S. HRG. 106–282

INDIAN LAND CONSOLIDATION ACT AMENDMENTS; AND TO PERMIT THE LEASING OF OIL AND GAS RIGHTS ON NAVAJO ALLOTTED LANDS

JOINT HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

AND THE

COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 1586

TO REDUCE THE FRACTIONATED OWNERSHIP OF INDIAN LANDS

AND

S. 1315, H.R. 3181

TO PERMIT THE LEASING OF OIL AND GAS RIGHTS ON CERTAIN LANDS HELD IN TRUST FOR THE NAVAJO NATION OR ALLOTTED TO A MEMBER OF THE NAVAJO NATION, IN ANY CASE IN WHICH THERE IS CONSENT FROM A SPECIFIED PERCENTAGE INTEREST IN THE PARCEL OF LAND UNDER CONSIDERATION FOR LEASE

NOVEMBER 4, 1999
WASHINGTON, DC

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APPENDIX

INDIAN LAND CONSOLIDATION ACT AMENDMENTS AND TO PERMIT THE LEASING OF OIL AND GAS RIGHTS ON NAVAJO ALLOTTED LANDS

THURSDAY, NOVEMBER 4, 1999

U.S. SENATE, COMMITTEE ON INDIAN AFFAIRS, MEETING JOINTLY WITH THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES,

Washington, DC.

The committees met, pursuant to notice, at 9:32 a.m. in room 106, Dirksen Senate Office Building, Hon. Ben Nighthorse Campbell (chairman of the Senate Committee on Indian Affairs) presiding.

Present from the Committee on Indian Affairs: Senators Campbell, Inouye, and Gorton.

Present from the Committee on Resources: Representatives Smith of Washington, Udall, and Inslee.

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

The CHAIRMAN. Good morning. The Committee on Indian Affairs will come to order.

Today we will be joined by our colleagues from the House Resources Committee to consider a bill that addresses one of the most difficult and complicated issues facing Indian tribes, and that is fractionated ownership of their lands.

This committee and Indian country together are often faced with the challenges of trying to reverse the effects of failed Federal policies. Often this means that we are asked to put toothpaste back in the tube.

In the case of land fractionation, hundreds of thousands of individual Indians own very small parcels of land, lowering the economic value of these lands and making the administration of these lands and the revenues from the lands an absolute nightmare. In the early 1980's, the view of Congress was that if these ownership interests were small enough and generated only a small amount of revenue, the parcel should go back to the tribe when the owner died. In 1997, the Supreme Court held this policy unconstitutional.

As an alternative to further fractionation, this bill proposes to require the owners of these small interests to pass the ownership of these tiny parcels to their heirs in a will. It also proposes that a

fund be established to allow the Bureau of Indian Affairs [BIA] to acquire these interests and hold them until they are paid out for revenues generated by the lands once they are consolidated.

[Text of S. 1586, S. 1315, and H.R. 3181 follow:]

II

106TH CONGRESS
1ST SESSION

S. 1586

To reduce the fractionated ownership of Indian lands, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 15, 1999

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

---

A BILL

To reduce the fractionated ownership of Indian lands, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Land Consolidation Act Amendments of 1999".

SEC. 2. FINDINGS.

Congress finds that—

(1) in the 1800's and early 1900's, the United States sought to assimilate Indian people into the surrounding non-Indian culture by allotting tribal lands to individual members of Indian tribes;

(2) many trust allotments were taken out of trust status and sold by their Indian owners;

(3) the trust periods for trust allotments have been extended indefinitely;

(4) because of the inheritance provisions in the original treaties or allotment Acts, the ownership of many of the trust allotments that have remained in trust status has become fractionated into hundreds or thousands of interests, many of which represent 2 percent or less of the total interests;

(5) Congress has authorized the acquisition of lands in trust for individual Indians, and many of those lands have also become fractionated by subsequent inheritance;

(6) the acquisitions referred to in paragraph (5) continue to be made;

(7) the fractional interests described in this section provide little or no return to the beneficial owners of those interests and the administrative costs borne by the United States for those interests are inordinate;

(8) substantial numbers of fractional interests of 2 percent or less of a total interest in trust or restricted lands have escheated to Indian tribes under

section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206), which was enacted in 1983;

(9) in Babbit v. Youpee (117 S Ct. 727 (1997)), the United States Supreme Court found that the application of section 207 of the Indian Land Consolidation Act to the facts presented in that case to be unconstitutional;

(10) in the absence of remedial legislation, the number of the fractional interests will continue to grow; and

(11) the problem of the fractionation of Indian lands described in this section is the result of a policy of the Federal Government, cannot be solved by Indian tribes, and requires a solution under Federal law.

SEC. 3. DECLARATION OF POLICY.

It is the policy of the United States—

(1) to prevent the further fractionation of trust allotments made to Indians;

(2) to consolidate fractional interests and ownership of those interests into usable parcels;

(3) to consolidate fractional interests in a manner that enhances tribal sovereignty; and

(4) to promote tribal self-sufficiency and self-determination.

SEC. 4. AMENDMENTS TO THE INDIAN LAND CONSOLIDATION ACT.

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

(1) in section 202—

(A) in paragraph (1), by striking "(1) 'tribe'" and inserting "(1) 'Indian tribe' or 'tribe'";

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

"(2) 'Indian' means any person who is a member of an Indian tribe or is eligible to become a member of an Indian tribe at the time of the distribution of the assets of a decedent's estate;";

(C) by striking "and" at the end of paragraph (3);

(D) by striking the period at the end of paragraph (4) and inserting "; and"; and

(E) by adding at the end the following:

"(5) 'heirs of the first or second degree' means parents, children, grandchildren, grandparents, brothers and sisters of a decedent.";

(2) by amending section 203 to read as follows:

"SEC. 203. OTHER APPLICABLE PROVISIONS.

