fax 605-867-5806

Del LeCompte
Box 268
Fort Yates, ND 58538
Tel: 701-854-7448
Fax: 701-854-7582

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

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

Peggy Doney, Land Manager
RR 1, Box 39
Harlem, Mt 59526
Tel: 406-353-8407
Fax: 406-353-2797

D o r e
Bietz
14175Mono
Way Sonora,
CA 95370
Tel: 209-
588-9772
Fax: 209-
588-9796

G e o r g e
Russell
9027NCobreD
rive Phoenix,
AZ 85028
Tel: 800-
835-7220
Fax: 602-
493-4691

INDIAN LAND WORKING GROUP

"Taking A Stand On Indian Land"

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

BY AUSTIN NUNEZ, CHAIR OF THE INDIAN LAND WORKING GROUP AND CHAIR OF THE SAN XAVIER DISTRICT OF THE TOHONO O'ODHAM NATION

ON S.1340, A BILL TO AMEND THE INDIAN LAND CONS OLIDATION ACT

MAY 22, 2002

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, specifically S.1340, "a bill to amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands".

Currently, I serve as Chair of the Indian Land Working Group, as well as Chair of the San Xavier District of the Tohono O'Odham Nation.

As currently written, S. 1340, the Indian Probate Reform Act and it's predecessor, the Indian Land Consolidation Amendments of 2000 (P.L. 106-462) contain serious flaws that complicate tribal and individual land management, make administration of trust allotments more difficult, and threaten the trust status of allotted lands.

In order for true probate reform and effective management of trust allotments to occur, the following areas must be addressed within S.1340.

CURRENT LAND TITLE INFORMATION IS NECESSARY FOR SYSTEM REFORM. Title documents must be corrected to reflect real ownership. It is a travesty that approximately 13,000 fractionated interests have not been returned to legal Indian heirs; a clear violation of the Supreme Court decision in Babbitt v.Youpee (117 S CT.727 1997).

In addition, there is a current probate backlog of nearly 8,000 cases (Indian Probate Reinvention Lab – Phase II, December '99 – Background) impacting thousands of Indian heirs and landowners. THIS HAS PUT A HUGE STALL ON REAL ESTATE TRANSACTIONS ON INDIAN TRUST ALLOTMENTS. One can only imagine the public outcry which would occur if state and county entities maintained title documents in the same manner.

- REPEAL THE 5% JOINT TENANCY WITH THE RIGHT OF SURVIVORSHIP (JTWROS) FEATURE (SECT. 2206). In intestate (no will) cases where a fractionated land interest is less than 5% of an allotment (in an allotment of 160 acres this would be anything 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; it is an anti-estate planning procedure.

- 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) only, 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 thousands of persons 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. To the ILWG, this means that tribes want to stay with bloodline determinations for inheritance purposes, not blood quantum.

- CORRECT THE CURRENT LAND ACQUISITION PILOT PROGRAM: Individual Indian landowners must be included in all acquisition pilot projects to assure consolidation of fractionated land title; otherwise the tribe, often a stranger to title, becomes a co-owner in an allotment. This further complicates title and creates additional records. Currently, the Secretary is making indiscriminate purchases of fractionated interests within the designated pilot project reservations. Purchases are not tied to individual or tribal use plans; tribal laws, ordinances, and land consolidation plans are not a required consideration for these purchases.

We recommend that the Committee incorporate the 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.

This system can also be used for other real estate related transactions, e.g., gift deeds, sales and purchases. This system works; the DOIS Trust Asset and Accounting Management System - TAAMS - does not!

- AMEND S.1340 TO PROTECT THE TRUST STATUS OF OFF-RESERVATION ALLOTMENTS. There has been no evaluation to determine the impact of this provision upon impacted Indian owners and their heirs. If the owner of a trust allotment is not Indian under the new P.L. 106-462 definition, the off-reservation interests pass to heirs in fee status, further diminishing the trust land base.

  While California was excluded from coverage in P.L. 106-462, this provision continues to have a negative impact on other Indian owners 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 (I.E. ATTORNEY DECISIONMAKERS) FOR INDIAN ESTATE PROCEEDINGS AND REQUIRE A SUNSET PROVISION FOR THIS PRECEDURE.

  Without legal authorization, the Department of Interior, is using non-APA (Attorney Decisionmakers [ADM]) proceedings – instead of a probate hearings – as the primary means of processing Indian probates. By amending 25 USC 372, the Department of the Interior is permanently affording Indian landowners - to whom it has a trust responsibility - lesser protections in law than it affords permittees and licensees on Public Lands. To get a hearing, rather than be assigned an ADM, heirs must make their request for a hearing, 20 days from the date of notice.

AN ADDITIONAL AND DETAILED ANALYSIS OF S.1340 PROVISIONS IS CONTAINED IN THE ATTACHMENTS LISTED AT THE END OF THIS TESTIMONY

A LEGISLATIVE HISTORY – FOR THE RECORD

In 1997, the Administration developed and introduced a legislative proposal to address management of trust allotments, H.R. 2743. This proposal was never endorsed by tribes and landowners, and in fact was unanimously opposed by both of these entities.

The bill lacked any provision for assistance to tribes and landowners for consolidating allotment ownership. Tribes and landowners need access to land data, technical assistance, and capital in order to effectively consolidate and reduce multiple ownership. H.R. 2743 did nothing to address this need.

Concurrent with this effort, the Indian Land Working Group (ILWG) developed a comprehensive legislative proposal for solving issues related to fractionation, H.R. 4325. This legislation was introduced in the 105th Congress, 2nd Session (1998). H.R.4325 was formulated with extensive input from tribes, individual landowners, and probate/realty practitioners during the Annual Indian Land Consolidation Symposiums and legislative meetings held throughout 1995 – 1999.

H.R. 4325 established a comprehensive estate planning program; provided for local development and maintenance of land data systems; removed regulatory barriers to make it easier to gift deed, sell, and exchange land interests; provided a uniform probate code that prevented non-Indian inheritance; and established a land acquisition program for tribes and individual Indian landowners for acquisition and consolidation of fractionated interests.

In December of 1998, representatives of the ILWG and the Department of the Interior were invited to meet with staff from the Senate Committee on Indian Affairs for the purpose of developing a compromise bill by combining the two legislative proposals that were before them, H.R. 4325 and H.R. 2743. The compromise version became know as S.1586. This bill was crafted by Department of Interior representatives and a single Senate Committee staff person, with minimal input from tribes or individual landowners. S.1586 includes several provisions from the original H.R. 4325, but otherwise there was no compromising.

On November 4, 1999 hearings were held on S.1586. Tribes and individual landowner associations testified in opposition to many of the provisions in the bill. (See hearing record for testimony before the Senate Committee on Indian Affairs, S.1586 "Indian land Consolidation Amendments of 1999); especially the inclusion of a "2% rule", which was removed from the final version of S.1586. In spite of continued opposition, S.1586 was enacted, and became the Indian land Consolidation Amendments of 2000. P.L. 106-462. S.1340 adds further amendments to the Indian Land Consolidation Act, ignoring the detrimental impact that P.L. 106-462 will have on Indian Country.

TERMINATION BY DEFINITION - SECTION 2201

Prior to the enactment of the Indian Land Consolidation Act Amendments of 2000, land could be inherited in trust status by persons of "documentable Indian blood". The current definition of Indian contained in the Amendments will cut off far too many people who now qualify as Indian under other federal laws – yet are unaffiliated (not enrolled) for a variety of reasons. As mentioned previously, at the Standing Rock Sioux Reservation alone, 4,096 heirs representing 15,749.44 acres will not be able to inherit. These numbers are alarming; no one knows the overall impact; how many tracts and acres are involved; not to mention the land values.

Defining who can inherit is a tribal authority and needs to be determined by each tribal community. Tribes have the power to determine their own membership and to formulate probate codes. The fact that only 8 tribes have implemented codes which are more restrictive than the "documentable Indian blood" requirement, says that most tribes do not want to cut off lineal descendants.

A restrictive definition of Indian for purposes of inheritance is another attempt by the Administration and Congress to reduce the number of Indians and to reduce the Indian budget. This definition, flys in the face of the written objectives of the law – to preserve trust status and promote consolidation of fractionated interests. If an Indian landowner cannot pass land on to their own children, because they cannot qualify for membership, the trust status of land will certainly be jeopardized and the legal challenges will certainly be forthcoming. Were a similar effort undertaken for any other racial group within the American society, there would be a riot.

P.L. 106-462 defines Indian, as "any person who is a member of any Indian Tribe or is eligible to become a member of any Indian tribe, or who has been found to meet the definition of "Indian" under a provision of Federal law if using such law's definition is consistent with the purposes of this chapter".

Interior is currently interpreting "under a provision of Federal Law" to include only the Indian Land Consolidation Act; excluding any other definition of Indian, such as is contained in the Indian Reorganization Act or the Indian Child Welfare Act, to name but a few of the 80 plus definitions of Indian contained in federal laws.

This interpretation will exclude persons with multiple tribal ancestors who are not enrolled or eligible to be enrolled at any one tribe, even though they are ¼ or ½ Indian blood from several different tribes. It also excludes heirs who are from non-federally recognized and terminated tribes.

Prior to the Amendments, heirs were determined by "documentable Indian blood". Now Administrative Law Judges, Attorney Decisionmakers, Probate Officers and Clerks, will need to research whether or not a person is a member, or eligible to become a member of a tribe. Parents of children who do not meet this restrictive interpretation will be inclined to fee patent or gift deed their land so that their property can be left to their children.

CREATION OF JOINT TENANCY WITH RIGHT OF SURVIVORSHIP – SECTION 2206

For persons dying without writing a will (intestate) the amendments create a "joint tenancy with right of survivorship" (JTWROS - section 2206[c]), for land interests which are less than 5% of a tract. In a 160 acre parcel this would mean anything under 8 acres. For most Indians, this amount of acreage may mean a potential homesite which may be willed or partitioned for this purpose. Section 2206 bars this action. Research on probate laws, in the U.S., England, France and Uniform Succession Laws (international) shows there is not a single instance in which JTWROS has been implemented to address intestate matters. Section 2206 is new and untested law; another experiment.

A joint tenancy does not require probate of interests as each tenant dies, only the last survivor. The last tenant to survive has "the right of survivorship" and can will the property to heirs. Currently, Interior cannot account for money in tribal and individual accounts in the billions of dollars, the last estimate being at least $10 billion. How is Interior going to certify that it will be able to track heirs within a joint tenancy situation? They can't – and even if they could – joint tenancy is an estate planning instrument, which is best used in circumstances where there are close-knit family units – seven brothers and sisters agreeing by drafting a will together - that the last of them to survive will own the land.

Contrast this with a situation where 30, 50, and 60 heirs from 3 marriages are thrown into a JTWROS where no one in the family knows everyone else; most don't know the other family components; and they are looking to Interior to tell them who the heirs are.

Speaking from 25 years of Indian probate experience, former Administrative Law Judge, Sally Willett says "If the family members do not know each other, then over time when and if someone figures out that all other heirs might be dead, the family or the government would have to go back, investigate and reconstruct the family history in order to ascertain, if possible, who died, when….. in order to determine whom the survivor was. This would be a monumental, costly, labor intensive task".

The Joint Tenancy Provision cannot take effect until six months after the Secretary certifies in the Federal Register "that the Department of the Interior has the capacity, including policies and procedures, to track and manage interest in trust or restricted land held as joint tenants with the right of survivorship." To date, this certification has not taken place.

CONTINUED BREACH OF TRUST RESPONSIBILITY

For proper management of trust property, title documents must be kept current. The Department of Interior continues to mismanage thousands of allotments, currently totaling over 10 million acres. There are no provisions in this P.L. 106-462 which address the probate backlog (see Indian Probate Reinvention Lab - Phase II, December '99 – Background) and the return of 2% interests mandated by the 1997 Supreme Court decision in Babbitt v. Youpee (117 S CT. 727 (1991), whereby the "2% rule" was declared unconstitutional.

The probate backlog and/or the unconstitutionally taken 2% interests which have not been returned, impact virtually every allotment in Indian Country. Where title has not been corrected to reflect current ownership, real estate transactions – involving acquisition loans, sales, and exchanges – cannot be completed. Allotment owners' hands are tied until title records are corrected to reflect actual ownership.

In September of 1998, the Assistant Secretary of Indian Affairs directed the Deputy commissioner of Indian Affairs to reopen all probates where 2% property interest had escheated to Indian Tribes under 25 U.S.C. Section 2206 of the ILCA This order was initiated to begin the legal process of returning the 2% interests to the rightful heirs, to comply with the Supreme Court Decision in Youpee.

To this day, an estimated 13,000 interests have not been returned. This means that title documents on thousands of allotments are outdated and do not reflect the true owners. This is certainly a breach of the trust responsibility related to management of these allotments.

A FLAWED ACQUISITION PROGRAM – SECTION 2212

The acquisition program in this law provides for Secretarial purchase of fractionated interests. Indiscriminate purchase of fractionated interests by the Secretary of the Interior is a far cry from tribal and individual self-determination – it will not lead to consolidation. It is paternalism at it's best.

True consolidation of fractionated interest means that a priority right of purchase be established within allotments to allow - heirs of the original allottee, then co-owners, then other Indian individuals, then the tribe – the opportunity to purchase interests that are for sale. Purchases should be tied to a personal consolidation, or use plan, e.g., homesite use, enterprise, or extended family use (hunting, fishing, wood gathering, recreation). Tribal laws and ordinances need to be considered.

Indian individuals impacted by fractionation need access to acquisition dollars for consolidation. Financial institutions rarely lend to Indian individuals for purchase of "fractionated interests" on trust property. An acquisition program, similar to the one contained in P.L. 106-462 has already been tried and it proved to be a dismal failure.

Under the USDA's "Indian Land Acquisition Program" many tribes borrowed money to purchase fractionated interests; individuals were excluded from this process. The purchases were not tied to tribal or individual land consolidation plans.

Today 27 tribes are in loan write-down situations because the income derived from the fractionated interests purchased under this program, was not enough to repay the loans (see Federal Register/Vol.64, No.211/Tuesday, Nov.2, 1999/Proposed Rules). A successful acquisition program must be tied to estate planning; land consolidation plans; tied to economic development plans with payback potential; and most importantly be available to individual Indian landowners.

Most disturbing, the Fund allows, and in fact encourages, Secretarial purchase of fractionated interests which should have already been returned Indian landowners as directed by the Supreme Court in Babbitt v. Youpee (117 S CT. 727 1997).

Worst yet, there is no true estate planning program that addresses fractionation at the starting point – on allotments where there is sole ownership, or very few co-owners. This is the time when estate planning options must be presented to Indian landowners – devising one interest to one heir, gift deeding, exchanging, etc. – in order to prevent allotments from further fractionating.

Additionally, Interior's land acquisition program involves setting up a system to account for the income derived from the land interests purchased under the acquisition program. When the land is paid for, or when 20 years has passed – whichever comes first – the land is returned to the tribe. Knowing Interior's recordkeeping capabilities, it would appear that tracking the income derived from these interests would be too great a task for the Department.

Related to this, Interior testified in hearings on the Amendments, that for each purchase they make, a record is closed – claiming that the Secretarial land acquisition program reduces records.

They failed to mention that for each record that is closed, a new one must be opened to track income derived and real estate transactions related to each interest. And then, what happens when the interest that is purchased is part of a joint tenancy with right of survivorship? Is it getting complicated yet?

RESERVATION-WIDE APPRAISALS TO ESTABLISH FAIR MARKET VALUE (2214)

The appraisal system is structured to give the Regional Appraiser final analysis of the "supporting statistical data and applicable testing/reconciliation method and final approval for the specific values generated by the appraisal systems" provided for in Section 2214. It should also be noted that 2206(e) does not expressly require fair market value determinations to support trust-to-trust "consolidation agreements approved by Administrative Law Judges or Attorney Decisionmakers.

Considering the BIA's track record on appraisals, this is an outrageous proposition. A few examples: lease rates for lakefront properties on the Leech Lake Reservation had been based on 1983 property values until the Tribe contracted the leasing program in 1999; Leases income on 19 agricultural allotments on the Ft. Hall Reservation increased by $2.075 million for a 5 year period over what had formerly been derived under BIA lease agreements. The Ft. Hall Landowners Alliance negotiated the lease agreements using current market values.

Unfortunately these examples are typical, as the BIA uses inappropriate and outdated data to assess leasing rates. Although the law cites USPAP (Uniform Standards of Professional Appraisal Practice) there is no provision for staffing or compliance reviews to assure that these standards are being met.

In closing, I would also like to submit for the hearing record, the ILWG position in regards to the Reorganization of the Department of the Interior. Specifically, our support of the NCAI Resolution #JUN-00-043: "Demanding the Return of Trust Records to Local Agencies; Full Tribal Access to Records Necessary for Self-Government; and Establishment of a Negotiated Rulemaking Committee to Develop Trust Reform Regulations with the Full participation of Indian Tribes and Individuals they are intended to Benefit.

In addition, I submit the ILWG position related to the content of P.L. 106-462 and S. 1340 and violations of Executive Orders No. 12875 "Enhancing the Intergovernmental Partnership" and Executive Order No. 12865 "Regulatory Planning and Review" and Executive Order No. 13084, providing for meaningful and timely input.....on matters that significantly or uniquely affect tribal communities" and Executive Order No. 13075 enacted to "encourage Indian tribes to develop their own policies to achieve program objectives" and that while "developing regulations use consensual mechanisms for developing regulations, including negotiated rulemaking....

P.L. 106-462 "the Indian Land Consolidation Amendments of 2000", the regulations developed to implement this law, and the proposed S.1340, have not adhered to the intent and directives contained in the aforementioned Executive Orders.

In closing I would like to submit the following pertinent documents into the record.

- "AMENDMENTS TO S. 1340", A SUMMARY AND ANALYSIS OF S.1340 PREPARED BY MS. SALLY WILLET, FORMER ADMINISTRATIVE LAW JUDGE, OHA – DOI; APRIL 2002.
- "THE INDIAN LAND WORKING GROUP'S POINTS AND CONCERNS" REGARDING THE NOVEMBER 7, 2000 ILCA AMENDMENTS AND S. 1340 AND ASSOCIATED TRUST "REFORM" REFORM MEASURES; MAY 2002.
- "FRACTIONATED INTERESTS IN LAND THAT IS HELD IN TRUST FOR NATIVE AMERICANS" BY ARVEL HALE, FORMER CHIEF APPRAISER, DOI – BIA, MAY 13, 2002.
- OKLAHOMA SUPREME COURT SOVEREIGNTY SYMPOSIUM, AN OVERVIEW OF INDIAN PROBATE PAST AND PRESENT", JUDGE SALLY WILLET, CHEROKEE TRIBE - MARCH 2002.

We will use the testimony we have given today, as well as the aforementioned documents, as a basis for further discussions with members of this Committee and staff, as we seek the much needed reform related to Indian ownership, use, and management of Indian trust allotments.

Our lands, and our future generations on these lands, are our lifeblood; we will no longer stand for being land rich and dirt poor; detached from our lands as your laws have tried to make us. As members of the Indian Land Working Group, we seek to reverse this trend. We are "Taking A Stand On Our Indian Land". We seek responsible use management and control of our land resources. We hope you will work with us. Thank you.

AMENDMENTS TO S. 1340

(April 2002 Version)

(S. Willett for the Indian Land Working Group – April/May 2002)

Sec. 1 Title: **"Indian Probate Reform Act of 2001"**

Sec. 2 Indian Probate Reform

(a) Adds [these amendments] as "Subtitle B" [X-ref. Sec. 241 "Subtitle C" and "Subtitle B."

Also Adds:

Sec. 231 Findings:

(a) GAA did not authorize will making.

(b) State laws were applied to inheritance[1]

(c) Use of state law caused multiple problems: (a) increased fractionation, (b) different standards applied on reservations with allotted lands in more than one state, (c) lack of uniform code for allotted lands makes it difficult for tribes to develop codes,[2] (d) federal Indian probate law lacked many features standardly found in general probate law.

(d) A uniform federal Indian probate code might: (a) reduce fractionation of allotted lands, (b) make it easier to provide estate planning aid and advice,[3] (c) aid intertribal efforts to develop ILCA [206] codes, (d) add standard features of general probate law not present in current Indian probate laws.

Also adds

Sec. 232 Rules Relating to Intestate Interests and Probate:

(a) When there is no will, allotted interests pass: (1) under a tribal (206) code or under (b), below.

NOTE: THROUGHOUT SEC. 232, THE PHRASE "INTESTATE INTERESTS" IS USED. THE TERMS "INTESTATE" AND "TESTATE" DO NOT REFER TO PROPERTY IN PROBATE TERMINOLOGY. THE TERMS APPLY TO THE DECEDENT. DID HE DIE WITH A WILL? IF SO, THE DECEDENT DIED "TESTATE." DID HE DIE WITHOUT A WILL? IN THAT CASE, HE DIED "INTESTATE."

(b) Intestate (No will)

INDIAN INHERITANCE

(1) (A) All to "Indian" spouse if no kids or grand kids.

(1) (B) Half to spouse if "Indian" kids or grandkids by right of representation [share the parent's share].

(1) (C)[4] Non-spousal shares: kids take equally. If deceased, the grandkids take deceased parent's share by right of representation.

NOTE: Any place the word "Indian" appears evaluate the effect upon persons of Indian blood but not enrolled. In cases where the definition makes "non-Indians" out of "Indians" significant arbitrary and erratic impacts will quickly be evident. Pinning the term "Indian" to "membership" is a budget device, both federal and tribal. Tribes are indeed entitled to establish membership criteria for eligibility for services, etc. This power should not be confused with the power to impair others' ethnicity. The phrase "tribal member" is no more a synonym for "Indian," than the phrase "American citizen" is an ethnic classification. Accordingly, full bloods, half bloods quarter bloods can be affected if they are of tribes with, for example, residency requirements, matri- or patrilineal membership structures or are individuals, who are full blood, but of insufficient quantum of any one tribe to be enrolled. Political definitions of "Indian" are harmful to the Indian population and will, as they did in Oklahoma when applied to land restrictions, do great mischief. With an out-marriage rate of 72%, tribes must begin to examine descendancy when addressing membership issues or face drastically reduced tribe size.

NON-INDIAN INHERITANCE

(2) (A) Non-Indian Spouse and "Indian" Issue

Non-Indian spouse: half life estate to spouse, remainder to issue (if any)

Kids take equally. If deceased, the grandkids take deceased parent's share by right of representation.

CRITICAL ERROR: Subsection (b)(2)(A)(ii) contains a substantive flaw. It says "the remainder from any life estate and "the remaining ½ interest in each intestate interest shall descend in equal shares" to the kids or children of deceased kids. EXPLANATION: A life estate is a tenancy superimposed upon title. 100% ownership of affected assets is in the designated remainderman or remaindermen. There is no other or "remaining ½ interest." The 100% ownership rights of the remainderman or remaindermen are subject to the paramount right of the life tenant to receive benefit from estate assets to the extent of ½. There appears to be an assumption that a ½ life estate has another ½ interest of some type hanging unvested. That is not correct. Ownership is fully vested in the remainderman or –men. Receipt of benefits is reduced only by share assigned in the life estate.

(2) (B) Non-Indian Spouse and No issue

A "life estate" [SHARE NOT STATED; therefore, 4/4 is assumed] to non-Indian spouse with the remainder to surviving parent or to parents in JTWROS, if both surviving.[5] If no parents survive, to the siblings equally.

If there are no parents or siblings, as stated in Sec. 207(a)(3)(B), (4) or (5) (11-7-00 Amendments)[6]

(3)(A) Descent if No Surviving Spouse

To kids equally. If any are deceased, grandkids take their parent's share by right of representation.

(3)(B) If no kids or grandkids, to the parents in JTWROS or the surviving parent if only one is living.

(4) Right of Representation described[7]

(c) An heir has to survive a decedent by 120 hours.[8]

(d) Wills Made Before Marriage and Birth of Children[9]

(1) A spouse gets an intestate share in the estate if the deceased spouse made a will before their marriage.

(A) This rule doesn't apply if the will was made before the later of:

[Refers to Sec. 234(a). [See 1st S. 1340 draft]

(1) 1 year after this subtitle is passed.

(2) <365 days after the Secretary certifies that notice of the 11-7-00 amendments was given to tribes and landowners.

(B) N/A if the spouse is non-Indian and the trust or restricted assets are willed to an Indian.

(C) N/A if evidence shows that the will was made in contemplation of the marriage to the surviving spouse.

(D) N/A if the will says that it is to be binding regardless of any subsequent marriage, or

(E) N/A if the testator made separate provision for the surviving spouse and it is clear that such provision was to be instead of taking under the will.

(2) A child born or adopted after a will is made, if the exclusion was not intentional (*See e.g.* (D), above), is entitled to an intestate share of the estate.

(e) Effect of Divorce/Annulment

(1)(A) Surviving spouse. An individual divorced from the decedent or whose marriage was annulled is not a surviving spouse unless there was a remarriage.

A separation decree does not terminate the marital union.