"(a) IN GENERAL.—Subject to subsection (b), sections 5 and 7 of the Act of June 18, 1934 (commonly

known as the 'Indian Reorganization Act') (48 Stat. 985 et seq., chapter 576; 25 U.S.C. 465 and 467) shall apply to all Indian tribes, notwithstanding section 18 of that Act (25 U.S.C. 478).

"(b) RULE OF CONSTRUCTION.—Nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land or the creation of reservations for Indians with respect to any specific Indian tribe, reservation, or State.";

(3) in section 205—

(A) in the matter preceding paragraph (1)—

(i) by striking "Any Indian" and inserting "(a) IN GENERAL.—Subject to subsection (b), any Indian";

(ii) by striking "per centum of the undivided interest in such tract" and inserting "percent of the individual interests in such tract. Interests owned by an Indian tribe in a tract may be included in the computation of the percentage of ownership of the undivided interests in that tract for purposes of determining whether the

consent requirement under the preceding sentence has been met.";

(iii) by striking ": *Provided,* That—"; and inserting the following:

"(b) CONDITIONS APPLICABLE TO PURCHASE.—Subsection (a) applies on the conditions that—";

(B) in paragraph (2)—

(i) by striking "If," and inserting "if"; and

(ii) by adding "and" at the end; and

(C) by striking paragraph (3) and inserting the following:

"(3) the approval of the Secretary shall be required for a land sale initiated under this section, except that such approval shall not be required with respect to a land sale transaction initiated by an Indian tribe that has in effect a land consolidation plan that has been approved by the Secretary under section 204.";

(4) by striking section 206 and inserting the following:

"SEC. 206. DESCENT AND DISTRIBUTION OF TRUST OR RESTRICTED LANDS; TRIBAL ORDINANCE BARRING NONMEMBERS OF AN INDIAN TRIBE FROM INHERITANCE BY DEVISE OR DESCENT.

"(a) TRIBAL PROBATE CODES.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust or restricted lands that are—

"(A) located within that Indian tribe's reservation; or

"(B) otherwise subject to the jurisdiction of that Indian tribe.

"(2) CODES.—A tribal probate code referred to in paragraph (1) may provide that, notwithstanding section 207, only members of the Indian tribe shall be entitled to receive by devise or descent any interest in trust or restricted lands within that Indian tribe's reservation or otherwise subject to that Indian tribe's jurisdiction.

"(b) SECRETARIAL APPROVAL.—

"(1) IN GENERAL.—Any tribal probate code enacted under subsection (a), and any amendment to such a tribal probate code, shall be subject to the approval of the Secretary.

"(2) REVIEW AND APPROVAL.—

"(A) IN GENERAL.—Each Indian tribe that adopts a tribal probate code under subsection (a) shall submit that code to the Secretary for review. Not later than 180 days after a tribal probate code is submitted to the Secretary under this paragraph, the Secretary shall review and approve or disapprove that tribal probate code.

"(B) CONSEQUENCE OF FAILURES TO APPROVE OR DISAPPROVE A TRIBAL PROBATE CODE.—If the Secretary fails to approve or disapprove a tribal probate code submitted for review under subparagraph (A) by the date specified in that subparagraph, the tribal probate code shall be deemed to have been approved by the Secretary, but only to the extent that the tribal probate code is consistent with Federal law.

"(C) CONSISTENCY OF TRIBAL PROBATE CODE WITH THIS ACT.—The Secretary may not approve a tribal probate code under this paragraph unless the Secretary determines that the tribal probate code is consistent with this Act.

"(D) EXPLANATION.—If the Secretary disapproves a tribal probate code under this paragraph, the Secretary shall include in a notice of the disapproval to the Indian tribe a written explanation of the reasons for the disapproval.

"(E) AMENDMENTS.—

"(i) IN GENERAL.—Each Indian tribe that amends a tribal probate code under this paragraph shall submit the amendment to the Secretary for review and approval. Not later than 60 days after receiving an amendment under this subparagraph, the Secretary shall review and approve or disapprove the amendment.

"(ii) CONSEQUENCE OF FAILURE TO APPROVE OR DISAPPROVE AN AMENDMENT.—If the Secretary fails to approve or disapprove an amendment submitted under clause (i), the amendment shall be deemed to have been approved by the Secretary, but only to the extent that the amendment is consistent with Federal law.

"(3) EFFECTIVE DATES.—A tribal probate code or amendment approved under paragraph (2) shall become effective on the later of—

"(A) the date specified in section 207(e)(1); or

"(B) 180 days after the date of approval.

"(4) LIMITATIONS.—

"(A) TRIBAL PROBATE CODES.—Each tribal probate code enacted under subsection (a) shall apply only to the estate of a decedent who dies on or after the effective date of the tribal probate code.

"(B) AMENDMENTS TO TRIBAL PROBATE CODES.—With respect to an amendment to a tribal probate code referred to in subparagraph (A), that amendment shall apply only to the estate of a descendant who dies on or after the effective date of the amendment.

"(5) REPEALS.—The repeal of a tribal probate code shall—

"(A) not become effective earlier than the date that is 180 days after the Secretary receives notice of the repeal; and

"(B) apply only to the estate of a decedent who dies on or after the effective date of the repeal.

"(c) USE OF PROPOSED FINDINGS BY TRIBAL JUSTICE SYSTEMS.—

"(1) TRIBAL JUSTICE SYSTEM DEFINED.—In this subsection, the term 'tribal justice system' has the meaning given that term in section 3 of the Indian Tribal Justice Act (25 U.S.C. 3602).

"(2) REGULATIONS.—The Secretary shall promulgate regulations concerning the use of proposed findings of fact and conclusions of law, as rendered by a tribal justice system, in the adjudication of probate proceedings by the Department of the Interior.

"(d) LIFE ESTATES FOR NON-INDIAN SPOUSES AND CHILDREN WHO WOULD OTHERWISE BE PRECLUDED FROM INHERITING BY REASON OF THE OPERATION OF A TRIBAL PROBATE CODE.—

"(1) IN GENERAL.—Paragraph (2) shall apply with respect to a non-Indian spouse or child of an Indian decedent, if that decedent is subject to a tribal probate code that has been approved by the Secretary (or deemed approved) under subsection (b) and—

"(A) dies intestate; and

"(B) has devised an interest in trust or restricted lands to that non-Indian spouse or child, which the spouse or child is otherwise prohibited from inheriting by reason of that tribal probate code.

"(2) LIFE ESTATES.—

"(A) IN GENERAL.—A surviving non-Indian spouse or child of the decedent described in paragraph (1) may elect to receive a life estate in the portion of the trust or restricted lands to which that individual would have been entitled under the tribal probate code, if that individual were an Indian.

"(B) REMAINDER OF INTEREST.—If a non-Indian spouse or child elects to receive a life estate described in subparagraph (A), the remainder of the interest of the Indian decedent shall vest in the Indians who would otherwise have been heirs, but for that spouse's or child's election to receive a life estate.";

(5) by striking section 207 and inserting the following:

"SEC. 207. DESCENT AND DISTRIBUTION; ESCHEAT OF FRACTIONAL INTERESTS.

"(a) DESCENT AND DISTRIBUTION.—Except as provided in this section, interests in trust or restricted lands may descend by testate or intestate succession only to—

"(1) the decedent's heirs-at-law or relatives within the first and second degree;

"(2) a person who owns a preexisting interest in the same parcel of land conveyed by the decedent;

"(3) members of the Indian tribe with jurisdiction over the lands devised; or

"(4) the Indian tribe with jurisdiction over the lands devised.

"(b) SPECIAL RULE.—A decedent that does not have a relative who meets the description under subsection (a)(1) or a relative who is a member described in subsection (a)(3) may devise that decedent's estate or any asset of that estate to any relative.

"(c) DEVISE OF INTERESTS IN THE SAME PARCEL TO MORE THAN 1 PERSON.—

"(1) JOINT TENANCY WITH RIGHT OF SURVIVORSHIP.—If a testator devises interests in the same parcel of trust or restricted land to more than 1 person, in the absence of express language in the devise to the contrary, the devise shall be presumed to create a joint tenancy with right of survivorship.

"(2) ESTATES PASSING BY INTESTATE SUCCESSION.—With respect to an estate passing by intestate succession, only a spouse and heirs of the first or second degree may inherit an interest in trust or restricted lands.

"(3) ESCHEAT.—If no individual is eligible to receive an interest in trust or restricted lands, the interest shall escheat to the Indian tribe having jurisdiction over the trust or restricted lands, subject to any life estate that may be created under section 206(d).

"(4) NOTIFICATION TO INDIAN TRIBES.—Not later than 180 days after the date of enactment of the Indian Land Consolidation Act Amendments of 1999, the Secretary shall, to the extent that the Secretary considers to be practicable, notify Indian tribes and individual landowners of the amendments made by the Indian Land Consolidation Act Amendments of 1999. The notice shall list estate planning options available to the owners.

"(5) DESCENT OF OFF-RESERVATION LANDS.—

"(A) INDIAN RESERVATION DEFINED.—For purposes of this paragraph, the term 'Indian reservation' includes lands located within—

"(i) Oklahoma; and

"(ii) the boundaries of an Indian tribe's former reservation (as defined and determined by the Secretary).

"(B) DESCENT.—Upon the death of an individual holding an interest in trust or restricted lands that are located outside the boundaries of an Indian reservation and that are not subject to the jurisdiction of any Indian tribe, that interest shall descend either—

"(A) by testate or intestate succession in trust to an Indian; or

"(B) in fee status to any other devises or heirs.

"(6) NOTICE TO INDIANS.—

"(A) IN GENERAL.—The Secretary shall provide notice to each Indian that has an interest in trust or restricted lands of that interest. The notice shall specify that if such interest is in 2 percent or less of the total acreage in a parcel of trust or restricted lands, that interest may escheat to the Indian tribe of that Indian.

"(B) LIMITATION.—Subsections (a) and (d) shall not apply to the probate of any interest in trust or restricted lands of an Indian decedent if the Secretary failed to provide notice under subparagraph (A) to that individual before the date that is 180 days before the death of the decedent.

"(d) ESCHEATABLE FRACTIONAL INTERESTS.—

"(1) IN GENERAL.—Notwithstanding subsection (a), no undivided interest which represents 2 percent or less of the total acreage in a parcel of trust or restricted land shall pass by intestacy.

"(2) ESCHEAT.—An undivided interest referred to in paragraph (1) shall escheat—

"(A) to the Indian tribe on whose reservation the interest is located; or

"(B) if that interest is located outside of a reservation, to the recognized tribal government possessing jurisdiction over the land."; and

(6) by adding at the end the following:

"SEC. 213. ACQUISITION OF FRACTIONAL INTERESTS.