(1)(B) Rule of Construction. (1)(A), above, doesn't prevent giving effect to a property settlement if one of the parties dies before the final dissolution decree is entered.[10]

(2)Effect of Subsequent Divorce or Annulment on Will/Devise

A devise to a former spouse is revoked unless the will expressly says otherwise. The spouse is treated as predeceased. If there is a remarriage, the (revoked) devise is revived.

(f) Notice

The Secretary is only required to notify landowners of this title "to the extent practicable." The notice can be combined with the Sec. 207(g) notice in the 11-7-00 Amendments.

Also adds

Section 233. Collection of Past Due Child Support.[11]

a)-(b) The Secretary will set up procedures to collect past due child support orders of tribal courts or any other court of competent jurisdiction from revenue from trust or restricted land taking into account obligations to other children.

WARNING!!!! This is a jurisdictional inroad for states to get access to trust assets. Nothing less than a judgment enforcement action should be acceptable. IBIA probate caselaw has uniformly held that state court orders have no application in Indian probate proceedings. In light of Nevada v. Hicks, which has basically delimited state

authority where Indians are concerned, no federal legislation should invite jurisdictional claims or conflicts. This provision has the potential for doing just that. Congress must exercise extreme caution when extending new rights to states on Indian issues.

Also adds "Subtitle C"

Section 241 Effective Date

[Note: No "(a)" in Sec. 241 text but there is a "(b)".]

(?) This title doesn't apply to estates in which the decedent died < 1 year after this subtitle is enacted or < 365 days after the Secretary certifies that notice of the 11-7-02 of the ILCA amendments was given in the Fed. Reg.

(b) Other Amendments

(b)(1) After Sec. 202, insert "Subtitle A –General Land Consolidation.

(b)(2) (A) [non-substantive]

Also adds

(b)(2) (B) Adds to Sec. 206(a)

Tribal Probate Codes: Tribal codes can't prevent the devise[12] to *non-members* [13] of the tribe, unless (1) the code provides for renouncing interests, retention of life estates and paying FMV and (2) does not prevent a descendent of the original allottee from taking by *devise*. [X-Ref. n. 12(a)]

Sec. 206(c)(2)(A) says that the tribal acquisition provisions (Sec. 206(c)(1) don't apply if the interests involved are part of a family farm *devised to a member of the decedent's family "if" the devisee agrees that the tribe has the 1st option to buy the land if it is offered for sale to anyone outside the family.*

Rule of Construction: The provision (immediately above) doesn't prevent a devisee (owner) from putting a mortgage on the land or limit mortgagor foreclosure rights.

Also adds

Change in Sec. 207(a)(6)

Special Rule[14] and Rule of Construction

If a testator has no spouse, 1st or 2nd degree relations, Indian or non-Indian, he or she can devise the estate to anyone. However, non-Indians get a life estate unless the will specifically states that the interest acquired is a fee simple.

Also adds

To Sec. 207

Unexercised Right of Redemption[15]

This provision applies to trust or restricted interests--in that status as of the date these amendments are enacted--that are subject to a tax sale or foreclosure or similar legal action.

Exercise of Right

If an owner of trust land doesn't exercise a right of redemption, the tribe can do so.

A tribes, to the extent permissible by law, can acquire the interest without payment of penalties or assessments above the FMV of the land.

Also adds

Changes in Sec. 217(e)(3)

Landownership Information

Now reads: "any person that is leasing, using or consolidating, or is applying to lease, use or

consolidate" trust or restricted lands can have access to land ownership information.

Also adds

Changes in Sec. 217(f)

Notice to Indian Tribe

Now reads: "Prior to considering an Indian application to terminate the trust status or to remove the restrictions on alienation from trust or restricted land, the Indian tribe that exercises jurisdiction over the parcel...shall be notified of the application and given an opportunity to match the purchase price... ."

Also adds

Amendment to the General Allotment Act's Sec. 348. (Sec. 5, 2nd proviso)

Deletes the use of state law language for probate

Replaces it with mandatory use of the intestate rules of ILCA or an approved tribal probate code or implementing ILCA regulations.

Also adds

Amendment to IRA Sec. 464 (Sec. 4, 2nd proviso)

Adds the same language that was added to Sec. 348.

Endnotes

1 State laws applied only to intestate inheritance; wills were authorized in 1910. Federal law exclusively has applied to testate succession. This is firmly documented in IBIA decisions.

2 The same will be true where the laws of multiple tribes are involved.

3 Actually certain features nullify estate planning (e.g. 5% joint tenancy with right of survivorship ("JTWROS")feature.) Only the surviving joint tenant can estate plan. Other joint tenants will have to deed during their lifetimes in order to pass an interest to a successor. Deeding severs the 4 unities required for a JTWROS. The deeded interest becomes a tenancy in common interest as to those remaining under the original JTWROS. A representative of the solicitor's office, giving training to DOI probate personnel, informed them that 5% joint tenants could not deed their interests. This is flatly wrong. There are no restraints on alienation imposed upon such interests. The law disfavors restraints, especially, by implication.

4 This provision, because it addresses the rights of persons other than the spouse, shouldn't contextually be included in the spousal section.

5 This provision will work a travesty in actual application. E.g. The decedent dies without spouse or issue. He has inherited property from his only sibling, a maternal full brother. The property came down the maternal line. At "D's" death, the property passes to the parents in JTWROS. Decedent's mother dies first. The father is the sole owner, he remarries and has kids. D's interests pass completely out of bloodline to strangers cutting out entirely maternal participation inheritance. Also not clear is why a JTWROS was imposed exclusively at this inheritance point unless it has assumed that Indians follow the white "June and Wally Cleaver" model of marriage and reproduction meaning that there are no second or third marriages (or more) and children by only one spouse or partner which is not the case. That fact is both historically documented (it was among the reasons for the enactment of the 1891 amendment allowing children not born of marriage to inherit from their fathers) and anecdotally well known to probate practitioners and probate decision-makers.

6 *See* Consanguinity Chart attached. The cited sections say that if no first or second degree relations, as shown on the chart exist to take the remainder, other heirs (called "collateral heirs of the 1st or 2nd degree") can take the interest(s) if they are co-owners in estate lands on the DOD. "Collateral heirs of the 1st and 2nd degree" are defined as: siblings, aunts, uncles, nieces, nephews and first cousins. [NOTE: that the use of 1st and 2nd degree conflicts with the definition of "1st and 2nd degree" assigned in the definition section of the amendments. *See* Sec. 202(5). Further note, using the chart as a reference, that there are no 1st degree collateral relatives.]

7 The provision describes in complicated terms the calculation of "right of representation." The concept is actually simple. E.g. D dies. He has four kids. One child predeceased D. The predeceased child had 5 kids. In D's probate, the five kids share the parent's 1/4th share. [This is "right of representation."] The denominator is "20." ¼ x 5 = 20. Therefore, child 1 has 5/20, child 2, 5/20, child 3, 5/20 and each of child 4's children (5) have 1/20.

8 This is taken from states like Arizona. It is not a universal probate requirement among state laws. It is so infrequently seen as an issue (versus simultaneous death problems), a basic question arises why something this infrequent is seen as important for Indian probate. It is not harmful so much as insignificant.

9 The ILWG has recommended life estates versus full intestate shares to preserve any non-fractionating estate plans that the decedent may have made. "Pretermission" is used to include subsequent marital partners. In probate terminology, "pretermission" is normally associated with children born after a will is made. The phrase "changed circumstances" is the standard language used to describe the change in status associated with a marriage after a will is made.

10 This section requires word completion. The provision does not say "a property rights settlement entered into or signed by the parties." It just says nothing precludes giving effect to a property rights settlement if one of the parties dies. While we can assume the drafter meant "entered into or signed" it would be preferable to have it stated in express language.

11 Why is this provision in the probate reform bill? BIA has dramatically limited the availability of recovery for creditor claims in its regulations. OHA by extension has adopted the provisions that are going to cut creditors off at the knees. However, at the same time BIA was taking a position against allowing significant claims in probate, it dramatically expanded the encumbrancing of IIM accounts *inter vivos* (during the life of the landowner). The question is why? Making tribal claims low priority after medical, last illness/funeral and nursing home expenses is going to dry up credit dramatically. This is said to be for the benefit of the heirs. However, in actual fact, it is designed to limit BIA's administrative functions. Nonetheless, it sanctions unprecedented encumbrances in Pt. 115 of the new IIM regulations and, here, adds yet another burden to inter vivos accounts. It appears that the government is at cross-purposes with itself. Eliminating burdens on one hand and re-creating similar burdens on another each where it will hurt the actual owner the most. Indian probate has become virtually the only forum in which heirs largely walk away from routine debts of the decedent legitimately made during his lifetime.

12 (a) This provision, like the 11-7-00 ILCA amendments treats "devised" interests [gifts of real property under a will] preferentially [X-ref. Sec. 206(c)(1). Tribes have the authority to purchase interests "devised" to a non-Indian by paying fair market value.] In so doing, an equal protection problem is created as between those who inherit under a will or at law. No enhancement in the quality of one's right arises from the fact of having been "devised" an interest in a will versus receiving an interest by "intestate" [without a will] succession.

(b) An additional X-ref. is made to Sec. 206(c)(2)(B) of the 11-7-00 amendments. This is a difficult to sort out provision. Sec. 206(c)(1) says if a trust interest is "devised" to a non-Indian "the Indian tribe (with jurisdiction)...may acquire *such* interest" [the devisee's interest] by paying the FMV. "The Secretary shall transfer *such* payment to the *devisee*."

Then in Sec. 206(c)(2)(B) says that a non-Indian devisee can retain a life estate in the devised property, including income therefrom, the amount of the tribal payment shall be reduced to reflect the value of the life estate. Sec. 207(a)(2) automatically gives a non-Indian a life estate.

The main question, however, that arises in connection with Sec. 206(c)(2)(B) is how it actually works and what the provision pays for and to whom. The holder of a life estate is a tenant. If the FMV to be paid is reduced by the value of the life estate, it can only mean that the tribe is paying for the remainder. *If so it is a forced sale of the remainder with the value of the remainder paid to the life tenant.* The only payment authorization in Sec. 206 is in Sec. 206(c)(1). It says, specifically, that "The Secretary shall transfer such payment to the *devisee*." The devisee is a life tenant. The only thing that the non-Indian owned was a life estate. If the value of the FMV of the interest is reduced by the value of the "retained life estate" there is only one interest left for which payment could be made: the remainder that transfers under Sec. 207(a)(3) to 1st and 2nd degree Indian heirs, collaterals, if co-owners, then, to the tribe.

This provision needs adjustment. It also requires express clarification regarding how it interfaces with the mandatory life estate provisions in Sec. 207(a) [inheritance by will.] Why would a tribe buy what in many cases it will already get: ownership subject to a life estate at no cost?

13. Again the definition of "Indian" becomes important. This provision doesn't say "non-member Indians," it just says "non-members." To make sense this provision must be interpreted as meaning "non-member 'Indians,'" (i.e. members of other tribes, Indians entitled to be members of other tribes or whomever is intended by the 3rd provision in the definition of "Indian." Interior takes the position that the 3rd proviso means "Indian" under a consolidation statute. There are no other consolidation statutes but ILCA itself. Interior's construction, therefore, renders the 3rd proviso meaningless and produces a "membership or entitlement to membership" provision that using 1990 census statistics would cut the recognized Indian population for ownership in trust purposes by 1/3. The action is a budget measure. It reduces the government's administrative load by eliminating the number of people entitled to be called Indian. A tribe's power to determine it's own membership is a political issue. It is not the same question as who is, by blood, Indian. That is a matter of consanguinity. Membership is a legitimate factor in determining receipt of tribal services and eligibility therefor. So is proximity. Not all tribal members are eligible to receive services on account of where they live. However, neither of these factors is the same as ethnicity or consanguinity. Tribes view the issue as purely one of sovereignty: the right to determine membership and extension of services. Unfortunately, by failing to look at the cultural, heritage, ethnic and affiliation issues in a broader sense, they are unwittingly serving a termination agenda for a large number of actual Indians. This issue deserves in depth study and evaluation for impact upon the Indian population. George Russell of Russell Publications has projected that Native American population figures, at actual levels, will result in statistical insignificance as the general population increases. Massive, political reductions of the Indian population, such as that done by narrowly defining "Indian," will accelerate the phenomenon. Indian's are already viewed as the "invisible Americans" and, therefore, easy to roll in political battles. The problem will only worsen over time, especially if jump started with the sizeable reductions that the 11-7-00 ILCA definition produces. The effect is described in the Indian Land Working Group's testimony on S. 1340.

14. This is a tediously-repetitive provision in which the reader literally becomes lost in the verbage, or trying to figure out the substantive reason the same language is used over and over or ascertain if there is a true difference in meaning from one tedious paragraph to the next. It basically says that if there is no spouse, Indian or non-Indian, or 1st and 2nd degree relation, Indian or non-Indian, he can to devise to, an Indian testator can devise his trust estate to anyone he wants. However, non-Indians take a life estate unless the will directs the interest to pass in fee simple in specific language.

15. Why is this in a probate reform act versus a separate act. This provision and the child support collection provision are making this act catch all legislation. The 11-7-00 ILCA amendments and now these are already complicated enough without bringing in extraneous provisions. If it specifically relates to probate then some indication of that fact should appear in the text of the language, such as in (ii), page 18, *e.g.* If the owner, "or his estate, if the owner is deceased," fails to exercise a right of redemption. If it is not an actual probate matter put it in other legislation. The child support provisions need to be in social services legislation not in probate reform legislation. This is dominantly an inter vivos matter. It is suspected that it has been included to provide substantive authority for the incredibly overreaching provisions in the IIM regulations which authorize Interior to encumber IIM accounts for child support obligations which matters surface only occasionally in estate proceedings.

THE INDIAN LAND WORKING GROUP'S POINTS AND CONCERNS REGARDING THE NOVEMBER 7, 2000 ILCA AMENDMENTS AND S. 1340 AND ASSOCIATED TRUST "REFORM" MEASURES

1. STUDIES MUST PRECEDE REFORM SYSTEM DESIGN.

NO FEDERAL REFORM PROPOSAL HAS INVENTORIED THE RESOURCES TO BE ADMINISTERED UNDER ANY SUGGESTED MANAGEMENT SYSTEM. NO EFFECTIVE REFORM MANAGEMENT SYSTEM CAN BE DESIGNED WITHOUT A CURRENT ACTUAL INVENTORY OF ASSETS TO BE ADMINISTERED.

NEITHER NOVEMBER 7, 2000, S. 1340, HLIP OR BITAM REFORM WERE PRECEDED BY RESOURCE INVENTORIES TO IDENTIFY THE EXTENT OF ASSETS TO BE MANAGED OR THE DETAIL CHARACTERISTICS OF SUCH ASSETS. ALL REFORMS PLANS AND MEASURES WERE CREATED IN A VACUUM. INTERIOR DOES NOT KNOW HOW MANY ALLOTMENTS WERE ISSUED AND HOW MANY ARE STILL IN TRUST OR RESTRICTED STATUS. IT DOES NOT KNOW HOW MUCH SURPLUSED LAND WAS PAID FOR AND HOW MUCH MUST BE RETURNED TO TRIBES. DUE TO BACKLOGS IT CANNOT PROVIDE CURRENT OWNERSHIP NUMBERS FOR ALLOTMENTS OR IDENTIFY THE NUMBER OF ACTUAL OWNERS IN EACH ALLOTMENT, INCLUDING INTERESTS IN FEE.

2. SECTION 203 OF THE NOVEMBER 7, 2000 AMENDMENTS OVERRIDES TRIBAL ELECTIONS AND POLICY DECISIONS.

192 TRIBES ACCEPTED THE INDIAN REORGANIZATION ACT. THAT NUMBER INCLUDES TRIBES WHO VOTED "YES" AND ABSTAINED. TRIBES NOT ORGANIZED UNDER THE IRA AFFIRMATIVELY VOTED "NO" TO THE ACT. 25 USC 465 IS A PROVISION OF THE INDIAN REORGANIZATION ACT.

TO THE EXTENT THAT IT HAS BEEN IMPOSED UPON TRIBES WHO VOTED "NO" TO ACCEPTANCE OF THE IRA, SECTION 203 HAS BOTH IGNORED AND OVERRIDDEN TRIBAL ELECTIONS AND LONG-SETTLED POLICY DECISIONS.

THIS PROVISION, LIKE SECTION 213(b(2), IS CONTRARY TO THE ACT'S FINDINGS WHICH PROFESS TO UPHOLD SELF-DETERMINATION. ANOTHER METHOD OF ADDRESSING THE VOID IN FEE-TO-TRUST LAW MUST BE FOUND.

3. LANDOWNER INPUT IGNORED.

LANDOWNER OWNER INTERESTS ARE LARGELY EXCLUDED FROM GENUINE CONSULTATION IN THE REFORM PROCESS ALTHOUGH THEY ARE THE ONLY PARTIES IN THE PROCESS WITH 5TH AMENDMENT PROTECTED PROPERTY RIGHTS AT STAKE. TO DATE, CONSULTATION WITH LANDOWNER GROUPS, AT MOST, HAS BEEN TREATED AS AN ANNOYING PROCESS THAT MUST BE TOLERATED BY REFORM FRAMERS RATHER THAN A SOURCE OF LEGITIMATE INPUT.

4. LANDOWNERS WILL CONTINUE TO LITIGATE IF THEIR CONCERNS ARE NOT TAKEN INTO ACCOUNT.

ALL LITIGATION [THE HODEL, YOUPEE AND COBELL LAWSUITS] CONCERNING TRUST REFORM IS INITIATED BY INDIVIDUAL LANDOWNERS. FAILURE TO CONSIDER INDIVIDUAL PROPERTY RIGHTS AND OTHER SUBSTANTIVE INTERESTS BOTH INVITES AND PERPETUATES COSTLY LITIGATION. INDIVIDUAL INTERESTS ARE INAPPROPRIATELY PITTED AGAINST TRIBAL INTERESTS RATHER THAN TREATING ALLOTTED LAND ISSUES AS A SOURCE OF MUTUAL IMPORTANCE AND CONCERN. THIS IS AN HISTORICAL CHARACTERISTIC OF ADVERSE FEDERAL POLICIES THAT IS HARMFUL TO TRIBES AND THE INDIAN COMMUNITY GENERALLY. THE PROBLEM OF FRACTIONATION IS TO LARGE TO TREAT CAVALIERLY.

5. THE INDIVIDUAL INDIAN COMMUNITY IS HARMED BY THE NOVEMBER 7, 2000 ICLA AMENDMENT DEFINITION OF "INDIAN" AS INTERPRETED BY INTERIOR.

THE CHANGE FROM 1983 ILCA MAKES NON-INDIANS OUT OF INDIANS. IT LEAVES INDIAN LANDOWNERS NO ACCEPTABLE ALTERATIVES FOR LEAVING THEIR PROPERTY IN TRUST TO CHILDREN OF DOCUMENTABLE INDIAN BLOOD. THIS IS NOT THE SAME ISSUE AS MEMBERSHIP AND ENTITLEMENTS DERIVATIVE THEREFROM.

THE NEW DEFINITION WILL ELIMINATE, CONSERVATIVELY, NO LESS THAN ONE THIRD OF THE INDIVIDUALS WHO HAVE BEEN CONSIDERED INDIAN. IT MAKES NON-INDIANS OUT OF INDIANS. PROBLEMS HAVE ALREADY SURFACED. IT IS INAPPROPRIATE FOR THE GOVERNMENT TO INTERFER WITH MATTERS OF CONSANGUINITY AND HERITAGE FOR REASONS OF SELF-CONVENIENCE OR COST CONTAINMENT.

SENATE STAFF WAS TOLD OF THIS EFFECT PRIOR TO EFFECTUATION OF THE NOVEMBER 7, 2000 ILCA AMENDMENTS.

6. "INTESTATE" JOINT TENANCY IS EXPERIMENTAL WITH NO LEGAL PRECEDENT IN THE LAW OF REAL PROPERTY. ITS USE IMPERILS 1/5 OF THE REMAINING INDIAN LAND BASE. NO SECRETARIAL CERTIFICATION OF THE ILCA AMENDMENTS SHOULD NOT BE PERMITTED.

JOINT TENANCIES ARE CREATED BY LEGAL INSTRUMENT. NO JURISDICTION (STATE OR FOREIGN) NOW USES OR HAS EVER USED JOINT TENANCY FOR INTESTATE DESCENT AND DISTRIBUTION.

THIS EXPERIMENT, DESIGNED TO BENEFIT THE GOVERNMENT ONLY, WILL HAVE DISASTROUS CONSEQUENCES FOR ALLOTMENTS WHICH CONSTITUTES 1/5 OF THE REMAINING TRUST LAND BASE.

DOUBLE APPROPRIATIONS WILL BE REQUIRED TO IMPLEMENT THIS PROVISION OF DUBIOUS LEGALITY. IF LEGAL AT ALL, TO ADMINISTER THE JOINT TENANCY SYSTEM PROPERLY FOR TITLE TRACKING PURPOSES AND TO ACCOUNT FOR TRUST FUNDS, A SECOND MONITORING SYSTEM IN ADDITION TO THE PROBATE SYSTEM ITSELF, WILL HAVE TO BE EXPENSIVELY FUNDED AND LONGITUDINALLY MAINTAINED. CURRENT TRACKING SYSTEMS ARE FOR INSTRUMENT-CREATED, SMALL CO-TENANT POPULATIONS. SUCH SYSTEMS HAVE NO RELEVANCE TO TITLE TRACKING OF LARGE POPULATIONS OF STRANGERS OVER 1 TO 8 DECADES. AN APPROPRIATE SYSTEM REQUIRES THE PERFORMANCE OF MONITORING, INVESTIGATIVE, TRACKING AND RECORDKEEPING DUTIES FOR LARGE CO-TENANT POPULATIONS FOR WHICH THERE IS NO LEGAL OR PRACTICAL PRECEDENT.

THE "5% RULE, IS A MATHEMATICAL DOOMS DAY MACHINE. AS LAND FRACTIONATES AND REACHES THE ARBITRARY "5%" MARK, THE DEPARTMENT, FOR ITS OWN CONVENIENCE, WILL CEASE TO PROBATE INTESTATE INTERESTS OF LARGE CO-TENANT POPULATIONS UNTIL THE LAST OF THE JOINT CO-TENANTS IS DECEASED. WITHOUT AN EXPENSIVE "BIG BROTHER-TYPE" TRACKING SYSTEM, NO ONE WILL KNOW WHEN THE LAST CO-TENANT DIES. GIVEN CURRENT LIFE EXPECTANCIES, THE TRACKING PERIOD COULD BE UP TO 8 DECADES. UNLESS TITLE IS METICULOUSLY TRACKED FOR DEATHS AND DEEDS, TRUST INCOME WILL BE UNACCOUNTED FOR.

TRACKING WILL ALSO CONSTANTLY BE NECESSARY FOR "5%" (OR LESS) INTERESTS MERELY TO ASCERTAIN THE "PERCENTAGE OF CONSENT REQUIREMENT" FOR LAND TRANSACTIONS UNDER SECTION 219 OF THE NOVEMBER 7, 2000 AMENDMENTS.

NO STATISTCAL DATA OF INTERESTS AFFECTED NOR PROJECTED IMPACT HAS BEEN PUBLISHED. NO SPECIFICATION OF SPECIAL IMPACTS BY RESERVATION OR REGION, HAS BEEN PRESENTED TO THE TRIBES OR LANDOWNERS. CERTAIN REGIONS PREDOMINANTLY HAVE INTERESTS OF LESS THAN 5 PER CENT. IN SUCH REGIONS, ONCE THE BASE PROBATE IS

DONE, THE GOVERNMENT WILL SIT BACK AND DO NOTHING FOR DECADES. NEITHER THE GOVERNMENT NOR THE LANDOWNERS, AT ANY GIVEN POINT, WILL BE READILY ABLE TO IDENTIFY HOW MANY CO-OWNERS THERE ARE, AT THAT TIME, WITH OUT AN EXPENSIVE TITLE STATUS INVESTIGATION.

FAR FROM CREATING A CHEAPER, SIMPLER SYSTEM, JOINT TENANCY CREATES A MORE COSTLY AND BURDENSOME SYSTEM THAN CURRENTLY EXISTINGS AND ONE THAT ACTUALLY IMPAIRS LAND ADMINISTRATION AND INCOME TRACKING CAPABILITY.

THE DEPARTMENT OF INTERIOR HAS A DOCUMENTED TRACK RECORD OF FAILURE TO MANAGE INDIAN ASSETS AND RECORDS THEREFOR. THE SPECIAL MONITOR HAS JUST ANNOUNCED IN AN EMERGENCY REPORT THAT INTERIOR'S TRUST RECORDS MANAGEMENT ENTITY "IS UNIQUELY UNQUALIFIED TO HANDLE ITS TRUST RECORDS RESPONSIBILITIES." IT FURTHER FOUND THAT THE RECORD KEEPING ENTITY "IS INCAPABLE OF ADMINISTERING THE TRUST RECOORDS PROGRAM WITHOUT OVERSIGHT...THE VERY HEART OF THE TRUST IS AT STAKE." A TEMPORARY RESTRAINING WAS ISSUED AGAINST THE DEPARTMENT TO PREVENT IT FROM ARCHIVING ACTIVELY USED RECORDS FOR WHICH 6 REQUESTS A DAY ARE MADE.

THE DEPARTMENT'S OWN 1999 NAPA REFORT, AS WELL AS THE COBELL LITIGATION ITSELF, IS A TESTAMENT TO THE FACT THAT THE DEPARTMENT CANNOT BE RELIED UPON TO MANAGE INDIAN SYSTEMS, INCLUDING RECORDS, APPROPRIATELY. THE NAPA REPORT FOUND THAT THE INDIAN SERVICE COULDN'T PERFORM ITS EXISTING FUNCTIONS. USE OF INTESTATE JOINT TENANCY FORCES ALLOTTED LANDS INTO THE JAWS OF A KNOWN AREA OF DEPARTMENTAL DEFICIENT PERFORMANCE.

IT IS FOLLY TO BELIEVE THAT INTERIOR WOULD ACTUALLY DO WHAT IT WOULD TAKE TO MONITOR LANDOWNER DEATHS--SIMPLY TO TRACK TITLE OWNERSHIP--WHEN IT HAS SHOWN NO WILLINGNESS OR ABILITY TO HANDLE DEATH TRACKING VIA PROBATE. INTERIOR'S PROBLEMS AREN'T NEW.

THE FIRST DOCUMENTED PROBATE BACKLOG WAS IN 1913. THE NUMBER OF BACKLOGGED ESTATES WAS 40,000, THE VALUE OF THE ASSETS INVOLVED WAS $60 MILLION.

7. JUDICIAL REVIEW UNDER THE NOVEMBER 7, 2000 AMENDMENTS IS INAPPROPRIATELY RESTRICTED TO SEC. 207.

SECTION 215 AUTHORIZES THE SECRETARY TO ESTABLISH THE FAIR MARKET VALUE OF LANDS UNDER ILCA BY SYSTEMS THAT INCLUDE VALUATION BY GEOGRAPHIC UNIT. THIS SYSTEM CAN POTENTIALLY BE VERY HARMFUL TO OWNERS OF HIGH VALUE RESOURCES IF COMBINED, INAPPROPRIATELY, WITH LOW VALUE RESOURCES. THE RESTRICTION OF JUDICIAL REVIEW TO SECTION 207 (DESCENT AND DISTRIBUTION), BY IMPLICATION, SUGGESTS THAT ADVERSELY AFFECTED PROPERTY OWNERS HAVE NO LEGAL RECOURSE AGAINST ADVERSE ACTIONS. THIS OMISSION MUST BE CORRECTED TO SAFEGUARD THE PROPERTY RIGHTS OF LANDOWNERS.

8. EQUAL PROTECTION AND DUE PROCESS PROBLEMS EXIST IN THE NOVEMBER 7, 2000 AMENDMENTS.

SECTION 206(c)(1) AUTHORIZES TRIBES TO ACQUIRE "DEVISED" [WILLED] INTERESTS TO NON-INDIANS UPON THE PAYMENT OF FAIRMARKET VALUE "TO THE DEVISEE." INTESTATE HEIRS ARE NOT SO BENFITTED.

SECTION 206(c)(1) PERMITS TRIBES TO ACQUIRE DEVISED INTERESTS. SECTION 207(a)(2), SEPARATELY, AUTOMATICALLY CONVERTS A NON-INDIAN DEVISE TO A LIFE ESTATE. THE

REMAINDER PASSES EITHER AS DIRECTED IN THE WILL, IF THE REMAINDERMAN IS INDIAN, OR TO THE NEXT 1ST OR 2ND DEGREE HEIRS UNDER SECTION 207(a)(3)(A) OR (B).

IF THE NON-INDIAN KEEPS A LIFE ESTATE, THE PRICE IS REDUCED BY THE VALUE OF THE LIFE ESTATE. THIS MEANS ONLY THE REMAINDER IS BEING PURCHASED. HOWEVER, THE PURCHASE PRICE IS PAID, UNDER SECTION 206(c)(1) TO THE NON-INDIAN DEVISEE, NOT THE REMAINDERMAN. SECTION 206(c)(1) THEREFORE PRODUCES NOT ONLY A FORCED SALE OF THE REMAINDER BUT ALSO CONFISCATION OF THE REMAINDERMAN'S SALE PROCEEDS FOR THE BENEFIT OF THE LIFE TENANT.

SECTIONS 206(c) and 207(a) ARE NOT ONLY MUTUALLY INCONSISTENT BUT ALSO 206(c) VIOLATES THE DUE PROCESS RIGHTS OF THE REMAINDERMAN.

9. **THE NOVEMBER 7, 2000 AMENDMENTS ARE THE SOURCE OF ONGOING COMPLAINTS. THEY ARE EXTREMELY POORLY WRITTEN AND THE SUBJECT OF CONSTANT CRITICISM BY LAYMEN AND PROFESSIONALS ALIKE WHO ARE CHARGED WITH IMPLEMENTING ILCA. THEY ARE NOT UNDERSTANDABLE TO A MAJORITY OF PERSONS SPECIALLY TRAINED IN PROBATE. THEY ARE NOT UNDERSTANDABLE AT ALL BY LANDOWNERS.**

MULTIPLE TRAINING SESSIONS ON THE AMENDMENTS HAVE BEEN HELD BY INTERIOR. THE SESSIONS ON NUMEROUS OCCASIONS HAVE BECOME ACRIMONIOUS. PARTICIPANTS REPORT THAT MORE QUESTIONS ARE RAISED THAN ANSWERS PROVIDED. ATTENDEES OPENLY SPEAK OF THEIR FRUSTRATION. THEY CANDIDLY STATE THAT THEY DO NOT UNDERSTAND THE AMENDMENTS AND LEAVE THE SESSIONS FRUSTRATED AND EXASPERATED. THESE ARE THE INDIVIDUALS REQUIRED TO EXPLAIN IT TO INDIAN COMMUNITY MEMBERS. REALTY STAFF PEOPLE ADMIT THAT THEY CANNOT ANSWER LANDOWNERS' QUESTIONS. EVEN SEASONED PRACTIONERS OF INDIAN LAW FIND THEMSELVES STYMIED BY THE PROVISIONS. AT THE 2000 INDIAN LAND SYMPOSIUM ON THE FLATHEAD RESERVATION, ONE SPEAKER SAID THAT BY THE "3RD PAGE," HE HAD "BRAIN FREEZE."

THE AMENDMENTS ARE SO FAR OVER THE HEAD OF THE AVERAGE INDIAN LANDOWNER THAT THERE IS NO POSSIBILITY THAT MORE THAN A FRAGMENT OR SMALL ELITE GROUP OF LANDOWNERS COULD POSSIBLY UNDERSTAND THEM SUFFICIENTLY TO DEVELOP A SUITABLE ESTATE PLAN FOR ALLOTTED LANDS.

THE SENATE COMMITTEE STAFF WAS INFORMED OF THE PROBLEM BEFORE THE AMENDMENTS WERE EFFECTUATED.

CONCRETE EXAMPLES OF WHY PEOPLE ARE COMPLAINING ARE INCLUDED AMONG THE EXAMPLES SET FORTH IN THE NEXT NUMBERED SECTION.

10. **BOTH THE NOVEMBER 7, 2000 AMENDMENTS AND S. 1340 CONTAIN PROVISIONS THAT ARE NOT ONLY INTERNALLY INCONSISTENT BUT ALSO WRONG AS A MATTER OF LAW.**

E.G. S. 1340'S LIFE ESTATE AND REMAINDER PROVISIONS EVIDENCE A LACK OF BASIC TECHNICAL KNOWLEDGE ABOUT LIFE ESTATES AS TENANCIES AND REMAINDERS AS OWNERSHIP. SECTION 232(b)(2)(A)(ii) VESTS A ½ LIFE ESTATE IN THE SPOUSE AND PROVIDES FOR VESTING OF THE REMAINDER BUT NONETHELESS STATES THAT THERE IS ANOTHER ½ INTEREST LEFT NOT DISPOSED OF. *SEE* LIFE ESTATE AND REMAINDER CHART.

E.G. SECTION 202(5) [DEFINITIONS IN 11-7-00 AMENDMENTS] CORRECTLY DEFINES 1ST AND 2ND DEGREE RELATIONS. HOWEVER, SECTION 207(a)(3)(C) DEFINES THE SAME RELATIONSHIP CATEGORIES AS INCLUDING PERSONS OF 3RD AND 4TH DEGREE. *SEE* ASCENDANCY/DESCENDANCY CHART.

E.G. SECTION 207 REPEATEDLY USES THE PHRASE 1ST AND 2ND DEGREE COLLATERAL HEIRS. IN THE LAW OF CONSANGUINITY THERE IS NO SUCH RELATIONSHIP AS A "1ST DEGREE COLLATERAL HEIR". *SEE* ASCENDANCY/DESCENDANCY CHART.

E.G. THE JOINT TENANCY PROVISION FOR INTESTATE SUCCESSION, SECTION 207(c)(1)(B), WAS "INVENTED" OUT OF WHOLE CLOTH. SECTION 207(c)(2)(B) WILL BE THE 1ST KNOWN USE OF A NON-INSTRUMENT CREATED JOINT TENANCY IN THE HISTORY OF THE LAW OF REAL PROPERTY. IT IS AN EXPERIMENT, LIKE THE TWICE-REJECTED "2%" RULE." IT IS YET ANOTHER PERCEIVED "SILVER BULLET" TO LESSEN THE ADMINISTRATIVE COSTS AND LOAD FOR THE GOVERNMENT. THE EXPERIMENT IS AT THE EXPENSE OF INDIANS WHO, IN A SIGNIFICANT PERCENTAGE OF CASES, WILL HAVE NO METHOD OF IDENTIFYING CURRENT, ACTUAL OWNERSHIP FOR TRANSACTIONAL PURPOSES EXCEPT BY INCURRING GREAT EXPENSE. OPERATING FOR SELF-INTEREST IS A CONFLICT OF INTEREST AND A BREACH OF TRUST BY A FIDUCIARY AGAINST THE BENEFICIARY OF THE TRUST. INTESTATE JOINT TENANCY VS. JOINT TENANCY BY LEGAL INSTRUMENT, IF LEGAL AT ALL, WILL DESTABILIZE TITLES TO ALLOTTED LANDS IN ALL ALLOTMENTS WITHIN A SHORT TIME.

E.G. S. 1340'S USE OF JOINT TENANCY FOR PARENTS OF A DECEDENT IS UTTERLY ARBITRARY. IT CAN HARM CLOSE RELATIONS OF THE SAME BLOODLINE AS THAT FROM WHICH THE PROPERTY DESCENDED WHILE BENEFITTING PERSONS WHO ARE STRANGERS TO THE LINE OF DESCENT.

PROBATE IS A VERY OLD LEGAL SUBJECT MATTER AND A PRECISE ONE. MAKING UP LAW AND TENANCIES AS WELL AS IMPRECISE USE OF LANGUAGE INJECTS CONFUSION AND UNCERTAINTY INTO AN ALREADY COMPLICATED FIELD. INDIAN PROBATE IS CLASSIFIED AS A "SUBSPECIALTY" OF INDIAN LAW. IN THIS DAY AND AGE, INDIANS SHOULD NOT CONTINUE TO BE HARMED BY MADE UP LAW AND NOVELTY EXPERIMENTS THAT ARE UNTETHERED TO KNOWN SUBJECT MATTER PRINCIPLES AND STANDARDS. EFFORTS BY THE INDIAN LAND WORKING GROUP TO POINT OUT TECHNICAL AND LEGAL DEFICIENCIES, AS WELL AS PRACTICAL CONSIDERATIONS, HAVE BEEN IGNORED. A CURRENTLY SITTING INTERIOR JUDGE WITH DECADES OF EXPERIENCE IN INDIAN PROBATE STATED THAT "THE ILCA AMENDMENTS HAVE MORE HOLES IN THEM THAN SWISS CHEESE."

11. THE NOVEMBER 7, 2000 AMENDMENTS SANCTIONS BOTH WASTE OF ACQUISITION FUNDS AND OPERATES TO THWART THE SUPREME COURT DECISION IN BABBITT V. YOUPEE (1997).

5 YEARS AFTER THE SUPREME COURT DECISION, THE DEPARTMENT OF INTERIOR HAS NOT RESTORED "2%" INTERESTS UNDER THE 1984 AMENDMENT TO ILCA TO THE RIGHTFUL OWNERS.

THE PILOT ACQUISITION PROGRAMS AUTHORIZES A PREFERENCE FOR SECRETARIAL ACQUISITION OF UNRESTORED "2%" INTERESTS. ALTHOUGH TRIBES ARE AUTHORIZED TO DEVELOP CONSOLIDATION PLANS UNDER SECTION 204, THE SECRETARY IS ONLY TO CONSULT WITH TRIBES TO THE "EXTENT PRACTICABLE," A PURELY SUBJECTIVE STANDARD UNDER THE EXCLUSIVE CONTROL OF THE DEPARTMENT.

TRIBES DEVELOP PLANS GEARED TO WHAT THEY DEEM IMPORTANT. NONETHELESS, THE DEPARTMENT MAY IGNORE TRIBES' WISHES AND INVEST MONEY IN RANDOM, NON-UNITIZED ACQUISITIONS THAT ADVANCE NO TRIBAL OBJECTIVE TO AVOID THE BURDEN OF GIVING THE INTERESTS BACK TO THE RIGHTFUL OWNERS. BOTH THE PROVISION AND THE OBJECTIVE ARE IMPROPER.

12. NEITHER THE NOVEMBER 7, 2000 AMENDMENTS NOR S. 1340 DECLARE THAT ALLOTTED LAND FRACTIONATION CONSOLIDATION IS A FEDERALLY PREEMPTED SUBJECT MATTER.

ALLOTTED LAND CONSOLIDATION IS IN DANGER OF BECOMING INAPPROPRIATELY EMBROILED IN THE FEE-TO-TRUST CONTROVERSY FUELED, PREDOMINANTLY, BY EASTERN LAND CLAIMS AND ASSOCIATED GAMING CONFLICTS.

FRACTIONATION IS AN ALLOTMENT ISSUE. THERE ARE NO ALLOTMENTS EAST OF THE MISSISSIPPI. ALLOTMENTS OFTEN INCLUDE INTERESTS THAT HAVE GONE OUT OF TRUST.

THE SAME LEGAL ARGUMENTS THAT ARE MADE ABOUT FEE INTERESTS WITHIN RESERVATIONS COULD BE MADE WITHIN INDIVIDUAL ALLOTMENTS MAKING ALLOTTED LAND JURISDICITION, MANAGEMENT AND ADMINISTRATION, ALONG WITH FRACTIONATION RESOLUTION, EVEN MORE COMPLICATED THAN IT IS NOW.

IT IS IMPERATIVE THAT CONGRESS, IN S. 1340, UNEQUIVOCALLY DECLARE INDIAN LAND CONSOLIDATION AND ACQUISITION OF FRACTIONATED INTERESTS IN ALLOTMENTS WHETHER TRUST, RESTRICTED OR FEE, FEDERALLY PREEMPTED SUBJECT MATTERS.

RECENT SUPREME COURT DECISIONS HAVE TAKEN CONGRESSIONAL SILENCE REGARDING JURISDICTION AS LICENSE TO INFER OR IMPUTE STATE JURISDICTION. FEE INTERESTS WHETHER OWNED BY NON-INDIANS OR INDIAN TRIBES HAVE BEEN A PRIMARY GATEWAY FOR BLEEDING OFF TRIBAL PRIMACY OVER RESERVATION LANDS.

ALLOTTED LAND FRACTIONATION IS ONE OF THE MAJOR CONTRIBUTORS TO THE TRUST FUND MANAGEMENT PROBLEMS CONFRONTED BY THE GOVERNMENT. THE SITUATION CAN STAND NO FURTHER IDIOSYNCRACIES OR COMPLICATIONS.

CONGRESS MUST STATE IN NO UNCERTAIN TERMS THAT STATES HAVE NO ACTIVE JURISDICTION OR OTHER SUBSTANTIAL ROLE AS TO FRACTIONATED INTERESTS IN OTHERWISE TRUST OR RESTRICTED ALLOTMENTS, INCLUDING FEE-TO-TRUST ACQUISITIONS OF ALLOTTED INTERESTS. IF IT DOES NOT, THEN, THE TRIBES' CONSOLIDATION PLANS AND FEDERAL EFFORTS TO MANAGE, REGULATE AND ACCOUNT FOR TRUST RESOURCES AND INCOME WILL BE FOR NAUGHT AND MAY EASILY BECOME EMBROILED IN THE STATE JURISDICTIONAL AND LAND ACQUISITION AND REGULATION CHALLENGES.

13. THE DEPARTMENT OF INTERIOR PROPOSES TO RETURN TO A SYSTEM OF DENIGRATED STATURE FOR INDIAN PROBATE BY MAKING PERMANENT THE USE OF NON-ADMINISTRATIVE PROCEDURE ACT ADJUDICATORS IN INDIAN ESTATE PROCEEDINGS.

THE DEPARTMENT OF INTERIOR HAS A HISTORY OF ANIMUS, DOCUMENTED IN THE AMERICAN BAR ASSOCIATION JOURNAL, TOWARDS RECOGNITION OF INDIAN PROBATE AS PROCEEDINGS PROPERLY CONDUCTED UNDER THE APA. IN DOING SO, IT IGNORED SUPREME COURT DECISIONS AND ITS TRUST RESPONSIBILITY.

ITS POSITION, BY AMENDING 25 USC 372, IS, PERMANENTLY, TO AFFORD INDIAN LANDOWNERS TO WHOM IT OWES A TRUST RESPONSIBILITY LESSER PROTECTIONS IN LAW THAN IT AFFORDS PERMITTEES AND LICENSEES ON PUBLIC LANDS.

INDIAN LANDOWNERS ARE ENTITLED TO THE SAME PROTECTIONS IN LAW AS ARE AFFORDED ALL OTHER LITIGANTS BEFORE THE DEPARTMENT.

A NARROW EXCEPTION FROM THE APA WAS AUTHORIZED BY CONGRESS THREE YEARS AGO FOR PURPOSES OF ADDRESSING THE PROBATE BACKLOG ONLY.

THE PROFESSIONALS WHO PARTICIPATED IN PHASE II OF THE PROBATE REINVENTION LAB (PART OF HLIP) FORMALLY DISAVOWED, IN WRITING, THE LEGITIMACY OF THE FINAL PROBATE REDESIGN DECLARING IT A MASSAGED, FOR SHOW ONLY PROCESS UNDERTAKEN SOLELY FOR THE PURPOSE OF APPEARING TO HAVE DONE SOMETHING REGARDING TRUST REFORM FOR COBELL JUDGE.

THE USE OF NON-APA ADJUDICATORS FOR INDIAN ESTATE PROCEEDINGS WAS TO BE VERY LIMITED AND TO HAVE A SUNSET PROVISION. THE DEPARTMENT HAS, IMPROPERLY, AND WITHOUT LEGAL AUTHORIZATION, EXPANDED THE USE OF NON-APA PROCEEDINGS TO MAKE THEM THE PRIMARY ADJUDICATION SYSTEM—TO THE DETRIMENT OF THE LANDOWNERS.

INDIANS ARE ENTITLED TO THE SAME RIGHTS AND PRIVILEGES BEFORE THE DEPARTMENT AS IS PROVIDED TO NON-INDIAN ADJUDICANTS WITH LESSER INTERESTS TO WHOM NO FIDUCIARY DUTY IS OWED.

SINCE THE NON-APA SYSTEM WAS IMPLEMENTED, THE BACKLOG , AS REPORTED BY INDIAN COUNTRY TODAY, HAS DOUBLED. THE BACKLOG CONTRACTORS IN THE MAIN HAVE ONE DAY'S PROBATE TRAINING. THERE IS REPORTED CONTENTIOUSNESS BETWEEN UNKNOWLEDGEABLE CONTRACTORS AND TRAINED PERSONNEL AND, MORE ALARMINGLY, REPORTS OF WILLS HAVING BEEN THROWN AWAY BY CONTRACT PERSONNEL WHO MADE VALUE JUDGMENTS ABOUT MATTERS BEYOND THEIR AUTHORITY AND SUBJECT MATTER KNOWLEDGE. THE 1999 NAPA REPORT CLEARLY STATED THAT INTERIOR'S INDIAN COMPONENT COULD NOT HANDLE EXISTING FUNCTIONS. NONETHELESS, INTERIOR REFORM HAS FUNNELED MORE FUNCTIONS TO THAT SAME SECTOR. ADJUDICATION IS NOT AN APPROPRIATE FUNCTION TO BE PERFORMED BY AGENCY PROGRAM COMPONENTS ESPECIALLY ONES WITH A DOCUMENTED HISTORY OF NON-PERFORMANCE. THE COMMITTEE IS ASKED TO STOP THE EROSION OF ADJUDICATIVE PROTECTIONS FOR LANDOWNERS. IT MUST NOT MAKE NON-APA ADJUDICATION PERMANENT, THEREBY REVERSING THE ACT OF MAY 24, 1900, WHICH WAS DESIGNED TO ENSURE THAT INDIAN LANDOWNERS ARE TREATED ON A PAR WITH NON-INDIAN PARTIES IN INTERIOR'S ADMINISTRATIVE ADJUDICATION SYSTEM.

14. INDIAN PROBATE AND ITS BASIC FUNCTIONS ARE NOT APPROPRIATE FOR PRIVATIZATION DUE TO LACK OF KNOWLEDGE OF THE SUBJECT MATTER WITHIN THE MAINSTREAM COMMUNITY AND PROBATE'S DIRECT RELATIONSHIP TO TRUST FUND MANAGEMENT ISSUES CURRENTLY IN LITIGATION. GIVEN THE DEPARTMENT'S POOR SHOWING IN COBELL, ACTS OF MALFEASANCE BY MARGINALLY-TRAINED AND "OJT" CONTRACTORS WILL ONLY ENHANCE PROBLEMS AND POTENTIAL DEPARTMENTAL LIABILITY.

INDIANS ARE TYPICALLY ASSIGNED THE BLAME FOR WHAT ARE , IN FACT, FEDERAL POLICY, MANAGEMENT AND BUDGET DECISIONS. INDIANS ARE BLAMED FOR COSTING TOO MUCH. INDIANS WOULD COST SUBSTANTIALLY LESS IF COMMON SENSE, ORDINARY BUSINESS PRACTICES AND STANDARDS WERE APPLIED BY THE GOVERNMENT IN THE CONDUCT OF INDIAN AFFAIRS AND SYSTEMS WERE DESIGNED BY REFERENCE TO OBJECTIVE NEED RATHER THAN POLITICS AND SELF-INTEREST.

THE GOVERNMENT HAS HISTORICALLY ADDRESSED THE "INDIAN PROBLEM," WHICH MEANS "HOW TO GET RID OF THE COST AND BURDEN OF INDIANS," BY IMPROVIDENT MEASURES IT, AT THE MOMENT, SEES AS IN ITS INTEREST BUT DECLARES TO BE FOR THE BEST INTEREST OF INDIANS.

PRIVATIZATION HAS BEEN TRIED IN OKLAHOMA, PALM SPRINGS AND NOW, TO NAME ONLY A FEW INCIDENTS. ON EACH OCCASION, IT HAS BEEN LETHAL TO INDIANS, THEIR PROPERTY AND THEIR RIGHTS. PRIVATIZATION WAS A 1950s "TERMINATION" PROPOSAL. IT REMAINS A TERMINATION MEASURE WHEN UNDERTAKEN BY A TRUSTEE THAT HAS FAILED TO PERFORM ITS DUTIES AND THAT WISHES TO GET RID OF THE RESPONSIBILITY FOR TASKS IT DID NOT COMPETENTLY HANDLE. PRIVATIZATION, TO BORROW THE SPECIAL MASTER'S LANGUAGE, IS A METHOD OF CONCEALING NON-PERFORMANCE BY INTERIOR.

REFERENCE TO THE RESOURCES TO BE ADMINISTERED AND THE INTERESTS OF THE AFFECTED COMMUNITY MUST ADDRESS THE TRUST FUND PROBLEM. TO DATE, ALL THAT HAS BEEN ACCOMPLISHED IS GROSS WASTE OF LIMITED RESOURCES WITH CORRESPONDING LOSS OF PATIENCE WITH INDIANS AS THOUGH THEY WERE RESPONSIBLE FOR THE POOR DECISIONS AND ACTIONS OF INDIAN AFFAIRS ADMINISTRATORS, DECISION-MAKERS AND POLITICIANS.

THERE IS NO LONGER ANY MARGIN FOR ERROR OR ROOM FOR MISTAKES.

15. THE OFF-RESERVATION DESCENT PROVISIONS ARE DESIGNED TO GET RID OF DIFFICULT TO MANAGE LANDS WITHOUT FIXING THE FRACTIONATION PROBLEMS.

FOR DECADES THE DEPARTMENT OF INTERIOR HAS BEEN TRYING TO GET OUT FROM UNDER THE ONUS OF HANDLING OFF RESERVATION ALLOTMENTS. THE ALLOTMENTS CAN BE UNDER THE INDIAN HOMESTEAD ACT, SPECIAL ACTS OF CONGRESS OR ANY NUMBER OF LAWS.