"(a) IN GENERAL.—The Secretary may acquire, in the discretion of the Secretary, with the consent of its owner and at fair market value, any fractional interest in trust or restricted lands. The Secretary shall give priority to the acquisition of fractional interests representing 2 percent or less of a parcel of trust or restricted land. The Secretary shall hold in trust for the Indian tribe that has jurisdiction over the fractional interest in trust or restricted lands the title of all interests acquired under this section.

"(b) PROGRAM OF ACQUISITION.—Any Indian tribe that has in effect a consolidation plan that has been approved by the Secretary under section 204 may request the Secretary to enter into an agreement with the Indian tribe to implement a program to acquire fractional interests, as authorized by subsection (a) using funds appropriated pursuant to this Act.

"SEC. 214. ADMINISTRATION OF ACQUIRED FRACTIONAL INTERESTS, DISPOSITION OF PROCEEDS.

"(a) IN GENERAL.—Subject to the conditions described in subsection (b)(1), an Indian tribe receiving a fractional interest under section 207 or 213 may, as a tenant in common with the other owners of the trust or restricted lands, lease the interest, sell the resources, consent to the granting of rights-of-way, or engage in any other transaction affecting the trust or restricted land authorized by law.

"(b) CONDITIONS.—

"(1) IN GENERAL.—The conditions described in this paragraph are as follows:

"(A) Until the purchase price paid by the Secretary for the interest referred to in subsection (a) has been recovered, any lease, resource sale contract, right-of-way, or other transaction affecting the document providing

for the disposition of the interest under that subsection shall contain a clause providing that all revenue derived from the interest shall be paid to the Secretary.

"(B) The Secretary shall deposit any revenue derived from interest paid under subparagraph (A) in the Acquisition Fund created under section 216.

"(C) The Secretary shall deposit any revenue derived from the interest that is paid under subparagraph (A) that is in an amount in excess of the purchase price of the fractional interest involved to the credit of the Indian tribe that receives the fractional interest under section 213.

"(D) Notwithstanding any other provision of law, including section 16 of the Act of June 18, 1934 (commonly referred to as the 'Indian Reorganization Act') (48 Stat. 987, chapter 576; 25 U.S.C. 476), during such time as an Indian tribe is a tenant in common with individual Indian landowners on land acquired under section 207 or 213, the Indian tribe may not refuse to enter into any transaction covered under this section if landowners owning a ma-

jority of the undivided interests in the parcel consent to the transaction.

"(E) If the Indian tribe does not consent to enter into a transaction referred to in subparagraph (D), the Secretary may consent on behalf of the Indian tribe.

"(F) For leases of allotted land that are authorized to be granted by the Secretary, the Indian tribe shall be treated as if the Indian tribe were an individual Indian landowner.

"(2) EXCEPTION.—Paragraph (1)(A) shall not apply to any revenue derived from an interest in a parcel of land acquired by the Secretary under section after an amount equal to the purchase price of that interest in land has been paid into the Acquisition Fund created under section 216.

"SEC. 215. ESTABLISHING FAIR MARKET VALUE.

"For the purposes of this Act, the Secretary may develop a reservation-wide system (or system for another appropriate geographical unit) for establishing the fair market value of various types of lands and improvements. That system may govern the amounts offered for the purchase of interests in trust or restricted lands under section 213.

"SEC. 216. ACQUISITION FUND.

"(a) IN GENERAL.—The Secretary shall establish an Acquisition Fund to—

"(1) disburse appropriations authorized to accomplish the purposes of section 213; and

"(2) collect all revenues received from the lease, permit, or sale of resources from interests in trust or restricted lands transferred to Indian tribes by the Secretary under section 213.

"(b) DEPOSITS; USE.—

"(1) IN GENERAL.—Subject to paragraph (2), all proceeds from leases, permits, or resource sales derived from an interest in trust or restricted lands described in subsection (a)(2) shall—

"(A) be deposited in the Acquisition Fund; and

"(B) as specified in advance in appropriations Acts, be available for the purpose of acquiring additional fractional interests in trust or restricted lands.

"(2) MAXIMUM DEPOSITS OF PROCEEDS.—With respect to the deposit of proceeds derived from an interest under paragraph (1), the aggregate amount deposited under that paragraph shall not exceed the purchase price of that interest under section 213.

"SEC. 217. DETERMINATION OF RESERVATION BOUNDARIES AND TRIBAL JURISDICTION.

"(a) DETERMINATION OF JURISDICTION.—

"(1) IN GENERAL.—The Secretary shall determine whether a parcel of land is—

"(A) within an Indian reservation; or

"(B) otherwise subject to an Indian tribe's jurisdiction.

"(2) REVIEW.—The United States District Court for the district where land that is subject to a determination under paragraph (1) is located may review the determination under chapter 7 of title 5, United States Code.

"(b) RULE OF CONSTRUCTION.—Nothing in this Act may be construed to affect section 2409a of title 28, United States Code.

"SEC. 218. TRUST AND RESTRICTED LAND TRANSACTIONS.

"(a) POLICY.—It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions involving individual Indians in a manner consistent with the policy of maintaining the trust status of allotted lands.

"(b) VALUATION OF SALES AND EXCHANGES.—Notwithstanding any other provision of law—

"(1) the sale of an interest in trust or restricted land may be made for an amount that is less than the fair market value of that interest; and

"(2) the exchange of an interest in trust or restricted lands may be made for an interest of a value less than the fair market value of the interest in those lands.

"(c) STATUS OF LANDS.—The sale or exchange of an interest in trust or restricted land under this section shall not affect the status of that land as trust or restricted land.

"(d) GIFT DEEDS.—

"(1) IN GENERAL.—An individual owner of an interest in trust or restricted land may convey that interest by gift deed to—

"(A) an individual Indian who is a member of the Indian tribe that exercises jurisdiction over the land;

"(B) the Indian tribe that exercises jurisdiction over that land; or

"(C) any other person whom the Secretary determines may hold the land in trust or restricted status.