BECAUSE SUCH LANDS OFTEN, BUT NOT ALWAYS, EXIST IN RELATION TO POPULATIONS WITH LOOSE TRIBAL GOVERNMENTAL SYSTEMS, THE NETWORK FOR MANAGING THEM IS LESS EFFECTIVE. THE RESULT HAS BEEN THAT THE GOVERNMENT ONLY MARGINALLY TRIES TO KEEP UP WITH OWNERSIIIP.

SECTION 207(d) REWARDS THE NON-PERFORMING TRUSTEE BY THROWING THE BABY OUT WITH THE WASH. IT MANAGES THE INTERESTs BY ELIMINATING THEM FROM THE FEDERAL BOOKS. IF THE OWNER IS NOT "INDIAN" UNDER ILCA'S NEW "NARROW" DEFINITION, THE INTERESTS PASS TO THE HEIR IN "FEE."

MANY OFF-RESERVATION ALLOTMENTS ARE IN THE FAR WEST AND ASSOCIATED WITH BANDS, TRIBLETS OR SIMILAR SMALL GROUPS WHO HAVE SOME HOW MANAGED TO SURVIVE BUT THAT HAVE LOOSE GOVERNMENTAL SYSTEMS WHICH MAY NOT INCLUDE ON-GOING ENROLLMENT. TRIBAL MEMBERSHIP, THE ILCA GOLD STANDARD, WILL FREQUENTLY NOT EXIST. THE DEPARTMENT THEREFORE WILL BE ABLE TO WASH ITS HANDS OF DIFFICULT TO MANAGE LANDS AND REPENALIZE TRIBES THAT WERE OFTEN VICTIMS EXTERMINATION AND OTHER NEGATIVE PRACTICES.

NO STUDY WAS DONE TO EVALUATE THE IMPACT OF THIS PROVISION UPON THE AFFECTED INDIAN POPULATION. THE INDIAN LAND WORKING GROUP BROUGHT THIS ISSUE TO THE ATTENTION OF COMMITTEE STAFF. WHILE CALIFORNIA WAS EXCLUDED FROM COVERAGE, 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. SUCH GROUPS RECEIVE FEW FEDERAL SERVICES AND HAVE LIMITED CONTACT WITH FEDERAL INDIAN LAND MANAGERS. OTHER SOLUTIONS MUST BE DEVELOPED FOR THESE INTEREST THAT THROWING THEM OFF THE FEDERAL BOOKS FOR THE GOVERNMENT'S CONVENIENCE. AND THEREBY FURTHER REDUCING AN ALREADY SEVERELY SHRUNKEN INDIAN LAND BASE.

OKLAHOMA SUPREME COURT SOVEREIGNTY SYMPOSIUM

"An Overview of Indian Probate Past and Present"
Judge Sally Willett, Cherokee Tribe
March 2002

Introduction

Indian probate, classified as a subspecialty of Indian law,[1] has been the stepchild of Indian law for as long as I can remember. Discounted by the federal administrative apparatus and ignored by the tribes, Indian probate boiled and brewed until, one day, it blew into a $10 billion dollar lawsuit.[2]

Even now, Indian Country has not fully recognized the visceral connection between Indian probate and trust fund distribution. Failing to take the time to study the subject matter in the depth required for genuine evaluation, in 2000 tribes acquiesced in the federal government's gerry rigging complicated reform laws that are not merely unknowable, with some provisions having no foundation in known real property law, but in all likelihood not implementable and, if implementable, only by the establishment of more expensive bureaucratic systems at a time when resentment of the cost of Indian programs runs dangerously high.[3] The damage of the alleged reform measures to the overall land base, in the long run, will be incalculable because not only have tribes dropped the ball on the probate/trust fund distribution connection, they have failed to see dangerous allotted land/jurisdictional exposure that ignoring probate issues has generated.

Indian probate involves allotted lands. Allotted lands are about one-fifth of the remaining Indian trust and restricted land base.[4] At least ninety-two percent of allotted land titles pass in probate.[5] Probate is the playing field upon which fractionation (multi-generational accumulation of joint tenancy interests) occurs. Allotted lands, specifically, those reservations where allotting, then, surplusing and opening to settlement and entry occurred are Indian Country's soft underbelly. It is the viscera where the states' endless jurisdictional attacks find an inviting and easy point of entry.[6]

The federal government recognizes a connection between trust fund distribution and probate but misses a fundamental ingredient of probate. In all likelihood, its blindness is intentional. It is certainly imperious. It sees only a dollar or cost of administration connection[7] but not the particular aspect of probate, heritage, that makes heirship a reverberating presence within the local Indian community unsusceptible to dollar calibration.[8]

Indian probate has a unique duality that eludes most observers. Because it is an arcane subject matter, known and understood by few, and because it has been dismissed historically as an inconsequential subject matter by the government and tribes alike, there is a general tendency is attribute to Indian probate the same perceived stodginess that is commonly associated with probate practices in the general population.

Such perceptions have little foundation in realty. At one rung, the familial/heritage

level, Indian families, often for the first time, see generations of their history and land ownership laid out before their eyes. Additionally, ancient cultural practices relating to funeral, burial and inheritance interact with modern laws to create unique problems and issues in the adjudication of Indian estates. There is also the ordinary human element: Indian probate is second only to domestic relations in the expenditure of raw emotion and intensity of feelings injected into proceedings. Dramas and pitched battles often unfold in a federal forum in which none of the parties are represented and in which family members funnel old grievances into the only arena available in which to duke it out. Embittered adjudicants, sadly, often put the last nail in the coffin of family relations in probate. At this level, families also confront the difficult decisions to be made concerning future ownership of familial assets linked to heritage in which there are more people to benefit than assets to confer and important fractionation avoidance issues to be addressed. These are the issues that Interior ignores and of which tribes seem to be oblivious. Congress's only response has been to compound landowner's difficulties by framing laws that the latter cannot comprehend much less apply in developing estate plans.

On the opposite end of the spectrum, are the system and process issues. While procedural practices have varied from 1887 to date for processing of probates, substantive Indian probate laws, for all but the Five Civilized Tribes, were only fine tuned from 1910 to 1983.[9] Procedurally, an administrative adjudicative model has been largely followed since the enactment of the Administrative Procedure Act in 1946. The quasi-judicial adjudication model was solidified in 1970 following the Supreme Court decision in Tooahnippah v. Hickel and the creation of the Department of Interior's Office of Hearings and Appeals.[10]

It was not the processing model that has produced the system blow out that Interior now faces in individual trust fund management, which is merely one station in the allotment-ownership sequence largely determined in probate. There are three basic reasons for the melt down:

(1) On each occasion in which the government has identified the problem of fractionation, beginning in the 19th century, it declined to address it due to cost. Property interests protected by the 5th Amendment require compensation for the taking as the government has twice learned;[12]

(2) "Simply put, the department does not respect the subject matter even though probate impacts one-fifth of the remaining Indian trust [and restricted] land base. Interior 'talks fractionation/probate talk' as glib patter but…does not 'walk its talk, in either a fair or realistic way.' This is so in major part, because there are few people in the upper echelons of the department and there have not been in many years where Indian land policy is made who have substantive knowledge about a subject that is so technical it is considered by Indian law experts to be a sub-specialty of Indian law."[13] Reform solutions have been designed in a vacuum, like the allotment act itself, and similarly by reference to the

wants and needs of the government without examination of the physical realities of the land base.[14] No actual or detailed technical studies or inventories of the current allotted land base, ownership data, accounting for the allotted land base and surplus land act reductions, special statutes applicable to particular reservations or areas or like surveys were conducted before the most recent amendments to the Indian Land Consolidation Act (hereinafter "ILCA") were drafted or, for that matter, before the act was first passed in 1983. The government developed a solution to a not fully charted problem. Moreover, due to last minute changes in the amendments between July 2000 and the date the amendments were enacted in November 2000, the Bureau of Indian Affairs' regulations, as published in the Federal Register on January 22, 2002 (effective March 23, 2002) relate to a different version of the amendments and, therefore, do not conform in certain respects to substantive law.[15]

(4) There has been long-term wholesale disjunction between Interior's approach and the problems present in probate administration. From 1980 to 2000, demonstrating palpable disdain for Indian probate proceedings and maintaining a form of apartheid as between public land adjudication and probate adjudication from 1970 until 1995, if not later, the Department of Interior systematically closed multiple local service probate field offices and redistributed the work to more remote offices that were not given increased manpower or resources, including travel funds, to address the increased caseloads. With no concern for impact, Interior's cumulative actions, then final blow in 1996, cubed already crisis conditions for probate at the end of the 1990s. Certain adjudicators saw caseloads rise to 1300 pending cases with staffing levels maintained, when fully filled at all, at the same size as when probate office work loads averaged 150 or less cases a year. *See infra* n. 20 Interior was "...downsizing the system and eliminating resources available to it at a time when the problem of fractionation [was] dramatically increasing.[16] It dealt the deathblow to probate in the exact same month (June 1996), actually a few days after, the Cobell suit was filed. Whether the Cobell plaintiffs understood, or even now understand, the full probate/trust fund management-distribution connection is not known. However, the palpable irony of giving lavish cash awards, replete with self-important ceremonies, to downsizing appointed officials who carried out the final devastating wave of probate office closures which implicitly later served as a contributing factor in the contempt findings against departmental officials, including the Secretary of Interior and Secretary of Treasury, does not escape notice. The probate adjudication function had been systematically raided for the benefit of other departmental components without consequence for nearly two decades. There is obvious

> symmetrical justice in the fact that an Indian realty function, historically denigrated as a throwaway activity by non-Indian officials, should bite back in the relentless manner that it has. However, still, Interior like a petulant child continues its habitual pattern of bluffing, ignoring and stonewalling its way through the trust fund debacle. It simply knows no other way to treat Indians. Simply fixing the situation by appropriate measures with which Indians agree seems to be out of the question.

These combined actions and conditions culminating in contempt citations have, as is typically the case, triggered reform overkill. Solutions were designed. It is not clear that the actual problems involved figured in Interior's solutions. Rather than analyze what the department and Congress actually did wrong and assess the merits of what was right in the system, under the High Level Implementation Plan (hereinafter "HLIP")--a smoke and mirrors process designed largely to get the Cobell judge off Interior's back following the secretarial contempt citations--Interior moved away from Administrative Procedure Act protections for Indian allotted landowners. Under HLIP, it 'programized' adjudication in an agency that is said to be bereft of management capability in its own commissioned study[17], created five levels of potential review[18], essentially doubled the number of probate adjudicators, the tail end of a continuous probate pipeline, and apparently managed, in the process, to double its probate backlog.[19]

Interior's current Byzantine system, as exacerbated by the November 7, 2000 ILCA amendments, is akin to shooting a canary with a shotgun. Interior has gone from a simple, albeit chronically under-funded, under-staffed and under-equipped adjudication model, with straightforward laws and rock solid probate procedural regulations, that required only occasional tune ups, to an expensive, layered, internally-inconsistent, resource-competitive and unproductive system, further bogged down by poorly-crafted regulations and succession laws that defy explanation to those who are required to apply them, federal employees and Indian community members with an average sixth to eighth grade educational level.

In 1990, the Blue Ribbon Committee Report of Interior's Office of Hearings and Appeals [hereinafter "OHA"] found that, despite serial office closures over a ca. ten year period, OHA Indian probate field offices, manned by an Indian law-knowledgeable work force, had not only managed to keep on top of their workloads, actually tripling productivity, but maintain essentially the same processing time as when their workloads were one-third their size. The report openly acknowledged that such productivity was not due to automation or any other management-generated factor but due to the willingness of field office personnel to do whatever it took to keep on top of their workloads for the benefit of their client communities. In 1996, political appointees in the Policy, Management and Budget component of the Office of the Secretary and OHA, responsive to general policy/budget demands upon what they considered to be available-for-the-taking Indian probate resources, dealt a fatal blow to OHA's field capability by closing two offices, Billings and Phoenix, in the heart of Indian Country. Their respective

workloads were sent to a remote (out-of-region) office that had a known and well-documented bias against performing Indian probate work confirmed by a specific briefing report prepared by Interior's Inspector General's Office auditors prior to the office closures.[20] The transferee office was sarcastically referred to as "Pangea" by Indians because it extended from the Mexican border to the Artic Circle.

Performance problems with probate data preparation duties at BIA agency offices, where probate backlogs originate, were due to similar yet distinct impediments. In BIA, probate was a generally discounted function. It was considered a laborious/time consuming almost nuisance activity. In the past, certain Realty Officers, administering programs with generally inadequate budgets and staffing, were focused largely upon other functions, including lease distribution activities. They did so without apparent appreciation for the fact that probate was required to determine the ownership of the leased lands for which IIM distributions were made in over ninety percent of the allotments. Nonetheless, agency probate personnel man-hours were shifted to other functions leaving probate duties, in an exponentially fractionating land base, to languish. The agencies robbed Peter to pay Paul. One southwest agency that often submitted death reports showing up to twenty-five deaths a month, a high percentage of which were landowners, for years, had a single GS-4 probate clerk to address 4998 land allotments. The clerk was constantly reassigned to perform collateral duties.[21]

The importance of probate on allotted reservations cannot be over stated. Apparently, only certain field probate personnel in OHA and BIA have understood that probate and lease income and other distributions related to allotments were simply different points on an ownership continuum. In certain areas, Arizona for example, sales of interests in allotted lands are unheard of. Trust-to-fee sales are non-existent. Therefore, all titles to allotted lands were and are transferred in probate except for occasional gift deeds from elder family members to younger individuals usually for .625 acre home sites. To those accustomed to thinking of sums associated with allotted lands as small, they should consider that on the Salt River Pima-Maricopa Reservation, out of a $233 million dollar distribution for a highway right-of-way taking, ca. $214 million was individually distributed. Similarly, another estate at San Xavier (Tohono O'odham), consisting of fractionated interests only, leased for copper mining had an *estimated* value of $8 million with $80,000 in IIM. Estates with timber lands and proceeds from logging can see million dollar IIM balances. Agua Caliente estate values run uniformly high.

BIA agency-level probate workloads, under the conditions described in the penultimate paragraph, chronically backlogged, more often than not, as a function of budget decisions over which they had no control. BIA, like OHA field offices, therefore, faced gross understaffing and wholly inadequate resources with training on the fly. The difference was that BIA, the perennial whipping boy, has historically been assigned the sole blame for what actually amounts to programmed performance failure on account of budget decisions made by Congress and policy-makers who fail to assign to themselves any role in the performance downfall. Contrary to popular assertions, and crediting some institutional recalcitrance at specific field sites, BIA field employees with Indian

preference were not found to be less qualified, less motivated or less capable of positive performance than the personnel of other federal agencies.[22]

Currently, the government contends that fractionation/allotted land/probate issues cannot be managed. It is not in a position to make that assertion because it has never tried. The government has spent the majority of its efforts since 1887, and before, trying to figure out how to get out of the Indian business, not manage or account for Indian resources. Had it spent a scintilla of the effort and resources managing Indian assets that it has spent planning and devising ways not to, it would not be in the fix it is today in Cobell nor would it have taken Indian Country down with it.

Indian Country has received, over its objection, precisely what the U.S. and other sectors wanted to have, and no more, since point of contact. The results speak for themselves. Despite the desire of the U.S. to be rid of the *Indian problem,* as it is historically styled, when Indians attempted to give the government what it wanted, even to the point of immigrating to other countries, it balked at that too. Essentially, the government's attitude has been like that of a spoiled child. It didn't and doesn't want to be bothered with Indians, it resents living up to the treaty commitments imposed upon them but hasn't wanted them to get away either.

The current demands for Indians to quit costing money and be successful--in an apparent vacuum because their entrepreneurial efforts are torpedoed at every turn--are simply echoes of an historical refrain Indians are sick of hearing. If history shows anything, it is that policy framers, almost universally, have been wrong and that the objections and warnings of Indians have almost always been right. Repeating past mistakes including ignoring Indian input, as Interior demonstrates every indication of doing today, is unacceptable. Policy-makers and interest groups need to "lead appropriately, follow or get out of the way."

Indian Country stands at the threshold of a new century and millennium. One-fifth of its land base is shackled by the residue of a malformed but enduring policy experiment that had no chance of working under any set of assumptions. It, like all other policies, was designed primarily to ensure that Indians would no longer be cared for by the federal government. Critical reasons for its failure will be seen in the next section.

Allotting

No discussion of probate is complete without a discussion of allotting. There is virtually no one in Indian Country who doesn't know that allotting was a method not only of termination of tribes and breaking up the vast tribal estate but also a means of getting coveted Indian resources into white hands. It is also well known that Indians were amazed by suggestions that one could purport to own nature or give them what they already occupied. Similarly, there is virtually no one who does not know that big business and other self-interested groups rode on the coattails of do gooders who, knowingly or not, served as cover for the sharks'/capitalists'/grafters' pecuniary motives much in the same

way, today, that purported morality-focused and other alleged citizens groups serve as a convenient shield for big money gaming/gambling interests in Las Vegas, Atlantic City and elsewhere who don't want their ox gored. Indian history is full of alliances of convenience by sectors that want what Indians have. The dynamic continues unabated.

At this point, how allotting came to pass is irrelevant except as a backdrop and as an object lesson. The bottom line is that the job got done over Indians' vehement objection and vigorous resistance and has gone on to produce two notable results: (1) the demographic collapse of previously successful Indian tribes and communities, and their economies, with concomitant astronomical increases in poor diet-related, chronic wasting and debilitating diseases which are now at epidemic levels[23] with conditions in 1928 and 1970 being essentially the same and appalling conditions still present in 1999, and (2) a land management nightmare for everyone: tribes, landowners and the government alike.

It would be gratifying to believe that the government's announced intention to "fix" the trust fund management debacle is for the benefit of Indians and tribes. However, Indians, to the extent that they are considered at all, are simply third party, incidental beneficiaries. Sovereignty and self-determination mean real jurisdiction, not use of the terms for effect or a process ignored more often than observed. Today, no one is deceived by the government's cosmetic use of these terms. An example of the true federal attitude is reflected in ILCA's 3-year pilot allotted land acquisition project. The Secretary is permitted to buy interests from willing sellers with a preference for 2% interests that should have been restored to the true owners after the supreme court decision voiding the 2% rule, but were not. In making acquisition selections, tribal input is limited to whatever the Secretary deems practicable. This subjective power could override tribal land consolidation plans and basically fritter away limited acquisition resources on random purchases that do little to promote block consolidation in desirable areas as determined by the tribe.

The goal of the Interior is to reduce the cost of Indian administration for its benefit and to save its officials from contempt citations. ILCA amendment findings mention costs. Interior officials concede that a primary goal is to reduce the government's administrative load and costs. This is openly admitted in meetings with tribes. It would be naïve to believe that any cost savings achieved would be turned over to Indian Country. Beyond the goals and perceived "fixes," a problem of more than one hundred and fifteen years in the making is not likely to resolved by yet another in a long line of silver bullets, especially one, like BITAM, that is of the quick fix variety unaccompanied by resource studies. Today, Indians are in an era identical to that which preceded the allotment act. Solutions are designed first. Context is seemingly irrelevant as is input from the impacted.

Before proceeding to address lesser known but critical aspects of allotting and its history, it would be derelict not to mention that there are attitudes within and elements of the national population who not only repeat today refrains identical to the 1880s-style demands for assimilation that accompanied the destruction of tribal economic self-

sufficiency--which is now once again resented--but also glaringly inconsistent and not-so-subtle demands that Indians cease to be a drain on the treasury as though there were no desire for self-sufficiency nor efforts in progress to attain economic stability.

Paralleling this current among anti-Indian sectors is the question of how long this country has to continue atoning for past wrongs. The sentiment implicitly conveyed is that Indians have had it sweet for too long, that they need to get on with the program and live in the present. The further tacit implications are that Indians fell to the bottom and stayed there on their own and that all wrongs done to them were in the remote historical past. None of the preceding is correct.[24]

Moreover, such attitudes ignore a demonstrable fact evident to open-minded observers: When Indians pursue and demonstrate actual success at embracing the American entrepreneurial dream, they are resoundingly attacked and disadvantaged in ways inconceivable if any other population were involved. The Indian gaming act is a notable example. Disadvantageous, mandatory contract restrictions directing short contract terms, directives regarding use of profits and limits upon fees paid under management contracts were imposed under the act *during an era of wanton free market enterprise* and skyrocketing CEO salaries in the Reagan years. Effectively, tribes were hamstrung to make them non-competitive with big money, non-Indian gaming interests who allegedly spent a hundred thousand a month lobbying for the act.

In summary, Indians have been and continue to be pushed to the bottom of the pile by two hundred years of active, serially disastrous policies designed to benefit third parties, the benefits and adverse consequences of which to Indians have been irrelevant to policy framers who compounded the harm by labeling patently inept measures as in the "best interests" of Indians.[25] It is high-minded language with a low-down purpose. It deceives no one who does not chose to be deceived. The companion to labeling is distortion. From tirades against gaming tribes, one could easily believe that every Indian has a casino in his back pocket and gets the proverbial monthly check, a far cry from the reality that fifteen to twenty tribes have the big gun operations said to be representative of the whole and that forty-five to fifty percent of the population lives at or below the poverty line.

The disjunction or rather chasm between fact and fiction on Indian issues is neither new nor novel. The same distortions were present in the 1920s when Osage oil wealth, known as the black curse, made them the richest and most murdered population in the world. Their wealth was cast as a norm for Indian Country in stark contrast to the harsh realities expressed in the contemporaneous Merriam report.

Allotting, out of all federal Indian policies, is the poster child for policies of third party benefit at Indian expense and of reform ineptitude by policy framers that can only find rational explanation in their having purposely put on intellectual blinders.

Most people familiar with Indian land know allotting only as a product of the

General Allotment Act of 1887 (hereinafter "GAA").[26] A majority of people have no idea of the range or breadth of enactments associated with allotting. A list of allotted reservations or areas by state (except Alaska) is found in Appendix I. A list of treaties and agreements providing for allotting is set forth in Appendix II. A list of acts to surplus Indian lands is contained in Appendix III. The Five Civilized Tribes and Osage have separate allotting and probate systems set forth in Appendix IV. Allotting in Alaska is not addressed in this article. It will be the subject of a separate paper.

Many allotted tribes had provisions in early treaties geared to future allotting. By 1863, allotting had been around for more than 60 years. The first treaty provision calling for allotting was in 1830. The last was in 1868.[27] The concept had been in play since 1798.[28] Assimilation was likewise a concept bandied about in the time of George Washington. There is much truth to the statement that Indian policy is circular not linear. In fact, there is never anything new in Indian policy only generational upgrades of old failed vehicles.

Variations in allotment provisions and requirements were coextensive with the differences among the numerous tribes involved. In some cases, lands were held in trust for the individual; in others, under a restriction against alienation or in fee simple. In some cases, allotting became a method of terminating tribes.[29] The first reservation to be allotted was Sisseton-Wahpeton in 1887. The last was Northern Cheyenne in 1930-31 long after it was understood that allotting was devastating to affected populations.[30] Certain tribes were exempted from the GAA.[31] Others were believed to be exempt from it.[32]

In any event, the concept of individual land ownership was old hat by the time of the GAA. By 1885, the government had, under various treaties and laws, issued over 11,000 patents to individual Indians and 1,290 certificates of allotment.[33] However, by the 1870s, the notion of a general allotment policy had established a toehold.[34] The fact that 8,595 of these patents and 1,195 of the certificates were issued during 1850-1860, under laws and treaties of that period, strongly indicates that the forces that produced the GAA came to life mid-century.[35] In 1875, homestead privileges were extended to Indians.[36]

On February 8, 1887, the allotment act was passed after more than 5 years of active skirmishing. The main provisions of the act were: (1) a grant of 160 acres to each family head, 80 acres to each single person over 18 and orphans under 18, with 40 acres to a single person under 18, (2) a patent was to be issued to every allottee and held in trust by the government for 25 years during which the land was inalienable and not subject to encumbrance, (4) 4 years were allowed for making allotment selections, failing selection, the Secretary would do so and (5) citizenship was to be conferred upon allottees and other Indians who forsook their tribes and took up the habits of civilized life (later altered by the Burke Act of 1906). Additionally, the laws of the state or territory where the lands were located were to apply to descent (intestate succession).[37] Inheritance by will was not authorized.

Allotting was intended by President Cleveland to be a slow and measured process working with five tribes a year to bring Indians into the dominant society. Instead, it was implemented at breakneck speed with virtually no planning or restraints.[38] The GAA was amended in 1891 to include married women, to legitimize children born to custom relationships and to provide for leasing.[39]

The gun sights were aimed at the Five Civilized Tribes and Osage at the turn of the 20th century. In many instances, allotting was an integral part of the statehood process. Oklahoma and South Dakota are examples. Allotting occurred first. Statehood followed immediately thereafter. The unique feature of the Five Civilized Tribes land tenure was that the tribes, who had earlier been forcibly removed to the Indian Territory, held their land by patents. The supposedly sacrosanct patents and absolute treaty guarantees of non-inclusion within a state, however, did not prevent the wolves circling and entering the Indian Territory from getting their prey. Angie Debo reported that, of the approximate 19 million acres owned by the tribes, over fifteen million were allotted. Less than half a million acres exists in Indian ownership today. In 1914, the federal government proudly, but wrongly, reported that the Cherokee tribe had ceased to exist. Today, due to sheer resilience and tenacity as a people who embrace their progeny, the Cherokee Tribe is one of the two largest tribes in the Country. *See generally* "Land of Red People," Federal Indian Probate Post, August 1999.