"(2) SPECIAL RULE.—With respect to any gift deed conveyed under this section, the Secretary shall not require an appraisal.

"SEC. 219. REPORTS TO CONGRESS.

"(a) IN GENERAL.—Not later than the date that is 3 years after the date of enactment of the Indian Land Consolidation Act Amendments of 1999, and annually thereafter, the Secretary shall submit to Congress a report that indicates, for the period covered by the report—

"(1) the number of fractional interests in trust or restricted lands acquired; and

"(2) the impact of the resulting reduction in the number of such fractional interests on the financial and realty recordkeeping systems of the Bureau of Indian Affairs.

"(b) RECOMMENDATIONS FOR LEGISLATION.—The Secretary, after consultation with the Indian tribes, shall make recommendations for such legislation as is necessary to make further reductions in the fractional interests referred to in subsection (a).

"SEC. 220. APPROVAL OF LEASES, RIGHTS-OF-WAY, AND SALES OF NATURAL RESOURCES.

"(a) IN GENERAL.—The Secretary may approve any lease, right-of-way, sale of natural resources, or any other

transaction affecting individually owned trust or restricted lands that requires approval by the Secretary, if—

"(1) the owners of a majority interest in the trust or restricted lands consent to the transaction; and

"(2) the Secretary determines that approval of the transaction is in the best interest of the Indian owners.

"(b) BINDING TRANSACTIONS.—Upon the approval of a transaction referred to in subsection (a), the transaction shall be binding upon the owners of the minority interests in the trust or restricted land, and all other parties to the transaction to the same extent as if all of the Indian owners had consented to the transaction.

"SEC. 221. REAL ESTATE TRANSACTIONS INVOLVING NON-TRUST LANDS.

"(a) IN GENERAL.—Notwithstanding any other provision of law, any Indian tribe may on the same basis as any other person, buy, sell, mortgage, or otherwise acquire or dispose of lands or interests in land described in subsection (b), without an Act of Congress or the approval of the Secretary.

"(b) LANDS.—Lands described in this subsection are lands that are—

"(1) acquired after the date of enactment of the Indian Land Consolidation Act Amendments of 1999; and

"(2) not held in trust or subject to a preexisting Federal restriction on alienation imposed by the United States.

"(c) NO LIABILITY ON PART OF THE UNITED STATES.—The disposition of lands described in subsection (b) shall create no liability on the part of the United States.".

(b) EFFECTIVE DATE; APPLICABILITY.—

(1) EFFECTIVE DATE OF AMENDMENTS TO SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT.—Except with respect to the notification under section 207(c) (4) and (6) of the Indian Land Consolidation Act (25 U.S.C. 2206(c) (4) and (6)), the amendments made by subsection (a) to section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) shall become effective on the date that is 2 years after the date of enactment of this Act.

(2) APPLICABILITY.—The amendments made by subsection (a) to section 207 of the Indian Land Consolidation Act shall apply only to the estates of decedents that die on or after the date specified in paragraph (1).

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this Act.

○

II

106TH CONGRESS
1ST SESSION

S. 1315

To permit the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation, in any case in which there is consent from a specified percentage interest in the parcel of land under consideration for lease.

IN THE SENATE OF THE UNITED STATES

JULY 1, 1999

Mr. BINGAMAN (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To permit the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation, in any case in which there is consent from a specified percentage interest in the parcel of land under consideration for lease.

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

SECTION 1. LEASES OF NAVAJO INDIAN ALLOTTED LANDS.

(a) DEFINITIONS.—In this section:

(1) INDIAN TRIBE.—The term "Indian tribe" has the meaning given the term in section 4(e) of

the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(2) INDIVIDUALLY OWNED NAVAJO INDIAN ALLOTTED LAND.—The term "individually owned Navajo Indian allotted land" means Navajo Indian allotted land that is owned in whole or in part by 1 or more individuals.

(3) NAVAJO INDIAN.—The term "Navajo Indian" means a member of the Navajo Nation.

(4) NAVAJO INDIAN ALLOTTED LAND.—The term "Navajo Indian allotted land" means a single parcel of land that—

(A) is located within the jurisdiction of the Navajo Nation; and

(B)(i) is held in trust or restricted status by the United States for the benefit of Navajo Indians or members of another Indian tribe; and

(ii) was—

(I) allotted to a Navajo Indian; or

(II) taken into trust or restricted status by the United States for a Navajo Indian.

(5) OWNER.—The term "owner" means, in the case of any interest in land described in paragraph (4)(B)(i), the beneficial owner of the interest.

(6) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(b) APPROVAL BY THE SECRETARY.—

(1) IN GENERAL.—The Secretary may approve an oil or gas lease or agreement that affects individually owned Navajo Indian allotted land, if—

(A) the owners of not less than the applicable percentage (determined under paragraph (2)) of the undivided interest in the Navajo Indian allotted land that is covered by the oil or gas lease or agreement consent in writing to the lease or agreement; and

(B) the Secretary determines that approving the lease or agreement is in the best interest of the owners of the undivided interest in the Navajo Indian allotted land.

(2) PERCENTAGE INTEREST.—The applicable percentage referred to in paragraph (1)(A) shall be determined as follows:

(A) If there are 10 or fewer owners of the undivided interest in the Navajo Indian allotted

land, the applicable percentage shall be 100 percent.

(B) If there are more than 10 such owners, but fewer than 51 such owners, the applicable percentage shall be 80 percent.