Prior to 1887, 7,463 allotments for a total of 584,423 acres had been issued. Between 1887 and 1900, 53,168 allotments had issued totaling nearly 5 million acres. In 1887, 136,394,895 acres of land were in Indian ownership. Of that figure, 25,410,346 were allotted. By 1911, 72,535,862 remained of which 32,272,420 were allotted. In 1920, there were 37,158,675 allotted acres out of 72 million. Another 2 million acres of allotted lands were added by 1929. Between 1929 and 1933, total Indian lands (71 million) dropped by 24 million to 47 million acres of which 22 million were allotted lands. The lowest figure for total Indian lands was in 1953 at 41,833,538 at which time 11.7 million were allotted. By 1985, total land figures were 53,633,797; allotted, 10,607,621.[40] A current inventory is required to establish the number of allotments still in trust or restricted status.

Where tried prior to 1887, allotting had been a dismal failure. Non-Indian homesteaders under the general homestead act fared no better. Nonetheless, allotment proponents' convictions about the certain benefits of private property ownership were unflappable. Such beliefs included the view that allotting meant Indians would promptly cease to be cared for by the executive branch. Two strains of thought, each more glib than the next, ran as parallel currents in the mind of Senator Henry Dawes, the leading architect of allotting: "Root, hog or die," and "...[T]his (allotting) is a self-acting machine that we have set going, and if we only run it on the track it will work itself all out, and all these difficulties that have troubled my friend will pass away like snow in the spring...."[41] Indians with less preparation were therefore to succeed where white men had failed. It was an article of faith. The same facile approach is rampart in today's "reform" efforts. The cure and the disease are equally as fatal.

If allotting is the quintessential symbol of failed reform policies, Henry Dawes is the poster boy for non-Indian reformers in Indian affairs. Proof of effectiveness requires no more than the utterance of a subjective belief that a proposition is so. It was true in the 1880s, in the 1950s and, today, in the Secretary of Interior's BITAM reform that, like the allotting, is being forced down Indian Country's throat because it is in the "best interests" of Indians as determined by reference to the litigation and fiscal needs of the Department of Interior and its officials, in a hastily pieced together process.

There were those in Congress who clearly understood that allotting was to get at Indian lands and open them up to settlement and that allotting would be injurious to Indians in the extreme. In 1881, Senator Tellier said passionately, "If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when 30 or 40 years have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion, they would not be here clamoring for this at all."

Senator Tellier, of course, was right but it didn't take thirty or forty years to ascertain the damage. It took twelve years. As the man to land ratio rapidly decreased, poverty and disease correspondingly rose. According to the 1900 census, the American Indian population had plummeted to 237,196; about one-third of what it was in 1800, and sickening poverty was the daily Indian fare.[42]

The cursing of Indians has long since passed as will been seen below. The cursing heard today is that of Interior officials who are fighting like panthers to avoid contempt citations as a consequence of the government having obtained everything it previously wanted. It is only just that imposers should experience at least some of the pain of the imposed upon.

Apart from the fact that Indians did not want allotting of the tribal estate, there were several objective factors that made allotting in Indian Country a disaster waiting to happen. The first was that the situs of the majority of the allotted lands wasn't suited to dry farming conditions that were made worse by droughts.[43] The second was that it was common knowledge that the size of the allotments were grossly inadequate.

"Since the 1880s, the federal government realized that a minimum of four hundred acres was necessary for successful, family-oriented farming in the Great Plains; as late as 1935, agricultural experts working for the federal government added that 'a 160-acre tract is, of course, pathetically inadequate to support a family.' Indian farmers in the region typically owned far less."[44] Additionally, "Those who retained their land, especially those who resided on reservations in the Great Plains, generally failed to produce harvests sufficient for subsistence. Agricultural skills and farm equipment eluded Indians. In addition, there existed little arable land, individual allotments remained small in an environment that required extensive acreage for primitive farming."[45]

On the ground Indian opinion about allotting, especially white-style allotting for Indians, is illuminating. A Cherokee farmer told a Senate committee investigating conditions in the Indian Territory in 1906 that he had been successfully farming 300 acres (of tribal acreage) for some time. Before federal allotting, Cherokees like himself had "...enough and more than enough to fill up the cup of their enjoyment. Every Cherokee that wanted a home or wanted a farm could go and open it up and enjoy it..." under guarantee. He reported that the federal allotting scheme had reduced him to 60 acres of other land but that before he could bring in his current crop, his farm with growing crops, was all to go to someone else. The man said that he had tried his best with all his ability, intelligence, industry and the love of his wife to make a go of it on the 60 acres but could not. He reported that the Senate had before them a previously successful, now "...poor man, on the verge of starvation."[46]

The man had personally gone to look at the law, the Curtis Act, and investigated the orders and rules of the Dawes Commission. Having done so, "...he folded his hands and said, 'I give it up.' Away went my crop, and if the same rule had been established in your counties in your State, you would have lost your dwelling house; you would have lost your improvements. Now, that is what has been done to these Cherokees. ..."[47]

Even for negative policies designed by reference to the wants and needs of others, there is a right and wrong way of doing things. The unique feature of federal Indian policy is that there is automatic gravitation to the wrong way with the result that damage to the Indian population to whom a fiduciary duty is owed is maximized.

Probate

Because, as Henry Dawes said, all that had to be done was put allotting on track and everything would take care of itself, little consideration was given to probate. The assumption, apparently, was that at the end of twenty-five years Indians would have melded effortlessly into the general population where they would be under the jurisdiction of state courts. Accordingly, the only provision for probate was the reference in Section 5 of the GAA to the use of state or territorial laws. [48] No provision was made for an actual mechanism to probate the estates of deceased Indian allotted landowners.

An informal report prepared prior to commencement of Phase II of the 1999 Probate Reinvention Lab, a part of Interior's HLIP process, provides a basic overview of Indian probate both in the early and later stages.[49] It reveals that despite references to state and territorial law applying to descent in the Section 5 of the GAA and references in the Burke Act of 1906 to decisions of the department in heirship matters being final and conclusive, "there was no express statute which authorized the Secretary of the Interior to conduct heirship proceedings for allotted lands until June 25, 1910. Up to 1906 and for a brief time thereafter the power was inferred." The power was "...inferred from the requirement of the General Allotment Act that the Secretary convey a fee patent to the heirs."[50]

The Act of 1910 was an omnibus bill. Among the many provisions was language authorizing the department to conduct both intestate and testate[51] proceedings. Until then, will making for tribes other than the Five Civilized Tribes was not authorized. At common law, the right to make a will (the right of testation) exists only by positive enactment of the sovereign but not otherwise. Under the 1910 act, only the original allottee could make a will. In 1914, the testacy statute was amended to include Indian landowners other than the original allottee.[52]

It appears that prior to 1910, the department made up rules as it went along ascertaining what was needed only by apparent hindsight.[53] It further appears that the department was not especially good at probate from the beginning. The first report of Commissioner Cato Sells, who took office mid-year in 1913, refers to forty thousand heirship cases awaiting determination; the estates were collectively valued at sixty million dollars.[54]

Despite enactment of formal provisions for probating the estates of deceased Indian landowners, the department clearly did not perform its duties in an appropriate way. Wholesale violations of due process rights were reported for the benefit of third parties. In 1912, conflict of interests were labeled the "...most extreme disregard of property rights and interest that can be found in modern times."[55] The described conditions were even worse for the 5 Civilized Tribes who through the allotting, heirship and guardianship processes were subjected to an orgy of spoliation and greed unparalled in U.S. history. The magnitude and rapidity of the predations committed upon the tribes was described almost beyond belief. "Land of Red People," *supra*. The one principle to be derived from the eastern Oklahoma tribes experience is, "State court jurisdiction over Indian lands...is a recipe for disaster."[55]

At Interior, the first processes were lengthy, tedious and duplicative. "A Hearing Examiner (Indian Probate), appointed by the Commissioner, conducted the hearing in decedents' estates. In the absence of an Examiner, the Superintendent was authorized to conduct hearings. The hearing official would then make a case report on the estate which included the hearing transcript, a property inventory, a list of the heirs as determined by applicable succession laws governing the particular asset (law of situs as to real property incorporation [Sic] (incorporating) state succession law by reference (25 U.S.C. Section 348) or tribal law as appropriate, law of domicile as to personal property and tribal law as to domestic relations.) The report was transmitted to the Commissioner with a recommended decision, including will approval or disapproval."[56]

"The system at the central office or Commissioner's level was cumbersome and inefficient. 'In Washington headquarters the examiner's report normally passed through the hands of six persons, the reviewing clerk, the head of the probate division, the law clerk of the Indian Office, the Commissioner or Assistant Commissioner of Indian Affairs, one of the attorneys in the Solicitor's Office...charged with the duty of reviewing Indian matters and the Assistant Secretary of Interior. "The Problem of Indian

Administration, [commonly known as 'The Merriam Report] (Baltimore, The John Hopkins Press, 1928), p. 791."[57]

"Until 1943, the Secretary issued orders...in all Indian probate cases." Then, "[b] y amendment to 25 C.F.R., Pt. 81, dated August 17, 1943, the Secretary delegated to the Commissioner the function of determining heirs and probating estates of deceased Indians except the Osage.[58] The delegation(s) created a right of appeal to the Secretary from the decision of the Commissioner." The inheritance examiner "...continued to be a part of the Bureau of Indian Affairs and to send his case report and recommended decision to the Commissioner who made an initial decision which became final unless appealed." More or less contemporaneously with the passage of the Administrative Procedure Act of 1946, hearing officers were conferred quasi-judicial powers to make final decisions in probate cases. New regulations were issued in 1947. Under the new procedural regulations, "The Examiner was authorized to make the initial decision in probating estates and determining heirs. Appeal was to the Secretary from either an order denying rehearing or reopening. The Secretary's authority regarding the disposition of appeals was delegated to the Solicitor on January 20, 1949 (14 Fed. Reg. 307)."[59]

"The above-described system continued for the next twenty years. On July 1, 1970, the Office of Hearings and Appeals (OHA) was created." The Indian probate function was placed in the hearings division. Probate appeals were to the Board of Indian Appeals. "...OHA's budget was approximately $20,000,000 when the office was established in 1970 when [the] agency probate workload was a fraction of its current level, dropping to a law of less than $6,000,000(+/-) in the mid-1990s."[60]

The budget decreases, as already noted, were accommodated through the serial dismantling of OHA's field probate offices after the early 1980s. Closures occurred while the probate caseload, like the fractionated land base itself, was proliferating. Crisis conditions for probate, as earlier noted, were primarily budget-induced by shifting the burden of budget shortfalls onto the shoulders of OHA's Indian probate function, largely as a consequence of disrespect for the subject matter that was pervasive within the agency. The result, long before the final wave of closures in 1996, discussed elsewhere, was that the Indian probate component of OHA while having seventy percent of the work load had only sixteen percent of the agency's adjudicative manpower. A detailed discussion of conditions and analysis of OHA's pre-1996 management practices with specific reference to its arbitrary treatment of Indian probate is contained in a 26-page memorandum to the Director of the Office of Hearings and Appeals from the Administrative Law Judge, Phoenix Arizona, dated September 24, 1993. *See also* n. 20, *supra*.

The probate adjudication system from 1970 to 2001 was basic. Had it been funded and staffed adequately and provided with appropriate management, it need not have collapsed as evidenced by the description of the component's capabilities and willingness to perform contained in the 1990 Blue Ribbon Committee Report mentioned, above. The process by which OHA's probate field capability was destroyed was one of

slow evisceration with steady elimination of its Indian law knowledgeable personnel.

The OHA system worked in tandem with BIA. From 1970 until, formally, March 23, 2001, service areas existed within OHA's hearings division headed by field judges. BIA probate staff for agencies within the areas prepared cases for submission to the Administrative Law Judges.[61] Dockets of hearings were held throughout the year throughout the service areas except in winter travel restricted areas. Case development functions were performed by BIA along with will preparation, estate planning and administration/distribution duties. The agency superintendent is designated the legal custodian of estate assets.[62]

Following a hearing, or after additional case development was received, a decision was entered by the Administrative Law Judge (hereinafter "ALJ"); provisions also existed for summary distributions by agency superintendents or their delegates for intestate estates of cash only involving $1,000 or less following an informal hearing.[63] As to the latter, where controversies arose, the matters were processed by an ALJ. If no petition for rehearing or, if appropriate, reopening was filed,[64] the decision became final and distribution was made. Until the trust fund management act was passed in 1994,[65] estate distribution was performed by the agency. Appeals from ALJ decisions were to the Board of Indian Appeals.[66] There was, and is today, no direct appeal from an initial ALJ decision to the board. The recordation office for probate decisions is the Land Titles and Records Office of BIA or of particular contracting tribes.[67] The Land Titles and Records Office is the equivalent of a county recorder's office on a regional basis.

The probate system reflected in the BIA probate regulations,[68] effective March 23, 2001, in conjunction with OHA's system, effectively doubles adjudication capability with no commensurate increase in probate case development capability except for probate backlog duties that are privatized to contractors who have had to be trained in the function they contracted to perform. The new regulations establish adjudicatory personnel in BIA[69] in addition to that present in OHA. They increase the superintendent's summary distribution authority by amount ($5,000) and extend the authority to will cases.[70] The regulations impose duties upon parties who report death to provide data for use in probate but not all the information required is to be included in the probate data submitted for adjudication.[71] The rights of creditors, under the current version, are greatly constricted while the regulations are devoid of notice provisions to them.[72] A probate specialist position has been established to determine where a case should be sent as between the superintendent, the BIA attorney decision-maker or the ALJ.[73] There are criteria for determining when a case is to be sent to the ALJ.[74] The criteria are highly subjective and if challenged would in all likelihood fail due to vagueness or indefiniteness. If a probate is not sent to an ALJ for cause, usually because a case is disputed or a complex matter legally or factually, all as ascertained by a layman, it is referred to a BIA attorney decision-maker.[75] All BIA officials have time frames for action and decisions.[76] Contemporary reports of workflow problems suggest that the time frames are not being met.

Heirs (at law or will beneficiaries), not creditors, may request a case to be transferred for hearing by a judge at any stage in the proceedings.[77] Although there appear to be time frames for making requests, a general provision exists that indicates a request can be made at any time before a decision is entered. A BIA attorney decision maker can also refer a case for formal APA hearing to an ALJ if circumstances warrant.[78] Appeals from BIA decisions in probate or for summary distribution are to the ALJ. Review is *de novo*. Appeals from ALJ decisions continue to be to the Board of Indian Appeals but only following an initial filing of a petition for rehearing or reopening, as appropriate, with the ALJ. Appeals from decisions of the Board of Indians Appeals are to the United States Federal District Court.[79]

From 1934 until the 1983, there were few substantive changes in federal Indian probate law. The November 7, 2000 amendments to the Indian Land Consolidation Act contain major changes in the succession laws, testate and intestate, applied in probate.[80] The amendments make either federal or tribal law apply in lieu of 25 USC 348's directive to apply state intestate standards.[81] (State will laws have never applied in Indian probate proceedings.) Tribal laws of domestic relations continue to apply in all situations except adoptions. Adoptions are a federally pre-empted subject matter.[82] Codes previously enacted by tribes through act of Congress should be preserved.[83] As in the 1983 original ILCA statute, tribes are encouraged to enact succession codes.[84] Notably, however, there is no central registry or reporter where the codes can be easily accessed for use in probate, which will be a significant impediment to adjudicative forums and estate planners. It is an omission that must be corrected.

The main provisions of the amendments relevant to probate are found in 25 USC 2206 (Section 207). Non-Indian inheritance is restricted to receipt of a life estate.[85] The definition of Indian is changed and will impact significant portions of the Indian population unless changed.[86] Intestate succession is restricted to persons related in the first and second degree (of consanguinity).[87] Devises of an interest to multiple beneficiaries are construed as a joint tenancy. Interests of less than 5% of an allotment pass by intestacy in joint tenancy. *See* n. 15.

Other non-probate provisions of the amendments that are important to be aware of are: the tribal code provisions and the restrictions that preclude exclusion of a lineal descendent of the original allottee.[88] The consent percentage requirements for transactions are significant[89] as is the provision authorizing the land valuations by geographic unit which could impact the amount landowners receive for their lands or under use agreements and contracts.[90] A pilot project for acquisitions is established but its preference is for the old 2% interests that were not restored under the twice-invalidated 25 USC 2206.[91] Of particular interest to tribes should be the definition of on-reservation and its implications for acquisitions under tribal consolidation plans developed under ILCA.[92]

The preceding is not intended to be an exhaustive treatment of the recent ILCA amendments but merely a summary of significant provisions.[93]

The current climate in Indian probate today is one of great uncertainty and malaise. Both the probate processing system and probate laws applicable therein have become tedious and complicated as the land base becomes more fractionated and appropriations stagnate.

The Indian Land Working Group has counseled probate reformers to develop user-friendly systems and procedures and to provide laws and implementing regulations written in simple declarative style for use by affected Indian community members and those who must help them address allotted land issues. Such admonitions have gone unheeded. It is the view of the Indian Land Working Group, of which this writer is a member, that substantial revisions must be made in the system developed by Interior under HLIP and the ILCA amendments and that Indian landowners are entitled to the same adjudicative rights as the Department of Interior affords permittees on public lands.

The reform measures Interior has heretofore undertaken are found to be duplicative, expensive and unwieldy with the laws, as written, too complicated for effective use by the allotted landowner population. It is our view that the best interests of Indian Country are not served by litigation-driven systems, including the department's BITAM proposal. The best interests of the landowners and tribes will be served by the government performing the base technical studies necessary to identify the extent of the resources to be managed then designing a system in relation to those findings not by designing a system in a vacuum and making the resources fit the system.

As it now stands, allotted land administration, including probate, is on the verge of blow out. Trust fund management cannot occur until a system tailored to the resources to be managed is established.

Endnotes

[1] "The Probate Crisis in the Department of Interior," Federal Indian Probate Post, August 1998, at 3, (hereinafter "Probate Crisis.") citing "Indian Law introduction," 11 Arizona Attorney, Vol. 29, No. 11, July 1993 and "Warning: Dangerous Curve Ahead," Federal Indian Probate Post, July/August 2000, at 7, (hereinafter "Dangerous Curve.")

[2] Cobell v. Norton (formerly Babbitt), Civil Action 96-1285, (filed D.D.C. June 10, 1996, (hereinafter "Cobell.")

[3] "Man The Battle Stations," Federal Indian Probate Post, (Special Issue) March/April 2002 [pending publication at writing] (hereinafter "Battle Stations.")

[4] "Dangerous Curve," *supra* note 1.

[5] "Indian Reform: High-Minded Language With Low-Down Purpose," Federal Indian Probate Post, November/December 2000, at 5, (hereinafter "High-Minded Language.")

[6] "Sioux Country Part. I: Ground Zero," Federal Indian Probate Post, January/February 2000, at 4-5, (hereinafter "Ground Zero.")

[7] "Most Dangerous Branch?" Federal Indian Probate Post, March/April 2000, at 9 (hereinafter "Dangerous Branch")

[8] Babbitt v. Youpee, 519 U.S. 234 (1997). The plaintiff in Youpee declined to settle his so-called " 2%" case under 25 USC 2206, part of the Indian Land Consolidation Act, as amended October 30, 1984. Settlement was the Department of Interior's preferred mode of avoiding substantive adjudication of a potentially adverse issue in light of Interior's loss on the same issue involving the first version of the 2% rule, enacted January 12, 1983, in Hodel v. Irving, 481 U.S. 704 (1987).

[9] 25 USC 464 limited eligible will devisees for lands under the jurisdiction of tribes incorporated under the Indian Reorganization Act of 1934. Section 464 was amended September 26, 1980 to delimit the class of eligible Indian beneficiaries, a move that was effectively countermanded (by the same drafters) in the limitations authorized for tribal codes under the Indian Land Consolidation Act (25 USC Section 2200 *et seq.*, specifically at 25 USC 2205) first enacted less than three years later on January 12, 1983.

[10] 397 U.S. 598 (1970). The supreme court held that federal officials may not substitute their personal concepts of equity for that of an Indian testator when wills to dispose of trust or restricted Indian property are made in accordance with the technical requirements for testamentary instruments under 25 USC 373. The case arose in Oklahoma where the regional solicitor had historically enjoyed broader official powers than similarly- situated offices elsewhere in the country. In the early days of Indian probate, episodically, reports of destruction of and overriding Indian wills for apparent nefarious purpose are documented. Kenneth W. Townsend, World War II and the American Indian, (University of New Mexico Press, 2000), at 7, (hereinafter "World War II.") Such incidents were rare, if ever, when the quasi-adjudication format for Indian probate was fully implemented by the Department of Interior with the establishment of the Office of Hearings and Appeals in 1970 whose processes and procedures for Indian probate provided a strict framework for handling Indian wills. *See* 43 CFR Part 4, Subpart D, specifically, 43 CFR 4.260. However, under the 2001 probate redesign, with partial non-APA probate processing accompanied by privatization of probate backlog case development functions, reports of will destruction have again surfaced relating to certain contractors who, devoid of subject matter expertise, knowledge of institutional authority and duties vested within the probate system and confidentiality requirements under Indian probate regulations, have passed subjective judgment upon the viability of particular testamentary instruments. The extent of the problem is not fully identified as of this writing. *See* "Man The Battle Stations," *supra* at note 3.

[12] Hodel v. Irving and Babbitt v. Youpee, *supra* at note 8, invalidated the Department of Interior's efforts to transfer individually owned interests in allotted lands to tribes for no compensation. 25 USC 2206 as enacted in 1983 and as amended in 1984 endeavored to blend two concepts by half measures: taking for a public purpose or good (fractionation elimination through ownership consolidation in tribes) and escheat (transferring property interests without compensation to the sovereign). The rub was that Interior wanted only to utilize the portions of each concept that served its purpose without regard for the full rule applicable to each. The goal was no expenditure of funds in the extinguishment of 5th amendment-protected property rights. 25 USC 2206, known as the 2% rule, directed the transfer of a decedent's interests to a third party, the tribe, without compensation. Subliminally styling the transfer as for the common good, killing two birds with one stone: reduction of administrative costs and creating tribal ownership, Interior failed to observe that takings of this type, even assuming an implied governmental purpose, are normally done via condemnation proceedings in which the fair market value of the interest is paid to the owner or, in the case of a decedent, to his estate. The heirs had expectancies so their rights were not immediately at stake. However, their rights arose under the 2% rule in an indirect but active way. Escheat, by definition, is not a situation in which actual heirs are identified and specifically named to receive assets of an estate. Interior's idiosyncratic concept, only out done by the November 7, 2000 ILCA amendment's "non-Indian estate" mentioned in note 15, *infra* [the department was the prime mover in pushing the legislation], therefore, involved the actual naming of heirs in the probate orders issued under 25 USC 372 and 373 but with the diversion of 2% interests involved in the probate to a third party (tribe) for no compensation. Third-party transfers are not a feature of condemnation. The 2 % mechanism in the original 1983 act provided that an undivided interest representing 2% or less of an allotment yielding less than $100 in income in the year before death could not pass by intestacy or devise but must "escheat" to the tribe with jurisdiction over the land. Interior seriously miscalculated the emotional connection that heirs have to the fact of allotted land as heritage. Considering the interests "de minimus" in its purely cost-conscious view, it failed to consider that heirs, who have legal standing to pursue issues on the decedent's or the estate's behalf, would not accept summary extinguishment of property rights which they viewed as their nexus to heritage regardless of interest size. The first version was dispatched in Hodel v. Irving. However, before a decision was entered in that case, the 2% rule had been amended. The amended version generated the Babbitt v. Youpee lawsuit. Apparently, Interior recognized that a single year's income stream in notoriously undeveloped lands in Indian Country was not an adequate measure for ascertaining the productive capability of allotted lands. The supreme court in Hodel had also made it clear that a law of this type that eliminates all methods of avoiding its application was unacceptable and would never withstand judicial scrutiny. Accordingly, the 1984 amendment to 25 USC 2206 looked at the income stream for the five-year period preceding death (less than $100) as creating a rebuttable presumption of income production incapability in the five-year period after death. An appearance of a ten-year window was thus projected. If the presumption was not rebutted, the affected 2% interests were transferred to the tribe again without compensation. A second feature of the amendment was that a devise to a co-owner preserved the transfer of the interest to the beneficiary. Inconsistently, however, inheritance by a co-owner through intestate succession did not preserve inheritance. The presence of an obvious equal protection problem eluded the legislative drafters and proponents. Both past and current probate consolidation laws imbue testate succession with an aura of specialty that has no foundation in succession law generally or the law of wills specifically. *See* e.g. 25 USC 2205(c) added by the November 7, 2000 amendments to the Indian Land Consolidation Act. Tribes are authorized to purchase interests of non-Indian will devisees but not non-Indian heirs at law. The quality of right acquired by devise is no different than that acquired by

intestate succession. Inheritance produces ownership regardless of the succession method.

[13] "Probate Crisis," *supra* note 1, at 3.

[14] "Battle Stations," *supra* at note 3.

[15] The version of the ILCA amendments in play when BIA's regulations were drafted had an extremely convoluted experimental structure, including a novel interest called a "non-Indian estate" that had many extraordinary features, the most significant of which were: (1) while purporting to operate like a life estate, it permitted the non-Indian life tenant to designate the remainderman which authority, if unexercised, would operate like an unexercised power of appointment to produce a merger of the lesser estate (the tenancy) with the larger estate (the remainder) to vest title in the non-Indian life tenant in fee simple absolute, and (2) the use of already inadequate Indian appropriations to administer the interests of non-Indians, apparently multi-generationally, while having to create a bureaucracy to do so, at a time when the Interior was complaining loudly about the administrative burden of having to manage allotted interests for Indians. Other features of the proposed amendments at that time imposed a straight membership requirement for inheritance which, based upon the, then, latest census statistics of 1990, would have reduced the Indian population and/or eligible ownership population by one-third (from 1.9 million to 1.2 million). While this feature is said to appeal to tribes, as a means of obtaining a "member only" inheritance system, which IRA tribes actually had before 25 USC 464 was tampered by untutored drafters in 1980, tribes apparently don't realize that they are now precluded from enacting such limitations, under the current generation of ILCA amendments, if the person to be excluded is a lineal descendent of the original allottee. *See* 25 USC 2205(a)(3). Interestingly, in the government's own intestate succession scheme codified at 25 USC 2206(b), no such limitation is found. The most ultimately damaging of the November 7, 2000 ILCA provisions, which was been maintained in at least the last two versions of proposed ILCA amendments, is the unprecedented use of joint tenancy for intestate succession for interests that constitute less than 5% of an allotment. Joint tenancy, in law, is and has always been instrument-created and requires strict conformance with four unities. time, title, interest and possession which unities are created by instrument. A detailed discussion of the specific problems and issues associated with the use and administration of joint tenancies in intestacy, assuming the provision passes legal muster at all, is set forth in "Battle Stations," *supra* at note 3 and "High Minded Language," *supra* at note 5, at 5. The full version of the July 2000 proposed ILCA amendments containing the "non-Indian estate" provision was described as "the bill for ethnic cleansing, to create the Bureau of White Affairs and to screw up what's left." "High Minded Language," *supra* at 4. Because joint tenancy is not suited for use, regardless of what legal issues may exist, in large populations of strangers, the 2% rule unconstitutional though it may be, was preferable because at least the government knew where the interest was and who the owner was. This will not be the case in large-population intestate situations. It will create particular problems in connection with the transactional consent (percentage) requirements of the November 7, 2000 ILCA amendments. *See specifically* 25 USC 2218 and Title II of the amendments affecting Navajo (Sec. 201). It effectively means that a title status report will be required in most cases before lease signing because the number of owners changes automatically through deaths within the heir pool.

[16] "Probate Crisis," *supra* note 1 at 5-7.

[17] "A Study of Management and Administration: The Bureau of Indian Affairs," prepared August 1999 by the National Academy of Public Administration, Chapters 4 and 5 (hereinafter "The NAPA Study.)

[18] 25 CFR Pt. 15 and 43 CFR, Pt. 4, Subpart D, BIA and OHA probate regulations, respectively.

[19] "Battle Stations," *supra* note 3.

[20] OHA leadership was fully apprised of such attitudes. It is equally as clear from the results of the 1996 actions that respectful service to the Indian community was irrelevant. While planning the gutting of probate field offices, OHA officials, James Terry, then Deputy Director now member of Interior's Board of Land Appeals, and Louise Curtis, Administrative Officer (retired), in a meeting with IG auditors, Roy Mills (auditor in charge), Leticia Mayronne, and Jeff Wilson, were informed that, since cross-utilization in 1994, "...the Salt Lake City Office is not issuing decision in a timely manner with regards to probate cases and that probate is generally snubbed in Salt Lake City." At the time, there were "...as many as over 100 cases where decisions have been rendered but not issued. Mr. Mills went on to say that this problem was not found in Phoenix were there was a greater reception to both Probate and Land cases amongst the Judges. Mr. Mills stated that there is no reason for rendered decisions to sit around without being issued...." "Record of Management Briefing" at the Office of Hearings and Appeals, Arlington, Virginia, dated April 16, 1996. Subsequent records leave no doubt that the IG audit itself was window dressing for an already decided upon plan for the elimination of field offices. OHA Director, Barry Hill, later said that he wanted "...only one consolidation option to be included in the report." Jim Terry "...stated that OHA wants a plan of action in the OIG report that would support the consolidation plan...[and] that OHA does not want to be second guessed in a court of law, and therefore wants to eliminate any speculation that more than one consolidation option could present." "Record of Meeting with OHA Management," dated June 11, 1996 attended by Barry Hill, Director OHA, James Terry, Deputy Director OHA, Sheila Morris, Administrative Assistant OHA, Bob Romanyshyn, Senior IG Auditor, Roy Mills, IG auditor in charge, Tony Hawkins, IG auditor and Jeff Wilson, IG auditor. Additional field office elimination was not out of the question. On June 14, 1996, senior auditor Romanyshyn queried whether or not OHA might consider further consolidation "...by looking at the possibility of consolidating the Sacramento, Oklahoma City, and Albuquerque field offices." In the last two paragraphs of the June 14, 1996 "Record of Meeting" attended by James Terry, Bob Romanyshyn, Roy Mills, Tony Hawkins and Jeff Wilson (titles previously listed), "Roy Mills said that the OIG report would include recommendations that the first

part of consolidation happen now with a further recommendation for OHA to evaluate the need for further consolidation in the future without naming specific offices. The Deputy Director approved of that idea." As a part of the 1996 IG audit process, as confirmed by written interview notes by IG auditors, former OHA Director, Jim Byrnes, who had previously threatened to fire the probate judges in connection with a grievance filed by them against him, as documented in the independent grievance examiner's decision, told the auditors that Indian probate proceedings were like "traffic court" and that up to 40 cases could be done in a day. This came on the heels of an announcement by a former Salt Lake City judge that he would "refuse to perform Indian probate work and further bragged that if ordered again he will again refuse and force OHA to fire him." Memorandum to Director Office of Hearings and Appeals from Administrative Law Judge, Phoenix Office of Hearings and Appeals, dated September 24, 1993.

[21] "The NAPA Study," *supra* note 17, generally at 44-45 and 54-57, shows that chronic assignment of collateral duties and poor training produce neglect and performance inadequacies of critical tasks and that the practice is budget compelled. It also shows that employee morale is adversely affected by these conditions.

[22] Id.

[23] Judge Sally Willett, *Fighting Enemies For Which There Is No Name: An Integrated Look at Disease in Indian Country Past and Present,* Oklahoma Supreme Court Sovereignty Symposium XIV 2001 – A Tribal Odyssey, at III-17, (hereinafter "Fighting Enemies.") *See also* World War II *supra* note 10, at 226. In the former article, it is pointed out that in 1999, the Indian Health Service called Indians the "sickest of the sick and the poorest of the poor" and said that the situation was an improvement. It went on to note that health of Indians in the U.S. is above only Haiti in the western hemisphere, including urban inner cities. Indian health is comparable to that of sub-Saharan Africans. In the 1940s, starvation was a palpable concern--just as it had been in the 1930s. *See* World War II, supra note 10, at 23. In the 1920s and before, due to allotting and the destruction of standard means of subsistence, appalling destitution prevailed. According to the famed "Merriam Report," in 1928, "An overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization." "The Problem of Indian Administration," prepared by the Institute for Government Research (now Brookings Institute) (John Hopkins Press 1928), at 4. Allotting, a perceived panacea to the Indian question was supposed to work all by itself without "training, tools or equipment." All that was required was the law and that it would by definition make the Indian a farmer. D.S. Otis, The Dawes Act and the Allotment of Indian Land, (University of Oklahoma Press 1973 Francis Paul Prucha ed.), at 101-103, (hereinafter "Otis.") As a side note to conditions in Indian Country in the 1920s and 1930s, famed Cherokee humorist, Will Rogers donated his salary from his appearances to the Red Cross, paying his own expenses, requiring that a portion of the money go to the Cherokee people. In that era, Will Rogers was the most famous man in the world. At no time, however, did he lose sight of the fact that he was Indian, "I'm Cherokee and it's the proudest little possession I ever hope to have." Liz Sonneborn, Will Rogers Cherokee Entertainer, (Chelsea House Publishers 1993), at 89-90. Rogers routinely turned led into gold verbally. There is no better expression of his wit than in the following quote, "They [the United States] sent the Indians to Oklahoma. They had a treaty that said, 'You shall have this land as long as grass grows and water flows.' It was not only a good rhyme but looked like a good treaty, and it was till they struck oil. Then the Government took it away from us again. They said the treaty only refers to 'Water and Grass'; it don't say anything about oil." Id., at 91.

[24] "Special Issue: Indian Country Fires Back," Federal Indian Probate Post, Summer 2001 (hereinafter "IC Fires Back,") the full article addresses a comment in an Indian Country Today (hereinafter "ICT") editorial, dated May 9, 2001, that stated, "A serious misreading of the history of this country takes place that needs to be addressed." The special issue was written in response to ICT's open invitation.

[25] Id. *See also* "Hell on Wheels," Federal Indian Probate Post, September/October 2000, (hereinafter "Hell on Wheels." "Hell On Wheels" which is an actual descriptive name for frontier railroad towns examines the phenomenon of why federal Indian policies are failures and inevitably backfire upon the population they are allegedly designed to benefit. The overarching conclusions are that Indian policies are framed upon the basis of an adverse frontier mentality and that Indians appear only to be known to their surrounding adversaries who, more often than not, are the ones given authority to make decisions in Indian issues. The current Secretary of Interior is an example of that phenomenon. She is from a western state. She worked with a legal organization and represented clients whose interests are in opposition to the interests of Indians. Indian groups have reported difficulty getting access to her on issues such as the fee-to-trust regulations; however, she is reported to meet with groups who opposed Indian acquisitions in trust. Regulations developed through give and take on both sides over a prolonged period were set aside by the administration as though they were merely a part of the eleventh hour regulation approval process of the final hours of the Clinton administration. Other examples are Slade Gorton, defeated in his senate re-election bid, who served as head of the Senate Committee on Indian Affairs and who, on a single day, introduced five anti-sovereignty bills in his unabated quest to suppress tribes and their authority over their lands [*See generally* "Lost in the 50s Tonight," Federal Indian Probate Post, November 1998, and Utah's Senator Watkins, also a senate Indian committee chairman, who badgered tribes unmercifully as he zealously and single-mindedly spearheaded the push for termination in the 1950s serving up his state's own impoverished tribes who were not on any proposed termination list in order not to appear to be bullying tribes in his peers' states. He was later rewarded for such conduct by being named head of the Indian Claims Commission where a high percentage of the claims filed were dismissed. The reader is referred to the following works for additional information regarding the role of Indian Country's great antagonists in critical positions of influence over Indian affairs: Vine Deloria, Jr., Custer Died For Your Sins, (University of Oklahoma Press 1988 ed.), at 61-69; Peter Matthiessen, In the Spirit of Crazy Horse, (Penguin Books 1991), at 42 and Larry Burt, Tribalism In Crisis, (University of New Mexico), at 42. Additionally, in the same issue as "Battle Stations," *supra* note 3 [publication pending] are two other articles "Full Court Press: Termination By Adjudication," and "A Sucker Born Every Minute." The latter article describes conservative, seemingly vindictive, assaults on tribes seeking economic self-sufficiency all the while asking the tribes to join them politically and for contributions to

their political coffers.

[26] 25 USC 331 *et seq.*

[27] Treaty of July 15, 1830 (No. 159 of the ratified treaties) involving the Sauk (Sac) and Fox, Sioux (Mdewakanton, Wahpeton, Sisseton, Yankton and Santee), Omaha, Iowa, Oto and Missouri. The last treaty with an allotting provision was also the last treaty signed between the U.S. and an Indian tribe, the Nez Perce, Treaty of August 13, 1868 (No. 374 of the ratified treaties). Treaty-making was abolished in 1871 due to jealousy of the House of Representatives of the Senate's exclusive treaty ratification power. A shift was therefore made to agreements that both houses of Congress approved. Interestingly, the first Indian Commissioner of Indian Affairs, Ely S. Parker, was an Indian treaty opponent.

[28] Felix S. Cohen, Handbook of Federal Indian Law, (United States Government Printing Office 1942), at 206, (hereinafter "Cohen 1942 ed.")

[29] Id. at 206-207. *See also* Tim Vollmann and M. Sharon Blackwell, *Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time For Legislative Reform,* reprinted from *25* Tulsa L.J. (Fall 1989), at 6.

[30] Angie Debo, A History of the Indians of the United States, (University of Oklahoma Press 1970), at 304 and 314.

[31] Cohen, *supra* note 28, at 208 n.32. Tribes exempted include: the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole), Osage, Miami, Peoria, Sac and Fox in the Indian Territory (Oklahoma), New York Seneca and inhabitants of the strip south of the Sioux in Nebraska. The Osage were also exempted. Cohen 1942ed, *supra* note 28, at 425 and 446-455.

[32] Felix S. Cohen, Handbook of Federal Indian Law, (The Michie Company 1982 ed.), at 744. (hereinafter "Cohen 1982 ed.")

[33] Otis, *supra* note 23, at 3.

[34] Id.

[35] Id.

[36] Id. at 3-4.

[37] Id. at 6-7. *See also* J.P. Kinney, A Continent Lost—A Civilization Won, (John Hopkins Press 1937), at 201 and the Act of February 8, 1887, (34 Stat. 388), § 5, (hereinafter "Kinney.")

[38] "A Hard Look at Indian Policy and Its Effects," Federal Indian Probate Post, February/March 1999, at 9.

[39] Otis, *supra* at note 23, at 111-113.

[40] Sally Willett, "All My Relations: Historical Calendar," (Indian Probate ed. 2002), at 4.

[41] Otis, *supra* note 23, at 59 and Cohen 1942 ed., *supra* note 28, at 210.

[42] Cohen 1942 ed., *supra* note 28, at 209 and "Fighting Enemies," *supra* note 23, at III-21.

[43] "Hell On Wheels," *supra* note 25, at 8. The article states, "The utter fallacy of the federal allotment policy is seen by the fact that most of the allotted land in Indian Country is west of the 98th meridian the point at which rainfall is generally insufficient to sustain dry farming." "IC Fires Back" *supra* note 24, at 11 states, "The General Allotment Act was the century's third theoretical panacea to the 'Indian question' in less than 60 years. The nation already had shaky experience with the Homestead Act of 1862 and the bailouts necessary to make the act work and was in the midst of a 20-year drought cycle throughout the country. Non-Indian settlers with more experience in agriculture were unable to make a go of it on semi-arid 160-acre tracts. ... Indians were expected to succeed where more prepared white settlers had failed—and in some of the harshest environments in the country made worse by droughts in the 19th and 20th centuries (citations omitted)."

[44] World War II, *supra* note 10, at 25.

[45] Id.

[46] Great Documents in American Indian History, (Wayne Moquin and Charles Van Doren eds., Da Capo Press ed. 1995), at 288,

(hereinafter "Great Documents.")

[47] Id.

[48] Section 5 of the General Allotment Act is codified at 25 USC 348. It provided as follows: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, *or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located*, and that at the expiration of said period the United States will convey the same by patent to said Indian, *or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. ...*" (Emphasis supplied.) Comments of Lyman Abbott in 1887, later referred to as a gadfly reformer, indicate, "...[T] he Indian (it was hoped) would not be cared for by the executive branch of the Government; like everyone else he was to come under the protection of the courts." Those courts as indicated in Section 5 were state and territorial courts. Previously, this writer found a separate reference, not here cited, to Lyman Abbot stating to the effect that he had never been on a reservation and had seen few Indians but that his convictions about what was best for Indians were nonetheless absolute. Such attitudes continue unabated in Indian affairs today. *See* "The Idiot's Idiot," Federal Indian Probate Post, November/December 2000, at 9 describing the introduction of an anti-Indian preference measure, euphemistically dubbed "The Native American Equal Rights Act," by a congressman from Pennsylvania with no Indian land base in his state. Using typical high-minded language and positive naming, the stated goal of the act is to prevent discrimination against all non-Indians. The article sets for the reasons Indian preference is valid and points out what the supreme court said in Mancari v. Morton, 417 U.S. 535 (1974) about Title 25 of the United States Code. The court said that if laws pertaining to preference, derived from historical relationship and explicitly designed to help only Indians were deemed invidious racial discrimination an entire title of the federal code would effectively be erased. The article goes on to note that federal case law expressly holds that so long as there is a substantial federal purpose served, the mere presence of a racial component does not make a classification constitutionally infirm, citing Alaska Chapter, Associated General Contractors v. Pierce, 694 F. 2nd 1162 (9th Cir. 1982).

[49] "GL Analysis: Allotted Lands Policy, Probate, Adjudication, Service Delivery Systems and Related Systemic Problems in the United States Department of Interior," dated July 17, 1999, at 9-25, (hereinafter "Analysis.")

[50] Id. at 9.

[51] Intestate proceedings are authorized by 25 USC 372; testate, by 25 USC 373.

[52] "Analysis," *supra* note 50, at 9.

[53] Id.

[54] A Continent Lost, *supra* note 37, at 283.

[55] Great Documents, *supra* note 46, at 291. The document from which the reference is taken were the "Proceedings of the First Annual Conference of the Society of American Indians," (Washington, D.C. 1912), at 112-21. The source goes on to describe Interior's probate methodology as a "star-chamber proceeding" that "...has gone on to such an extent that in one case the Supreme Court of the United States has said that the action of the Interior Department was so arbitrary that it had no place in American jurisdiction" and, further, that "there was no place even in the Executive Department of the Government for such arbitrary action and disregard of law." The excerpt goes on to excoriate the department for using officials with no court experience to act as judge in controversies involving land titles by descent, worth millions of dollars, who attempted to adjudicate thirty or forty cases in a single day. Id. at 291-292. The excerpt proceeded to describe in the same vivid terms the autocratic and arbitrary power of the competency commission and the character of those thrust into positions of power over Indians as, "Men, through political accident, and most likely through business failure preceding it, are placed in positions of arbitrary powers. They evolve new theories...and remedies for all. They are followed by a horde of their appointees who know nothing more than themselves about the [Indian] people and their conditions." Then, the process was said to begin all over again.

[55] "Analysis," *supra* at 10.

[56] Id.

[57] Id.

[58] Id. at 11.

59 Id.

[60] Id.

[61] 43 CFR 4.210.

[62] 43 CFR 4.270.

[63] 43 CFR 4.240.

[64] The rehearing regulations are set forth in 43 CFR 4.241. 43 CFR 4.242 contains the reopening provisions.

[65] The American Indian Trust Fund Management Reform Act is codified at 25 USC 4001 *et seq*.

[66] 43 CFR 4.320

[67] 43 CFR 4.236(b).

[68] 25 CFR Pt. 15.

[69] 25 CFR 15.301 *et seq*.

[70] 25 CFR 15.206.

[71] *Compare* 25 CFR 15.104(a)(2) with 25 CFR 15.202(a).

[72] 25 CFR 15.303-15.321. See also 66 Fed. Reg. 7074 (2001) and 66 Fed. Reg. 67654 (2001).

[73] 25 CFR 15.203.

[74] 25 CFR 15.205.

[75] 25 CFR 15.203(b) and 15.301.

[76] Time frames for summary distribution are found at 25 CFR 15.206(b) and (c). Deadlines for BIA attorney decision makers are contained in 25 CFR 15.301(b), (c) and (d) and 15.310.

[77] 25 CFR 15.204. The restriction of the right to request a hearing to probable heirs or beneficiaries is mentioned at 25 CFR 15.203 (c)(1). Note that 25 CFR 206(a) pertaining to summary distribution states that "probable heirs" (a term used for intestate presumptive heirs only) have 30 days from receiving a notice of rights from BIA (25 CFR 203(c) to request a hearing. However 25 CFR 15.204 contains no qualification regarding summary distribution matters. Nor does it expressly exclude creditors who are legally classified as parties under the definition of "interested parties" and included within the definition of "you" in the informal parlance of BIA's regulations. Definitions in BIA's probate regulations are found in 25 CFR 15.2. It is noted that the summary distribution provisions do not contain the same express restriction to intestate matters as was previously contained in the summary distribution regulation in effect from 1970 until 2001. 43 CFR 4.271. This type of idiosyncrasy and inconsistency is found throughout BIA's regulations. The effect of the inconsistencies is to inject great uncertainty in the application of the regulations. Note that some components at Interior are fully aware that the regulations need work, the introductory section to OHA's conforming regulations state, "...these changes are not intended to serve as the Department's final word on the Indian probate process. BIA and OHA are both contemplating further revisions. ..." 66 Fed. Reg. 67652 (2001).

[78] 25 CFR 15.301.

[79] There are no procedural regulations addressing appeals from Board of Indian Appeals decisions to the United States Federal District Court contained in 43 CFR, Pt. 4, Subpart D.

[80] The Indian Land Consolidation Act Amendments of 2000 are codified at 25 USC 2201 *et seq*.

[81] *See* Section 106(a)(2) of the 2000 ICLA amendments containing conforming provisions. Notably included are express repeal provisions for the authority and procedures for allotting under the GAA in Section 106(a)(1). Section 106(b)(1) and (2) expressly amend 25 USC 372 and 372 to use ILCA or tribal succession standards in Indian probate proceedings eliminating the incorporation by reference of state law standards under 25 USC 348. As noted in the article text, state law has never had application to Indian wills. *See e.g.'s* Estate Anna Charley Kaseca White, IA-T-13 (decided June 18, 1968) and Estate of Elizabeth Frank Greene (Green), deceased Nez Perce Allottee No. 1517, 3 IBIA 110 (decided September 19, 1974), 81 I.D. 556.

[82] 25 USC 372a.

[83] The 2000 amendments do not repeal by express terms the original language of ICLA. The 1983 original enactment, as amended October 30, 1984 at 25 USC 2202 (Section 203) states, "That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s). Moreover, unless otherwise expressly stated, laws are not assumed to have retroactive effect. Congress has enacted four statutes that prescribe succession for the following tribes: Umatilla (Act of April 12, 1978. 92 Stat.202) now superseded by an ILCA code, approved March 5, 1999); Standing Rock (Act of June 17, 1980, 94 Stat. 537), Devils (Spirit) Lake Sioux (Act of January 12, 1983, 96 Stat. 2515) and Sisseton-Wahpeton (Lake Traverse) (Act of October 19, 1984, 98 Stat. 24ll). Note also that the Salt River Tribe has an approved ILCA inheritance provision, (SRO-150-92, approved June 25, 1999). Other tribes have ILCA codes in process of preparation but face uncertainty as to their prospect of approval due to difficulty in interpreting the tribal code and related provisions of the 2000 ILCA amendments. Rosebud is one tribe that is in the process of code development known to this writer. The reader is further directed to tribal purchase option provisions contained in 43 CFR 4. 300 for Yakama, Warm Springs and Nez Perce. The tribal provisions themselves were enacted, respectively, December 31, 1970, August 10, 1972 and September 29, 1972.

[84] 25 USC 2205.

[85] As to will devises, 25 USC 2206(a)(2). For intestate succession, 25 USC 2206(b)(2).

[86] 25 USC 2201(2). A detailed discussion of the practical effect of the definition upon Indian Country is contained in "Battle Stations," supra note 3 [publication pending.] Standing Rock projects that approximately 4,000 individuals will be impacted. A major landowner at Agua Caliente is facing the prospect of being unable either to devise or deed interests in trust to her unenrolled children of documentable Indian blood. The impact of constructed definitions of Indian upon land tenure in trust is significant. Politically crafted definitions versus consanguinity are at once a tacit termination method and a budget factor which interact to adversely impact Indians. *See* related discussion, supra note 15. Use of constructed definitions divorced from consanguinity is called the 'blood game." It "culls the service population." "Full Court Press: Termination by Adjudication," *supra* note 25 [publication pending.] For the full range of political, social and cultural implications of the "blood game," the reader is referred to "Little Red Sambo," an alternate article, submitted November 1, 2001 with the last-mentioned piece, to the Federal Indian Probate Post. Due to the importance of addressing the judicial activism demonstrated by the supreme court on Indian issues, the former was designated the article for publication. In April 2002, the high court's activism was the subject of fertile comments at the Federal Bar Association's Indian Law Conference. Speakers lamented the 77% loss rate before the court by tribal litigants. Professor David Getches of the University of Colorado School of Law remarked to participants that he had racked his brains trying to find any group where the numbers were comparable. He observed that it was better to be a criminal than an Indian tribe before this court. Criminals had a 34% success rate.