(C) If there are 51 or more such owners, the applicable percentage shall be 60 percent.

(3) AUTHORITY OF SECRETARY TO SIGN LEASE OR AGREEMENT ON BEHALF OF CERTAIN OWNERS.—The Secretary may give written consent to an oil or gas lease or agreement under paragraph (1) on behalf of an individual Indian owner if—

(A) the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined; or

(B) the heirs or devisees referred to in subparagraph (A) have been determined, but 1 or more of the heirs or devisees cannot be located.

(4) EFFECT OF APPROVAL.—

(A) APPLICATION TO ALL PARTIES.—

(i) IN GENERAL.—Subject to subparagraph (B), an oil or gas lease or agreement approved by the Secretary under paragraph (1) shall be binding on the parties

described in clause (ii), to the same extent as if all of the owners of the undivided interest in Navajo Indian allotted land covered under the lease or agreement consented to the lease or agreement.

(ii) DESCRIPTION OF PARTIES.—The parties referred to in clause (i) are—

(I) the owners of the undivided interest in the Navajo Indian allotted land covered under the lease or agreement referred to in clause (i); and

(II) all other parties to the lease or agreement.

(B) EFFECT ON INDIAN TRIBE.—If—

(i) an Indian tribe is the owner of a portion of an undivided interest in Navajo Indian allotted land; and

(ii) an oil or gas lease or agreement under paragraph (1) is otherwise applicable to such portion by reason of this subsection even though the Indian tribe did not consent to the lease or agreement,

then the lease or agreement shall apply to such portion of the undivided interest (including entitlement of the Indian tribe to payment under

the lease or agreement), but the Indian tribe shall not be treated as a party to the lease or agreement and nothing in this subsection (or in the lease or agreement) shall be construed to affect the sovereignty of the Indian tribe.

(5) DISTRIBUTION OF PROCEEDS.—

(A) IN GENERAL.—The proceeds derived from an oil or gas lease or agreement that is approved by the Secretary under paragraph (1) shall be distributed to all owners of the undivided interest in the Navajo Indian allotted land covered under the lease or agreement.

(B) DETERMINATION OF AMOUNTS DISTRIBUTED.—The amount of the proceeds under subparagraph (A) distributed to each owner under that subparagraph shall be determined in accordance with the portion of the undivided interest in the Navajo Indian allotted land covered under the lease or agreement that is owned by that owner.

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106TH CONGRESS
1ST SESSION

H. R. 3181

To permit the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation, in any case in which there is consent from a specified percentage interest in the parcel of land under consideration for lease.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 28, 1999

Mr. UDALL of New Mexico (for himself, Mr. HAYWORTH, and Mr. CANNON) introduced the following bill; which was referred to the Committee on Recources

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The CHAIRMAN. Before we turn to the witnesses, let me say that there are many differing opinions on how we should address fractionation. This bill is designed to be a vehicle for those opinions. I think we can all agree that the only thing we know for sure is that what has happened with fractionation is absolutely unacceptable. Chairman Young may or may not be able to attend today. Senator Inouye is on his way and I understand Senator Bingaman will be a little bit late, too. So the only other person who is with us here is Representative Smith from Washington.

Representative Smith, welcome to this chamber.

Did you have an opening statement?

Mr. SMITH OF WASHINGTON. I do not, Mr. Chairman.

The CHAIRMAN. We will go ahead and start with our first witness, Kevin Gover, Assistant Secretary for Indian Affairs, Department of the Interior, accompanied by Wayne Nordwall, Director, Western Regional Office; Larry Morrin, Director, Midwest Regional Office; and Ed Cohen, Deputy Solicitor, Department of the Interior.

Mr. Assistant Secretary, did you all have statements?

Mr. GOVER. Mr. Chairman, we submitted statements for the record.

The CHAIRMAN. You are welcome to start. Thank you for being here.

STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY WAYNE NORDWALL, DIRECTOR, WESTERN REGIONAL OFFICE; LARRY MORRIN, DIRECTOR, MIDWEST REGIONAL OFFICE; AND ED COHEN, DEPUTY SOLICITOR

Mr. GOVER. Thank you, Mr. Chairman. It is always a pleasure to be with the committee.

Let me begin by commenting on S. 1315 by saying that we very much support the objective of this bill. We think it is a good idea to begin to allow the owners of these various allotments to lease those lands with less than 100 percent concurrence of all the owners. To that end, we very much support the concept underlying. In fact, we like the concept so much that we would propose broadening it and make it simpler still for these lands to be leased by allowing a simple majority of the interests to control the property in all circumstances, not just at the Navajo reservation, but throughout the country.

To that extent, we have only a minor disagreement with the bill and propose that it be expanded.

Mr. Chairman, I would like to spend more time on S. 1586, the Indian Land Consolidation Act, because we think that it is so essential to finally solving the entire range of issues that arise from trust administration.

The last couple of days we have had lengthy meetings at the Department to try to get a grip on just the probate aspect of our high-level implementation plan. It became very discouraging because what we realized was that because there are more Indians, even though the death rate is slowing, the number of probates is actually rising. So as we send a swat team out to the field, even if that team manages to eradicate the backlog in each agency, the number

of probates after they leave will actually continue to grow and inevitably the backlog will rise again. It is like a bad pyramid scheme where at the bottom the interests are so tiny that they hardly justify the effort and expense that goes into a probate, yet we have to do more and more and more of them just as a statistical reality.

We brought some posters that we want to use to show you what the circumstances are, but more importantly to show that the Indian Land Consolidation Act can actually resolve this situation.