[87] 25 USC 2206(b)(3). Note that the definition of first and second degree as used in the 2000 amendments is not consistent throughout. *Contrast* 25 USC 2206(a)(3)(C) and 25 USC 2201(5).

[88] 25 USC 2205 generally. Section 2205(a)(3) precludes approval of a tribal code if the code prevents an Indian person from inheriting an interest in an allotment that was originally allotted to his or her lineal ancestor. Inconsistently, the federal succession provisions in 25 USC 2206(b) do not contain similar restrictions. Tribes are therefore given less flexibility than the U.S. affords itself in restricting succession.

[89] 25 USC 2218 sets forth the following consent standards: 5 owners or less, 100%; >5 but <11, 80%; >10 but <20, 60% and >20 owners, majority consent. See Title II of the 2000 ILCA amendments Section 201(b)(2) for the consent provisions pertaining to Navajo.

[90] 25 USC 2214. It is important to note that the judicial review authorization in the 2000 ILCA amendments mentions only Section 207 (25 USC 2206), the succession provisions. Whether this was an intentional restriction, an omission or the product of drafter oversight is not known. Whatever the basis of the omission, the absence could be highly damaging to landowners in instances of geographic unitization of high value with low value resources and no mechanism authorized for review of the classification or valuation. It is an area that requires rectification to ensure that the due process rights of property owners are protected.

[91] 25 USC 2212.

[92] 25 USC 2206(d)(1)(B). Indian reservation includes land within "the boundaries of any Indian tribe's current or former reservation." In this era of fee to trust controversy, this provision has escaped notice by the groups who stone wall fee-to-trust regulations. Under the ICLA land consolidation plan provisions, once a plan is approved, individual transaction approval is no longer required from the Secretary. Therefore, if a tribe were to formulate a consolidation plan that gave it a purchase option in probate to take advantage of this descent provision, interests could be acquired without secretarial approval on a case-by-case basis. There is only one impediment to accomplishing that goal at this point. It requires only a minor amendment: 25 USC 2216 states that federal policy encourages consolidation by Indians and tribes and that the policy does not apply to non-Indians. There are tenancy in

common interests in fee owned by Indians in allotments. There are also non-Indian fee interests within otherwise trust allotments that part of the fractionation mix. Such interests contribute as much to the fractionation dilemma as trust interests and must be brought under the umbrella of ILCA's consolidation authorization in order to have a complete mechanism for addressing allotted land fractionation and promoting effective consolidation of small interests.

[93] Two summaries of the amendments are available from this writer: One, a technical outline with detailed annotations; the other, a concept outline developed solely as a means of facilitating review of a convoluted law that that is causing great consternation among probate personnel and others who are required to implement it or learn it for other reasons. Requests for either may be made to this writer at snwillett@yahoo.com .

Fractionated Interests in Land that is Held in Trust for Native Americans;

This is a serious problem that cannot be solved using existing paradigms;

However, it can be solved.

Prepared by

Arvel M. Hale

May 13, 2002

Real Estate Appraisal & Information Services 9902 Jay Lane, Bristow, VA 20136

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 was smaller than 2%. On the same reservation 77.47% of all allotted interests are less than 2%.

Fraction	Tribe Interest	Allotted Interest	Total Interests	Tribal Percent	Allotted Percent	Tracts	Acres
0% - 2%	2,644	54,683	57,327	94.77%	77.47%	1,259	35,426.36
2% - 5%	42	7,316	7,358	1.51%	10.36%	1,459	48,390.31
5% - 50%	96	7,301	7,397	3.44%	10.34%	2,473	269,882.40
50% - 99%	8	1,287	1,295	0.29%	1.82%	320	36,940.07
Total Interests	2,790	70,587	73,377	100.01%	99.99%	2,380	443,809.74
100%	3,065	59	3,124	52.35%	0.08%	3,476	566,496.03
Totals	5,855	70,646	76,501			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 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 $1,000	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.

Real Estate Appraisal &
Information Services 9902 Jay Lane, Bristow, VA 20136

Cost to Process Real Estate Transactions of Owner Interests using Current BIA Methods

Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Cost per Owner Interest Transaction						Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
		Apply	Appr - aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost /Interest			
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 interested 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 of 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 an 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.

Real Estate Appraisal & Information Services 9902 Jay Lane, Bristow, VA 20136

Cost to Process Real Estate Transactions of Owner Interests using the MAD System										
		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.

In spite of all this the rest of the BIA seems intent on destroying MAD. I have heard two comments that represent the attitude of the BIA. (1) The appraisal module will eliminate appraiser jobs and (2) I am getting rich from the MAD system.

When I was Chief Appraiser for the BIA, I was pleased when our budget was reduced because it forced people to use more efficient methods to provide appraisal services. Fore some people, the more money you give them the more inefficient they will become.

I have not become rich developing MAD. I have only been paid for half the time I spent working on the system. I have spent time in the Dakotas when the weather was miserable and where the accommodations were less than acceptable. This has been an expensive hobby for me.

My goal has been to move to a higher level where we use modern technology to solve the difficult problems of managing trust interests, which includes repairing the damage caused by fractionated interests.

Testimony of Michael S. Pfeffer, Executive Director
California Indian Legal Services
510 16th Street, Fourth Floor, Oakland, California 94612; (510) 835-0284

respectfully submitted to the
Senate Committee on Indian Affairs
United States Senate

on S. 1340, a bill to amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands.

June 5, 2002

Thank you, Mr. Vice-Chairman Campbell, for this opportunity to address you and the distinguished members of the Senate Committee on Indian Affairs on proposed amendments to the Indian Land Consolidation Act. The issues addressed by the Indian Land Consolidation Act and the proposed amendments in S. 1340 are very important to preserve the Indian land base throughout Indian Country and especially in California.

I. INTRODUCTION.

These comments from California Indian Legal Services (CILS), a law firm devoted exclusively to the representation of Indian people and Tribes, are based upon the collective experience of the law firm over the period of some 35 years. CILS has represented most of California's 109 federally recognized tribes during its 35 years and has served as counsel in many successful cases resulting in the restoration of improperly terminated California rancherias. We have also represented many California tribes in their efforts, often successful, to restore their rightful status as recognized California Indian tribes. In addition, we have represented over 30,00 California Indians in matters of Indian status, land status, and probate. Our experience leads us to conclude that ILCA must be amended, with three simple changes, in order to protect California Indians.

Our three suggested amendments address the unique legal status of California Indians – issues that affect both the political status of individual Indian people and their Tribes and their land holdings.[1]

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[1]Congress commissioned exhaustive reports that detailed this tragic history and its remaining effects on California Indians. See, Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, September 1997.

II. OVERVIEW OF THE INDIAN LAND AND NATURAL RESOURCE BASE IN CALIFORNIA

Considering that there are 109 federally recognized tribes in California, the Indian land base in California is extremely small. There are only 89 reservations and rancherias under the jurisdiction of the Sacramento Area Office,[2] consisting of approximately 400,000 acres of land held in trust for the benefit of California Indian tribes. An additional 63,000 acres of public domain and reservation allotments are held in trust for the benefit of individual Indians.[3] By contrast, the eighteen unratified treaties with California tribes would have reserved approximately 8.5 million acres.[4]

At least eighteen recognized tribes in California have no tribal land base whatsoever.[5] Many of the reservations in California are extremely small: most are less than 500 acres; 22 are 100 acres or less and, of these, 16 are 50 acres or less, seven are 20 acres or less, five are under 10 acres, and four are under five acres.[6] Only 11 California tribes have a land base of over 10,000 acres.[7]

This lack of land stems, at least in part, from the existence of negotiated but unratified treaties and the termination of California tribes under the California Rancheria Act of 1958, as amended, and their restoration.[8]

In light of the serious lack of Indian land in California and CILS's experience and expertise in working to address this problem, we respectfully submit the following comments and proposed amendments to the Indian Land Consolidation Act.

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[2] This count does not include the three reservations that straddle the California/Arizona border, which are under the jurisdiction fo the Phoenix Area Office. Seven of the eighty-eight rancherias are held for the benefit of the Pit River Tribe. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996"

[3] Id.

[4] See Flushman and Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 390, 418 (1986) at 403-404.

[5] See Table 1 to the ACCIP Economic Development Report.

[6] Id.

[7] The ACCIP Trust and Natural Resources Report, at pp. 11-12.

[8]The ACCIP Historical Overview Report: The Special Circumstances of California Indians," at p. 5,13; See, e.g., The ACCIP Termination Report: The Continuing Destructive Effects of the Termination Policy on California Indians."

Comments to Senate Bill 1340 (Amendment to Indian Land Consolidation Amendments of 2000)

I. BACKGROUND

The critical issue in applying the Indian Land Consolidation Amendments of 2000 (ILCA) to California Indians centers upon the definition of "Indian." Under ILCA, as well as under proposed amendments, many trust interests in California, upon the death of the current interest holder, will pass out of trust ownership. Many trust interests that will remain in trust will not be subject to the land consolidation provisions of ILCA. These two scenarios, which are contrary to the purposes of ILCA, result because many California Indians, as a result of their unique status, do not meet the definition of Indian under ILCA as it is applied by the Secretary. We do not believe that this was Congress' intent in passing ILCA, but Congress has the rare opportunity to prevent these potential situations by making three easy changes to ILCA. Recent Congresses have been sensitive to the unique problems facing California Indians as a result of their particularly tragic history.

For example, under section 2206(d)(ii) of the current ILCA statute, Congress recognized the special California situation by including a "do no harm" provision that exempts the descent provisions of ILCA for off-reservation trust lands. The intent of this provision was to keep California off-reservation allotments in trust status, and to reduce any unintended negative consequences of ILCA. Since ILCA was adopted, our experience and greater familiarity with the statute and our attendance at BIA consultation and training sessions, has lead us to conclude that this "do no harm" provision fails to promote ILCA's goals. As currently drafted, and even with the proposed changes, ILCA will work to the detriment of the goal of both preserving the Indian land base in California and consolidating fractionated interests in trust allotments.

California Indian trust interests must be allowed to remain in trust when inherited by Indian heirs. Loss of trust status will inevitably lead to a significant diminution of the small Indian land base in California. If fractionated interests remain in trust, rather than pass into fee ownership, this will facilitate the eventual consolidation of these interests. Small fractionated fee interests can quickly become subject to many encumbrances that make it costly and impracticable to return these interests to trust for consolidation purposes.

To protect California Indian trust interests and foster consolidation within California requires three relatively minor changes to the Act. The California exception in Section 2206, quoted above, should be removed and the definition of Indian found in Section 2201 should be amended to include in the definition of Indian the following language:

any descendant of an Indian who was residing in California on June 1, 1852.

This definition closely mirrors the definition of California Indian contained in the Indian Health Care Improvement Act (IHCIA). In the IHCIA, Congress was concerned, as it should be here, with ensuring that California Indians are treated equitably under federal programs and policies

affecting Indians. Under ILCA's definition of Indian, as currently drafted, the Secretary of the Interior could have chosen to incorporate our proposed definition. The Secretary, under ILCA, can determine who is Indian by referring to their eligibility for participation in other federal Indian programs. 25 U.S.C. §2201. Thus the Secretary could have designated the IHCIA as a qualifying federal program for determining who is an Indian, but she chose not to, perhaps because of its impact on other states.[9] Although the Secretary's decision makes sense in other states, it will be harmful in California. This problem can easily be corrected by simply incorporating the California-specific IHCIA definition within ILCA. Congress' intent in adopting this definition for IHCIA, and its intent in adopting the "do no harm provision" was to protect and be mindful of the unique status of California Indians. To complete that task, however, we now understand will require incorporating the IHCIA definition of California Indians into ILCA and removing the "do no harm provision."

A broad definition of California Indian, as found in the IHCIA, is the only manageable definition of Indian that adequately protects California Indian trust interests. To illustrate this point, we have appended a list of the different classes of Indian status commonly found in California by both holders of trust interests and their potential heirs. These lists are found in **Appendix A**, attached hereto and incorporated by reference. This truly bewildering variety of possibilities of Indian status in California is the culmination of one-hundred fifty years of mis-treatment of California Indians. The lack of ratified treaties, the devastation of the Gold Rush, the unlawful termination and partial restoration of almost 40 tribes and reservations, the myriad special acts, lawsuits, court decisions, settlements, partially recognized, newly recognized, re-recognized, and soon to be recognized tribes, and still yet other factors all combine to create this complex pattern of Indian trust ownership. A definition of Indian that attempted to detail each of these special circumstances would dwarf the rest of the ILCA, as it would have the IHCIA. Congress in its wisdom has recognized that the simplest definition of California Indian, at least for IHCIA, is also the best definition. The same logic and equitable concerns require adoption of the same definition within ILCA.

The reasons that have led to this truly staggering and variable array of combinations of who can possess or inherit Indian trust interests in California has led to relatively little land remaining in trust. Keeping Indian land in trust and consolidating fractionated interests is of paramount importance to California Indians and their future. If ILCA is applied broadly throughout California, it will further these purposes. If our proposed amendments to ILCA are

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[9]Current law defines Indian as section 2201(2) "Indian" means any person who is a member of any Indian Tribe or is eligible to become a member of any Indian Tribe, ***or any person who has been found to meet the definition of "Indian" under provision of federal law if the Secretary determines that using such law's definition of Indian is consistent with the purposes of this Chapter.*** (Emphasis added)

However the Secretary in training sessions held for BIA probate staff specifically exempted the Indian Health Care Improvement Act and IHS services as an Act whose purposes are consistent with the purposes of this chapter. See BIA-Western Regional Office; Indian Land Consolidation Act -Training Materials (October - December 2001).

adopted, it will keep the land in trust and ultimately subject most, if not all, Indian trust lands to tribal jurisdiction. This will allow Tribes to adopt appropriate probate and other land consolidation enactments so that those lands that have become highly fractionated, but nevertheless remain in trust, will pass unencumbered to the Tribes or other Indians.

The third and last California specific proposed amendment to ILCA which we urge Congress to adopt is a grandfather provision that clarifies that land currently held in trust for a person who is descended from one of California's original inhabitants is properly held in trust by the United States. This provision is necessary because, in our many years of experience representing California Indians, officials within the Department of the Interior have raised concerns about removing the trust protection of current public domain allotments. We believe these concerns can be appropriately addressed through minor changes to the ILCA. We propose language that states that "Any land currently held in trust by the United States for an Indian is hereby declared to be land properly held in trust for such individual or individuals."

Our proposed language is based on the current language contained in the proposed amendments to SB 1340. There are provisions concerning the issuance of patents and transfers of restricted Indian land contained at the very end of the proposed changes. Under these sections, we would urge the inclusion of language confirming the trust status of public domain allotments in California. Proposed wording for these sections are as follows:

"(c) ISSUANCE OF PATENTS.-- ...shall apply thereto after those patents, *including those for public domain allotments,* have been executed and delivered."

"(d) TRANSFERS OF RESTRICTED INDIAN LAND. – Section 4 of the Act of June 18th, 1934 (25 U.S.C. 464), is amended *in the first clause to include language as follows:* 'Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands, *including public domain allotments,* or of shares in the assets of any Indian tribe..."

Appendix B, attached hereto, is a list of statutes involving these commonly-occurring off reservation allotment or public domain parcels.

Other Miscellaneous Concerns

Beyond California specific proposals, California Indian Legal Services also suggests the following changes to ILCA:

Escheat

Under current 25 U.S.C. § 2206, and the proposed changes, there is no provision concerning what happens when there are no heirs whatsoever and there is no tribe that exercises jurisdiction

over the trust parcel. ILCA should be amended to provide that where there are no heirs and no tribe exercising jurisdiction, if there are Indian co-owners, the land escheats to them proportionally to their interests in the trust parcel.

Trust and Restricted Land Transactions (25 U.S.C. § 2216(e))

Section 2216(e) should be modified to allow other Indian co-owners of an interest in a trust allotment to receive information from the Bureau of Indian Affairs about their co-owners. Oddly, as currently drafted, if the land is located within the boundaries of a reservation, any Indian on a reservation can ask for any of that information, whether or not they have an interest in that particular trust allotment. Proposed language is as follows:

"*(2) Other Indian owners of interests in trust or restricted lands with interests in the same off reservation lands or parcels*;
~~(2)~~*(3)* the tribe that exercises...
~~(3)~~*(4)* prospective applicants for..."

We believe these comments and the amendments they suggest foster the achievement of ILCA's expressly stated goal to consolidate Indian land holdings, and at the same time we believe they help preserve the Indian land base in California. We are happy to provide any further comment, discussion or information on this subject of vital interest to California Indians.

Respectfully submitted,

Michael Pfeffer,
Executive Director,
California Indian Legal Services

APPENDIX A –

Classes of Indian with Trust Interests

A. *Individual Indians holding trust interest on allotments located on a California Reservation*

Member of recognized California Tribe located on that reservation
Member of recognized California Tribe from a different reservation
Member of recognized California Tribe with no reservation
Member of unrecognized California Tribe located on that reservation
Member of unrecognized California Tribe not located on that reservation
Member of terminated California Tribe not located on that reservation
Member of terminated California Tribe located on that reservation
Member of unterminated California Tribe not located on that reservation
Member of unterminated California Tribe located on that reservation
Ineligible member of recognized California Tribe located on that reservation
Ineligible member of recognized California Tribe located on different reservation
Ineligible member of unrecognized California Tribe located on or off of that reservation
Ineligible member of recognized California Tribe located on different reservation or that has no reservation
Ineligible member of unterminated tribe - there are special factors here that have to do with *Knight v. Kleppe* if they are a dependent of a distributee, or the specific terms of the settlement or court rulings in the various untermination cases, or restoration statutes.
Ineligible member of terminated tribe - some of the special factors listed immediately above might also apply.
All of the above but the tribe is from another state
Combinations of the above - for example - part unrecognized, part in-eligible for membership

B. *Individuals who are intestate successors to persons listed in part A above*

Member of recognized California Tribe located on that reservation
Member of recognized California Tribe from a different reservation
Member of recognized California Tribe with no reservation
Member of unrecognized California Tribe located on that reservation
Member of unrecognized California Tribe not located on that reservation
Member of unacknowledged (ie never recognized) California Tribe with no reservation
Member of unacknowledged (ie never recognized) California Tribe on that reservation
Member of unacknowledged (ie never recognized) California Tribe not located on that reservation
Member of terminated California Tribe not located on that reservation
Member of terminated California Tribe located on that reservation
Member of unterminated California Tribe not located on that reservation

Member of unterminated California Tribe located on that reservation
Ineligible member of recognized California Tribe located on that reservation
Ineligible member of recognized California Tribe located on different reservation
Ineligible member of unrecognized California Tribe located on or off of that reservation
Ineligible member of recognized California Tribe located on different reservation or that has no reservation
Ineligible member of unterminated tribe - there are special factors here that has to do with Knight v. Kleppe if they are a dependent of a distributee, or the specific terms of the settlement or court rulings in the various untermination cases, or restoration statutes.
Ineligible member of terminated tribe - some of the special factors listed immediately above might also apply.
All of the above but the successor is from an out of state tribe
All of the above but the tribe is from another state (where the tribe, not a person is a successor)
Non Indian spouses, but Indian children will inherit from non Indian spouses
Non Indian spouses, but no Indian children will inherit from non Indian spouses
Non Indian children, heirs of the 1st or 2nd degree, or collateral heirs of the 1st or 2nd degree
Other non Indian survivors if they exist - I'm not sure they do
Combinations of the above - for example - part unrecognized, part in-eligible for membership

C. *Individuals who are testate successors to persons listed in part A above*

Member of recognized California Tribe located on that reservation
Member of recognized California Tribe from a different reservation
Member of recognized California Tribe with no reservation
Member of unrecognized California Tribe located on that reservation
Member of unrecognized California Tribe not located on that reservation
Member of unacknowledged (i.e. never recognized) California Tribe with no reservation
Member of unacknowledged (i.e. never recognized) California Tribe on that reservation
Member of unacknowledged (i.e. never recognized) California Tribe not located on that reservation
Member of terminated California Tribe not located on that reservation
Member of terminated California Tribe located on that reservation
Member of unterminated California Tribe not located on that reservation
Member of unterminated California Tribe located on that reservation
Ineligible member of recognized California Tribe located on that reservation
Ineligible member of recognized California Tribe located on different reservation
Ineligible member of unrecognized California Tribe located on or off of that reservation
Ineligible member of recognized California Tribe located on different reservation or that has no reservation
Ineligible member of unterminated tribe - there are special factors here that has to do with *Knight v. Kleppe* if they are a dependent of a distributee, or the specific terms of the settlement or

court rulings in the various untermination cases, or restoration statutes.
Ineligible member of terminated tribe - some of the special factors listed immediately above might also apply.
All of the above but the successors are from an out-of-state tribe
All of the above but the tribe is from another state
Non Indian spouses, but Indian children will inherit from non Indian spouses
Non Indian spouses, but no Indian children will inherit from non Indian spouses
Non Indian children
Other non Indian survivors, if they exist
Combinations of the above - for example - part unrecognized, part in-eligible for membership

D. *Same as A, B, and C above but the land is* ***not*** *located within the exterior boundaries of any reservation, plus the following variations*:

Variations of membership listed in section A,B,C above compounded by the fact that the land is **within** the "jurisdiction" of **some** tribe either recognized or unrecognized, terminated or unterminated

Variations of membership listed in section A,B,C above compounded by the fact that the land is **within** the jurisdiction of **more than one** tribe any of which are recognized or unrecognized, terminated or unterminated

Variations of membership listed in section A ,B,C above compounded by the fact that the land **not within** the jurisdiction of any tribe

Variations of membership listed in section A,B,C (except the non Indians) who inherit interest from non Indian who, in turn, had inherited land from Indian (e.g.: Indian wife leaves to non Indian husband, interest falls into fee, but upon non Indian husband's death, goes to Indian children)

E. *Trust interest is from Public Domain Allotment*:

Trust allotment is an Interior Allotment (BIA, BLM)

Trust land is not an Interior Allotment (Dept of Agriculture)

Trust land is not on a reservation and was not placed in trust pursuant to any public domain allotments.

F. *The same fact pattern as D, but the land is outside of California, could be within potential*

jurisdiction of tribe (Nevada, Arizona or Oregon) or somewhere else entirely.

APPENDIX B –

Statutory Bases for Public Domain Allotments Held In Trust for California Indians

- 25 U.S.C. § 334 (2001)
  Allotments to Indians not Residing on Reservations

This provision provides statutory authority for allotment of unappropriated federal lands to Indians who: 1) do not reside on reservations, 2) whose tribe has not been provided a reservation. Application for such allotments must be made to the local land office where the lands lie.

- 25 U.S.C. § 336 (2001)
  Allotments to Indians Making Settlement

This provision provides statutory authority for allotments of unappropriated federal lands to Indians who are otherwise entitled to allotment under existing law. Furthermore, the land must be allotted in the same manner as provided by law for allotments to Indians residing upon reservations. Moreover, the President may authorize allotments from the public domain provided that several restrictions are met.

- 25 U.S.C. § 337 (2001)
  Allotments in National Forests

This provision grants the Secretary of the Interior discretionary authority to allot land in national forests to Indians who: 1) occupy, live, or have improvements on national forest land *and*, 2) are not entitled to allotments on any existing Indian reservation *or*, 3) are members of tribes that have no reservation *or*, 4) are members of tribes with reservations that are not sufficient to afford allotments to all members. These allotments are subject to a determination by the Secretary of Agriculture that the lands are more valuable for grazing or agricultural purposes.

- 25 U.S.C. § 373b (2001)
  Restricted Estate or Homestead on the Public Domain

In cases of intestacy, public domain lands escheat to the United States subject to pre-existing creditors' claims allowed at the Secretary of the Interior's discretion. However, where the land value does not exceed $50,000, the land escheats to the United States to be held in trust for needy Indians as the Secretary may designate. Lands valued at more than $50,000 may be held in trust for needy Indians as Congress may designate.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
P.O. Box 278
Pablo, Montana 59855
(406) 675-2700
FAX (406) 275-2806
E-mail: csktcouncil@cskt.org

June 4, 2002

The Honorable Daniel K. Inouye
Chairman, Senate Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, DC 20510-6450

RE: Comments to Senate Bill 1340 entitled "Indian Probate Reform Act of 2001," Amending the Indian Land Consolidation Act Amendments of 2000, P.L. 106-462, 114 Stat. 1999, 25 U.S.C. § 2201, et seq., Legislative Hearing held on May 22, 2002

Dear Mr. Chairman Inouye and Members of the Committee:

Thank you for the opportunity to comment on S. 1340, a bill to amend the Indian Land Consolidation Act. The Confederated Salish and Kootenai Tribes [CS&K Tribes] appreciate the efforts of this Committee and its staff in attempting to correct the fractionation problems of Indian land ownership and to retain the trust status of the property. The federal Indian policy of allotments and the attempts to correct the detrimental effects are vast, complex, and difficult to understand. Unfortunately, the allotment policy created an inherent conflict between Tribal ownership and Individual land ownership. The CS&K Tribes recognize those conflicts and propose amendments to S. 1340 in an attempt to balance both the interests of the Tribes and our membership for a positive outcome and successful legislation.