Mr. Chairman, as you may know, in our fiscal year 1999 appropriations bill, we were authorized to conduct a pilot project in the Midwest Region to see what we could do in terms of eradicating these small fractionated interests. We chose three reservations in Wisconsin and Larry Morrin is the regional director who oversees the project that is being carried out in Wisconsin.

You can see the extent of fractionation here, that we have as many as 38,000 interest holders on one reservation. Let me emphasize that 32,000 of those 38,000 interests represent less than 2 percent of the ownership of any given parcel of property. There is even one parcel of 80 acres on one of these reservations that has 2,000 owners.

The CHAIRMAN. How big is that parcel?

Mr. GOVER. It is 80 acres, with 2,000 owners. We can produce data. We can produce a title status report that is about an inch and a half thick with fractions in it like one-three millionth in ownership of 80 acres of land.

The CHAIRMAN. What do the numbers in the left column represent—20 percent, 40 percent, 80, 100, and so on.

Mr. MORRIN. Those represent interests associated with that particular piece of land. You can see here, the green portion represents the 2 percent or less interests in that particular reservation. Those interests represent 32,311 interests for Bad River Reservation in northern Wisconsin.

Mr. GOVER. So in other words, on the Bad River Reservation there are 38,818 separate interests in land held by the tribal members. Of those almost 39,000 interests, over 32,000 of them represent less than 2 percent ownership in any given parcel.

The CHAIRMAN. I understand.

Mr. MORRIN. Mr. Chairman, we are getting close to 90 percent of those interests within that particular parcel on that reservation which are 2 percent or less.

The CHAIRMAN. Which means that no one can do anything?

Mr. GOVER. That is correct, especially under current law where we have to get 100 percent of the owners to agree. Obviously at parcel with 2,000 owners, we will never reach agreement. The effort just to produce the lease would cost more than whatever the lease generated in terms of revenue.

We were talking earlier about the family history, about the allotment with 2,000 owners and if we unrolled this, we could stretch it all the way across this room. That would be the family tree we would have to keep track of in order to know who all owns an interest in these various allotments. A number of these folks are no longer alive and their estates are in probate. When we complete that probate, the number of interests continues to grow exponentially.

This bill authorizes a program very much like the pilot we are carrying out. Let me show you what we have already been able to do.

The pilot went into effect in late April of this year. Since then we have purchased 8,000 of these small interests. That represents the equivalent of 4,843 acres. We calculated that number. On a particular parcel of 100 acres, we bought one percent of the interest, which represents one acre. So it is not 4,843 real acres, but it is the equivalent.

The CHAIRMAN. These were purchased acres on the three reservations that were in the pilot project?

Mr. GOVER. That is correct.

Having done that, we have avoided 258 probates and eliminated 252 IIM accounts. So you can see that one single account holder will own dozens or more of these small interests. That, of course, creates an even more complicated management task.

The CHAIRMAN. What was the cost of purchasing those interests?

Mr. GOVER. That was about $1.6 million.

Mr. MORRIN. That was $1.6 million, and that was of the $5 million total that was appropriated this fiscal year. We expect to have that total amount expended by the end of this year. Mr. Chairman, We are looking at acquiring somewhere in the neighborhood of 17,000 to 20,000 separate interests in these three reservations.

Mr. GOVER. For that $1.6 million, we did some rough estimates of what it saves the Government to eliminate these fractionated interests.

First, on an annual basis, you eliminate at least $7,500 worth of IIM maintenance costs. It costs us $30 to $35 per year just to have an account open. Even if there is no activity, we pay $30 to $35 to maintain the account.

Second, assuming that each of these interest holders made one inquiry in their lifetime about the status of their land and we had to respond to them, we estimate that costs us over $400,000 to maintain these small interests.

In terms of probates, with a very conservative assumption, we spend about $1,500 per probate. By virtue of this program and the purchases we have already made, we have saved the Government $378,000 in probates that will not have to be conducted.

The CHAIRMAN. You have disappointed a lot of attorneys in the process.

Mr. GOVER. Actually, money attracts lawyers. These cases are not worth any money. We are talking about such tiny interests; interests not unlike my own, the infamous 7 cent account, I do not expect the probate attorneys to rush to my family's aid when the time comes.

In terms of future probates that will not have to be conducted, there is another $1.8 million. For our $1.6 million in purchases we have already made, we believe there will be an ultimate savings of over $2.5 million.

Expand the program to the point that we think it is necessary in order to really deal with these problems, and you can see that it is a wise investment. More importantly, when we eliminate these small interests and consolidate ownership in the tribe, we return the lands to productivity. Then, if the tribe chooses, it can be

leased, developed in other ways used for tribal housing, or any number of other uses. When it is encumbered by dozens, hundreds, or thousands of owners, it must lie unused.

That is the ultimate tragedy because the only real asset that most tribes have for economic development is land. Under the current land tenure, it cannot be used in an economic way. It is small wonder, then, that although the tribes are land-rich, they do not have meaningful economic activity on most reservations.

Mr. Chairman, we very much support S. 1586. We think it is absolutely essential. You can see that if we do not deal with it, the problem grows exponentially in the next 20 years. If we have another generation of dissent of these tiny fractionated interests, the problem just becomes compounded all the more. Worse yet, it becomes all the more difficult to undo the damage that we have created.

The other thing I would like to say is that this is sort of the fulfillment of the promise of the Indian Reorganization Act. The Indian Reorganization Act basically said the allotment policy was a tragic error. It did enormous harm in the communities and it is time to reconsolidate tribal land bases in the tribes themselves. This bill has that effect by basically authorizing us to go out and acquire these interests that cost us more than they will ever produce in revenue and consolidate that ownership in the tribe, which we believe is where it belongs.