I. INTRODUCTION

The Flathead Indian Reservation was reserved through the cession of over 22 million acres of tribal homelands to the United States retaining 1.24 million acres and other treaty rights. *The Treaty of Hellgate*, Treaty of July 16, 1855, 12 Stat. 975. The CS&K Tribes bitterly opposed the allotment policy on the Flathead Reservation and initially avoided the adverse effects of The General Allotment Act of February 8, 1887 commonly referred to as the Dawes Act. However, the competition for the land from outside business and political interests forced the passage of the Flathead Allotment Act of April 23, 1904, 33 Stat. 302, the legal authority for disposal of lands located within the exterior boundaries of the Flathead Reservation. As a result, the CS&K Tribes' most valuable asset, the land, was sold to non-Indian settlers at below-market value, nearly destroying the tribal economic base. The transfer of land from tribal ownership to private ownership created jurisdictional battles and barriers to tribal self-governance on our own Reservation that we struggle with daily. Since the era of the forced sale of tribal assets, the CS&K Tribes have expended great efforts and much resources to reacquire lands within the

exterior boundaries of the Flathead Reservation. The mission statement of the CS&K Tribes acknowledges the great importance of tribal ownership and control over all lands within our reservation boundaries.[1]

This history helps to explain the CS&K Tribes' struggle for self-determination and the desire to have a hand in the decisions that affect us. For example, since 1994, the CS&K Tribes have operated the realty program pursuant to Public Law 93-638, The Indian Self-Determination and Education Assistance Act of 1975, as amended. Prior to that time, the CS&K Tribes operated the realty program pursuant to a contract. As a result of our active land stewardship, the CS&K Tribes have first-hand experience and knowledge of Indian land issues. In August 2001 when some of the CS&K Tribes Indian landowners received the BIA brochure entitled "Notice to Indian Land Owners," it generated fear among our membership and initiated a flood of requests for fee patent applications. The potential of Indian landowners on our Reservation, who feel forced to transfer their interest from trust to fee status, poses a threat to our self-governance and Tribal jurisdiction. The CS&K Tribes recognize that the Indian landowners should not have to prematurely remove their land from trust status for estate planning purposes. The ability to place land into trust status is a difficult, time consuming and an expensive process. Currently, the Indian Land Consolidation Act Amendments of 2000 (ILCAA) are having the unintended consequence of tribal members requesting fee patents for their trust property for the purpose of avoiding the federal legislation. While there may be a perceived conflict between Indian landowners and the Tribes, the CS&K Tribes believe there are workable compromises in S. 1340 that will provide us with an opportunity to work with, not against, our membership for purposes of Indian land consolidation. The following is an analysis of the ILCAA and proposed amendments for your consideration.

II. RECOMMENDED AMENDMENTS TO S. 1340

A. Amend the Definition of Indian to Limit Secretarial Discretion in Certain Situations.

The CS&K Tribes propose that S. 1340 amend the definition of Indian in the ILCAA to limit Secretarial discretion in certain situations recognizing that individual Indian landowners have heirs who may not be enrolled but are still recognized as a member of the Indian community as

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

well as meeting the definition of Indian pursuant to other federal legislation.[2] The ILCAA provided a minor amendment to the definition of Indian that has resulted in a very restrictive interpretation. Pursuant to ILCAA, "Indian" means:

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

Under the new ILCAA definition, a person will be considered an Indian for purposes of inheriting trust land if he or she is an enrolled member or eligible for enrollment in a federally recognized Indian tribe. If an heir is not enrolled, the burden shifts to the heir to prove at the probate proceeding that a specific federal statute contains a broader definition of "Indian" and that definition is consistent with the purposes of ILCAA. The latter interpretation will delay probate proceedings, leave the determination of who is an Indian to the subjective decision of the administrative law judges or attorney decision makers, who may or may not use the same criteria. Furthermore, the definition is too vague for staff assisting Indian landowners with estate planning services to determine whether an heir may be able to meet the burden of proof at the time of probate.

In addition, this definition ignores the reliance of Indian landowners on past estate planning advice provided by the BIA which recognized first and second generation descendants as Indian for purposes of inheriting trust land. For example, prior to the passage of the ILCAA, land could be inherited in trust status by a person with any degree of Indian blood, even if that individual was not enrolled or eligible for enrollment with an Indian tribe. Based on that policy, Indian landowners have made decisions on behalf of their heirs with the intent that the land remain in trust. Now, with the enactment of ILCAA, Indian landowners who have taken the time and responsibility to estate plan for Indian Land Consolidation Act purposes are in jeopardy of having their heirs either inheriting a diminished interest of life estate, or (if S. 1340 is enacted) inheriting the land in "fee" status. As a result, a non-enrolled descendant heir of the Indian landowner may acquire title without trust status, thus alienating the property and assets, never previously taxed, but now suddenly subject to state taxation, regulation and jurisdiction.

The CS&K Tribes appreciate the need of this Committee to define who the federal government may owe a trust responsibility to and acknowledges that the previous policy of recognizing any individual with any degree of blood may be too broad. However, the Committee should also honor other federal legislation that recognizes non-enrolled first and second generation descendants as Indian for other purposes and also consider that the goal of the ILCAA is to

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[2] *See,* Indian Education Act of 1972, 20 U.S.C. § 1221h; Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(c); Indian Reorganization Act of 1934, 25 U.S.C. § 479.

purportedly maintain trust status of the land. The CS&K Tribes propose that in certain circumstances, the Secretarial discretion for the definition of Indian should be limited. For example, in cases wherein an Indian landowner explicitly devises in a will that land transfer to a first or second generation descendant heir "in trust," the Secretary should recognize that heir as an eligible Indian to inherit as furthering the goals of ILCAA. This allows the Indian landowner who is taking responsibility for his or her land ownership, the opportunity to estate plan as previously advised, and also expands the Tribes' opportunity to purchase or acquire the land in trust.

Here, amending the definition of Indian to limit Secretarial discretion may very well extend the ability of the Indian tribe, a perpetual titleholder, greater opportunity to purchase the property in trust without competing with our tribal members' desire to provide for their descendant heirs. In addition, this is an opportunity to provide incentives for Indian landowners to estate plan and take responsibility for their beneficial trust ownership. If the Indian landowner does not provide for descendant heirs through estate planning then the Indian tribes' interest to reduce fractionation and to purchase at the time of an intestate probate is greater. In summary, the CS&K Tribes recommend that the definition of Indian be construed as follows:

> 1) Testate (With Will) - Indian landowner may devise trust land to enrolled or first or second descendant heir "in trust" similar to the proposed S. 1340 amendment that allows an Indian landowner to devise trust land to a non-Indian heir "in fee."
> 2) Intestate (Without Will) - Definition of Indian would retain the more restrictive definition as proposed by the Secretary of the Interior.[3]

Testimony has already been provided to this Committee regarding the Indian community and opposition to the limited interpretation of Indian. However, the CS&K Tribes' proposed amendment to S. 1340 clarifies who will be eligible to inherit trust property which will greatly assist staff with providing Indian landowners estate planning advice; provides Indian landowners an incentive to draft a will for land consolidation purposes; and lessens the potential harm to Indian landowners who may otherwise choose to prematurely remove their land from trust status during their lifetime.

B. Amend the "Special Rule" of Inheritance to Support and Recognize Tribal Interests through Active Participation of Indian Tribes.

The CS&K Tribes do not oppose the rules of construction provided in S. 1340 to broaden the

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

special rule of inheritance to allow an Indian landowner to explicitly devise his or her property to a non-Indian "in fee." Again, this Tribal government represents and is comprised of the Indian landowners who now have grave concerns that they may not be able to devise their trust land to their heirs. The CS&K Tribes recognize the importance of the tribal membership's desire to estate plan for spouses and family members who clearly do not meet any definition of Indian to be eligible to inherit land in trust. Furthermore, the United States Supreme Court has already recognized that "a decedent's right to pass on property to one's heirs is itself a valuable right." Hodel v. Irving, 107 S. Ct. 2076 (1986). Here, the CS&K Tribes are still reprocessing 88 escheat estates involving 174 tracts or allotments resulting from the last litigation involving ILCA. Babbitt v. Youpee,117 S. Ct. 727 (1997). The CS&K Tribes support amendments that will lessen the risk of the United States Supreme Court finding ILCAA unconstitutional again. Therefore, the CS&K Tribes do not object to the amendment allowing an Indian landowner to devise his or her trust land to a non-Indian heir "in fee."

Next, the CS&K Tribes propose that Indian tribes be recognized as a party participant in probate proceedings. Since, Indian land titles and probates are so complex, the CS&K Tribes believe that flexibility for Indian tribes and the heirs of Indian landowners is an essential key to successful legislation provided in the ICLAA. Probate is an opportunity for the Indian tribes to participate and be a party to agreements between decedent's heirs to consolidate interests. Since ILCCA provides authority for approval of agreements including trust land that is not a part of the estate for consolidation purposes, an Indian tribe, as a landowner, should also have an opportunity to actively participate in those agreements arising from a probate proceeding. *See*, 25 U.S.C. § 2206(e).

The CS&K Tribes understand that any devise through a probate proceeding to a non-Indian will be subject to the tribal purchase option now provided for in 25 U.S.C. § 2205(c). However, again, this is an opportunity to codify existing BIA trust-to-fee policies which deny applications for fee patent for fractional interests, but still consider applications in fee for full ownership interest, subject to a tribal "right of first offer" to purchase prior to the termination of trust status.

C. Expand Authority of Indian Tribes to Codify Existing BIA Policy to Receive Notice and to Acquire Trust Land Prior to Any Conveyance that may Terminate the Trust Status.

The ILCAA currently provides authority to Indian Tribes to acquire trust land for fair market value if an owner of an interest in trust devises an interest in such land to a non-Indian. 25 U.S.C. § 2205. The CS&K Tribes propose an amendment to S. 1340 to expand and clarify the acquisition authority of Tribes to include all transactions that may terminate the trust status. This proposal is similar to the existing BIA policies when an Indian landowner requests removal of trust status through an application for fee patent. For example, the Code of Federal Regulations provides that the Secretary may withhold approval of the fee patent application request, if the removal of the property from trust status adversely affects the best interest of other Indians or the

tribes, until the other Indians or the tribes, have a reasonable opportunity to acquire the land from the applicant prior to the removal of the trust status. 25 CFR § 152.2. The decision to withhold action on a fee patent request is an appealable decision.

In addition, the new ILCAA provides for a five-year limitation in trust-to-trust conveyances before the Secretary may approve an application to terminate trust status. See 25 U.S.C. § 2216. After the expiration of the limitation, the new ILCAA provides that Tribes shall be notified of the application and given an opportunity to match the purchase price that has been offered for the trust land involved. However, a trust-to-trust conveyance such as a gift deed of property may also be approved pursuant to other existing federal law such as the Indian Reorganization Act of 1934 without limitations. Further, as discussed in these comments, the ability to track the five-year limitation through the Land Title and Records office will prove to be very difficult. Next, the opportunity for the Tribes to acquire the land at the purchase price anticipates a sale of land that may or may not be the situation.

Here, amending S. 1340 is an opportunity to clarify, to provide consistency and affirm the authority for Indian tribes to have notice and a reasonable opportunity to acquire interests in land at fair market value prior to removal of the trust status. Therefore, CS&K Tribes propose amending S. 1340 to address across the board an Indian tribe's authority to receive notice and a reasonable opportunity to purchase the interest at fair market value in all applicable conveyances that may terminate trust status, i.e., application for fee, probate proceedings, sale, etc. This recommendation should simplify an already very complex process and achieve the intent of maintaining the trust status of the land.

D. Extend the Date of Secretarial Authority to Take Lands into Trust.

The CS&K Tribes commend the drafters of the ILCAA on the efforts to facilitate fee-to-trust acquisitions with mandatory authority directing the Secretary to forthwith take lands into trust, if at least a portion of which was in trust as of November 7, 2000. 25 U.S.C. § 2216 (c). The CS&K Tribes propose amending this section to broaden Secretarial authority to forthwith take lands into trust in which a portion of **or the whole** was in trust or restricted status as of the date of General Indian Allotment Act of **February 8, 1887**. [24 Stat. 388]. This is an opportunity to recognize the failed policy of allotments and attempt to restore the lands in trust status that Indian tribes initially acquired by treaty or other means.

If nothing else, the ILCAA should be amended to recognize the date of the Indian Reorganization Act of June 18, 1934. [48 Stat. 984]. Clearly, the IRA signaled the shift of Congressional federal Indian policy from allotments to restoration of lands to Tribal ownership. As such, the amendment of the date from November 7, 2000 to June 18, 1934 is supportable. The CS&K Tribes recommend that the Committee amend the date in 25 U.S.C. § 2216 to preferably February 8, 1887 and for any or all interests in lands previously held in trust.

E. Development of a Land Title and Records [LTRO] System to Track Life Estates and Fee Interests held by Non-Indians.

The CS&K Tribes have also compacted the federal function of operating the title plant for recording, maintaining, and certifying of title documents, and the issuance of title status reports. The ILCAA requires that the LTRO be able to track all transactions including life estates and fee interests. Our present system has the ability to track a life estate by including it on the Title Status Report (TSR). However, in a case where the life estate holder is a non-tribal member and the owner dies, it becomes virtually impossible to track, as non-members are not probated in the same manner as Tribal members. Most often the non-member owner is not aware that there is ownership in trust property, therefore, it is not included in the estate. Also, when an interest is fee patented, there is no way to keep track of a life estate.

Typically, the BIA does not track fee ownership, since there is "no trust responsibility;" again, the fee interest is reflected on the TSR, but those in the "fee world" are not aware of our TSR's and we have no way of knowing when one of these owners die. Also, the LTRO's have great concern regarding the five-year limitation on the removal of trust status imposed by ILCAA: this affects trust-to-trust conveyances for less than fair market value. Presently, the tracking system has no way of monitoring these interests or parcels or providing notice to the Indian tribe when the limitation has expired. Again, as previously suggested, Indian tribes should be a party to trust probate proceedings, so that the Indian tribe has a reasonable opportunity to purchase interests before reverting to fee status, or are converted to an interest in life estate. In addition, it is possible that a national tracking system of fee and trust interests should be developed to cover both Indian and non-Indian interests for a tract of land.

F. Provide a Grandfather Clause for Existing Wills.

The CS&K Tribes recognize that the proposed amendments to S. 1340 will create an enormous administrative burden on our staff to prepare Wills and to provide technical estate planning assistance. As a P.L. 93-638 Compact program responsible for providing Will drafting assistance, the CS&K Tribes propose that some consideration be given to Indian landowners who already have a Will and that Will prepared prior to the effective date of section 2206 of ILCAA (yet to be determined) be interpreted by the judge at the time of probate in a manner that best reflects the knowledge the landowner probably had at the time of preparing his or her Will. A grandfather clause would assist with issues regarding Indian landowners who may now be incompetent or who cannot be located.

G. Clarify the Leasing Authority of Tribes or Indian Landowners with Majority Ownership.

Based on the number of owners in a tract of land, the new ILCAA provides an applicable

percentage of owner's consent required for approval of an lease. However, if there are five or fewer owners of undivided interest, a lease requires consent of all the landowners (regardless of the amount of undivided interest owned) prior to approval. 25 U.S.C. § 2218. This is an opportunity to clarify the process and grant authority to the Secretary to approve leases with notice to the Indian landowner upon request of the majority interest owner.

For example, the current authority utilized to grant a lease without consent of the owner is 25 U.S.C. § 380 entitled *Leases of Inherited Allotments by Superintendent* enacted July 8, 1940. In general, this section provides for a 90-day notice to the undivided interest owners to negotiate a lease or the Superintendent will grant a lease on their behalf. The CS&K Tribes propose an amendment that recognizes the majority interest owner with five or fewer owners who, for whatever reason, cannot attain 100 percent consent from the other owners. This will allow majority interest owners, often times the CS&K Tribes, with undivided interest and less than five owners to lease property without significant delays and without forcing purchase.

H. Encourage Broad Secretarial Authority to Approve Tribal Probate Codes.

The CS&K Tribes request that the Secretary be encouraged to approve a Tribal Probate Code that a Tribal government has enacted to determine inheritance and land consolidation efforts of the Tribes. The proposed Federal Probate Code in S. 1340 should only be applicable if the Tribes do not have governing Tribal law. The Indian tribes are in the best position to identify and eventually resolve fractionated interests on their reservation. However, the process and expense of enacting a Tribal Probate Code and then seeking approval of the Secretary of a Tribal Probate Code could take several months. In addition, Tribes have not received assistance nor funding for development of Tribal Probate Codes, further delaying the Tribes' ability to enact Tribal law in this complex area. Consequently, the barriers to enacting Tribal Probate Codes should be recognized and alleviated through the Secretarial approval process that is required in ILCAA.

I. Utilize Existing Federal Regulations for the Collection of Past-due Child Support.

Section 233 of S. 1340 provides for collection of past-due child support from the revenues derived from an interest in trust or restricted land. However, Title 25 of the Code of Federal Regulations, Part 115 provides a process for encumbering an Individual Indian Money account. The process of collecting for past due child support should be addressed through the existing regulations as a judgment against the individual.

Also, we have experienced jurisdictional problems in child support cases. For example, the local child support enforcement agency which does not have jurisdiction over a Tribal member residing on the reservation, but still attempts to enforce an administrative default judgment without going through the proper forum of Tribal Court. It does not appear that the Secretary needs any additional authority to establish a procedure for restricting revenue derived from trust

land if the common practice is to deposit those funds in an Individual Indian Money (IIM) account. For purposes of consistency in encumbering trust interests, the CS&K Tribes recommend that Section 233 be eliminated from S. 1340 and the collection of past due child support be addressed through the existing federal regulations.

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

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

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

III. SUMMARY

Again, the CS&K Tribes appreciate the opportunity to participate in the amendment of this very important legislation. The CS&K Tribes understand the complex nature of Indian land issues and recognize that there is no easy solution or legislative answer. Still, there are many positive aspects in the ILCAA and the proposed amendments in S. 1340. The recommendations of CS&K Tribes provided herein attempt to address some of the local issues the CS&K Tribes have experienced over the years, as well as the recent concerns raised since the passage of the Indian Land Consolidation Act Amendments of 2000. Please contact us if the Committee or your staff have any questions or would like us to provide any further information.

Sincerely,

D. Fred Matt
Chairman, Tribal Council

Honorable Daniel K. Inouye, Chairman
Committee on Indian Affairs
United States Senate
Sh-838 Hart Office Building
Washington, DC 20510-6450

Dear Mr. Inouye:

I strongly support Senate Bill 1340 to amend the Indian Land Consolidation Act to provide for Indian Probate Reform.

I am an enrolled member of the Shoshone Indian tribe. I was born at Fort Washakie, Wy. in 1944. I attended school at Lander, Wy. and married my high school sweetheart 36 years ago in 1966. She and I were both from ranching families and together we began to build our own ranch. We purchased our first 200 acres in 1972. This land is fee patent, located on the Wind River Reservation and contains the homesite where myself and my family have resided for 30 years. We also lease several allottments adjoining our home place and this has allowed 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 at a fair market price. 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 neighbor to allow for expansion as our son and daughter had expressed an interest in being a part of the ranch operation. At the same time we also purchased 200 acres of adjoining Indian trust lands from multiple indian heirs. These lands are all contigeous to our existing ranch lands with a creek the runs year round thereby adding further value.

In addition, I do have a share of trust land in another area of the reservation which I did inherit as a small child from my father. I have never received any benefit from owning this land nor have I ever received any monetary compensation from the BIA in handling a lease or managing this land for me. My family has never seen this land and does not even know where it is located. That is what comes from land that is supposedly held in trust for indians who are not able to access or use inherited land.

Our ranch presently consists of 440 acres of patent fee land and 280 acres of Indian trust land (over 1/3 of the ranch) which was bought and paid for by myself and my wife through years of hard work and sacrifice. After years of working and building our assets, I want this land to go to my wife (a non indian) and children (non-enrolled indians) who I consider my heirs. I'm told this land goes to my sisters through intestate succession because they are enrolled and that my wife and children can only receive a life estate if I state this in my will. This was not my intention or my understanding when the land was purchased to be a part of the ranch which is held jointly by myself and my wife. Had this law as it is written been in effect at the time, it is doubtful that we would have made such purchases, desiring to go elsewhere or make other purchases.

After years of working and building these assets with my family at my side, I want to be able to dispose of my holdings as I see fit. I did not inherit this land. My wife and I bought it as our life's work. The whole concept of this land consolidation act goes against free enterprise and forces me to be limited in what I can do with my land. I have been an independent businessman all my life and in the event that I need to use resources that I have built up over the years, I'll be forced to settle for less.

This would be true even if my family were enrolled. Any free minded individual that wants to improve himself and grow with the free enterprise dream that is supposed to be the goal of all Americans cannot do so within the boundaries of an Indian reservation in part because of the limitations of this act. I have been told by various officials of the tribe and BIA, "Well, you should have married an Indian!." This is not acceptable to me. An individual (indian or non) who owns land in trust is limited and forced to hold second class rights to land that he may never be able to do with as he wishes.

It is for these reasons that I support Senate Bill 1340.

Sincerely,

Ben O'Neal

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 4, 2002

Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510
Fax (202) 224-5429

RE: Indian Probate Reform Act of 2001, S. 1340

The Yakama Nation submits the following comments to the Senate Committee on Indian Affairs on S. 1340, the Indian Probate Reform Act of 2001 for the official record on this bill.

Of utmost importance to the Yakama Nation is the preservation of the trust land base within the Yakama Reservation. The Allotment Acts of the past have caused extreme harm to Indian Nations across the United States by allowing allotted trust lands to pass into non-Indian ownership, and thereby eroding tribal sovereignty. It is important that federal law act to undue this harm.

The Yakama Nation supports the measures within S. 1340 which work to maintain Indian/tribal ownership of reservation lands, including both the testate and intestate limitations, and the ability of tribes to purchase lands from non-Indian heirs. We are especially pleased to see the provisions regarding a tribal right of redemption added to 25 U.S.C. 2206 (S. 1340, pp. 17-19).

In fact, for many years the Yakama Nation has been acting pursuant to the Yakama Enrollment Act of August 9, 1946 (60 Stat. 969) as amended by and the Act of December 31, 1970 (84 Stat.1874), through which we are able to purchase at fair market value any lands that otherwise would pass by inheritance or devise to non-Yakama persons; a method very similar to that being proposed in S. 1340. Through the operation of these laws the Yakama Nation has been able to reduce fractionated interests, maintain tribal trust lands within trust status, and thereby preserve the sovereign authority of the Yakama Nation. It is vitally important to the Yakama Nation that these legal mechanisms devised specifically for the use of the Yakama Nation are not superseded or otherwise affected by S. 1340. The proposed Bill makes no reference to these federal laws concerning the Yakama Nation, and we, therefore, believe and assert that S. 1340 would not so supersede or otherwise affect these laws. However, we ask that the Bill be amended to clearly reflect this.

Despite our support for the above discussed measures, we must also express two concerns with S. 1340. First, an exemption from the ability of tribes to purchase lands which would otherwise descend to non-Indian heirs is created with respect to "family farms". Nowhere in the Bill is the term "family farm" defined, nor is reference made to any other federal statutory definition. Such an oversight could lead to the creation of a mechanism through which tribes are prevented from buying these lands. This term must be defined, and limited appropriately.

Second, the Yakama Nation voices a strong objection to Section 223 "Collection of Past-Due Child Support" (S. 1340 p.13). This section would appear to allow the garnishment of trust revenues from IIM accounts to pay past due child support pursuant to any valid child support order from tribal or state courts. Application of this section to the Yakama Reservation would result in several injustices, including:

1. Trust monies being paid to the State of Washington, and other states, for *default* paternity and support orders where a child support payment is established pursuant to an income imputed to a father/mother based upon wholly unreasonable and unfair income tables.

2. Trust monies being paid to the State of Washington, and other states, to reimburse state coffers as a result of children being placed on TANF/welfare, where the poverty and lack of employment of many tribal members is directly due to past actions by the federal and state governments to terminate tribes and eliminate tribal culture. This reimbursement includes repayment of federal funds which the Yakama Nation asserts are made available to tribal members pursuant to the Treaty of 1855 (12 Stat. 951).

3. Over collection of trust monies for child support where the system has failed to credit a parent with contributions of food (including fish, meat, berries, and roots, all traditional foods of the Yakama people), clothing, firewood, and other methods of "support" other than monetary assistance.

The Yakama Nation has its own laws regarding the imposition and collection of child support. It is for the Yakama Nation, and other individual Tribes, to determine whether or not trust monies should be subject to garnishment for payment of past due child support, not the federal government. We, therefore, respectfully request that Section 223 of S. 1340 be removed in its entirety. We appreciate your support for the sovereign right of the Yakama Nation to govern our own people and the care of our children.

In conclusion, we agree with the National Congress of American Indians that measures of such great importance require tribal consultation. We thank you for this opportunity to participate, and sincerely hope that the Committee will fully and fairly consider our wishes.

Sincerely,

Robert N. Wahpat, Chairman
Yakama Nation Tribal Council

Virgil Lewis Sr., Chairman
Roads, Irrigation, Land Committee

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