Mr. Chairman, we will also be submitting some technical comments. We do have a few quite minor issues we would like to work with your staff on to resolve. Other than that, we very enthusiastically support this bill and hope that both committees will pursue its enactment with all possible speed.

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

The CHAIRMAN. I appreciate that. It sounds like we are doing something right. I congratulate the Bureau on the direction they are taking on the demonstration projects, too.

Before I ask some questions, Senator Inouye, did you have an opening statement that you wanted to make?

Senator INOUYE. Thank you very much, Mr. Chairman. I do, but may I have that made a part of the record?

The CHAIRMAN. Without objection, your prepared statement will appear in the record.

[Prepared statement of Senator Inouye appears in appendix.]

Senator INOUYE. May I also request that a statement by the Honorable Dale Kildee, Congressman from Michigan, be made a part of the record.

The CHAIRMAN. Without objection, Mr. Kildee's prepared statement will appear in the record.

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

The CHAIRMAN. Congressman Udall, did you have an opening statement?

Mr. UDALL. Yes, Mr. Chairman.

PREPARED STATMENT OF HON. TOM UDALL, U.S. REPRESENTATIVE FROM NEW MEXICO

Mr. UDALL. First of all, let me say that I know Senator Bingaman is the author of this piece of legislation and I think he has

done a very good job of pulling all of us together in trying to reach a consensus piece of legislation. We will hear from him shortly.

I want to point out that this legislation is bipartisan measure. that on the House side I introduced the companion measure in the House with the support of Congressman J.D. Hayworth and Chris Cannon, who also represent parts of the Navajo Nation. That is an important point.

This legislation provides for the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation. This legislation would correct a serious problem facing the Navajo people in Arizona and New Mexico, the issue of fractionated lands.

Since the late 1800's and through the early 1900's, the Federal Government attempted to force Indian people to assimilate by allocating parcels of traditional tribal lands to individual tribal members. I would note—and I know the Chairman knows that the period is a very sad chapter in American history—this practice resulted in alternating parcels of land being owned by individual tribal members, the State, the Federal Government, and other private landowners. Navajo owners were granted an undivided interest of their entire allotment, as were their heirs.

An undivided interest meant that the heirs received an interest in the entire original allotment rather than a portion of the original land. For example, if four heirs were to receive an equal interest to a 160-acre parcel, each heir would receive a 25-percent interest in the entire original allotment, not the 40 acres. Over time, the number of owners with an interest in the allotment is compounded or fractionated.

This unique system does not serve the Navajo people well. After nearly a century, this allotment policy has become a nightmare for the Navajo people. Keeping records straight has become an impossible task and in many cases owners can no longer be located, while some individuals are completely unaware that they are heirs to an interest in a parcel. Many times, title to the parcel is clouded when just one owner dies without a legal will.

Over the years, Congress has tried to deal with the fractionated lands and other issues governing Indian land ownership without success. These issues are complex and will not be fully resolved overnight.

In the meantime, I believe it is appropriate to consider a stopgap measure aimed at stimulating near-term economic development on fractionated Navajo lands. This bill will facilitate the leasing of Navajo allotted land for oil and gas development by authorizing the Secretary of the Interior to approve oil and gas leases on Navajo allotted lands when less than 100 percent of the owners agree to such a lease, a mechanism that is already available to non-Indians in most States.

Now, I note that given Mr. Gover's testimony there is a difference in his and our bill in terms of the actual percentages. I believe the important thing there is that we just reach a consensus. I know we may hear from allottees in this hearing, and since this is a consensus bill, I hope it will also be a consensus process so that we will be able to find some middle ground and move this forward as quickly as possible.

With that, Mr. Chairman, I thank you very much and also want to recognize Mr. Gover not only as a very capable lawyer from New Mexico, but also as a capable administrator. I think he made a very fine assistant secretary. It is good to have him here today.

Thank you.

The CHAIRMAN. Thank you.

We got off to a little bit of a convoluted start because people were coming and going, and Senator Bingaman was not here when we first started. So before I ask for any further opening statements, Senator Bingaman, would you like to make a statement concerning your bill, S. 1315 before we ask for reactions?

STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much, Mr. Chairman.

First let me compliment you, Senator Inouye, Congressman Young, and Congressman Miller. I gather this is a joint hearing you are having here. I think the larger bill you have proposed is certainly meritorious and I heard some of the testimony that Kevin Gover gave in support of it and think you are clearly on the right track and I will want to work with you on that.

The bill I am here to testify about is the one that Congressman Udall just talked about, S. 1315. It is a much more targeted bill to deal with a particular problem we have in Northwestern New Mexico related to Navajo allottees. Let me just say a couple of words about it, which is along the same lines that Congressman Udall spoke about.

I went out in April and met with a group of Navajo allottees in Nageezi, NM—which I am sure the chairman and Senator Inouye know quite well, on the road from Farmington down to Albuquerque there. We talked about this whole problem of fractionated ownership and the fact that there was a lot of oil and gas production taking place in Northwestern New Mexico, but it was not taking place on any of the Indian allotted lands for the simple reason that you have the ownership so divided there and the current law requires 100 percent of the owners to agree before any kind of lease can be entered into with an oil and gas company.

We are trying to do the same thing that the Congress has done in a couple of other circumstances. Fort Berthold Reservation and seven reservations in Oklahoma, specifically, Congress has legislated that fewer than the 100 percent—I think in both of those cases they legislated that 50 percent of the allottees could agree and go ahead and enter into a lease.

In this legislation, we are talking only about oil and gas leases. We have come up with a proposal working with the Navajo allottees and the Navajo Tribe one which is somewhat different from the 50 percent that has been previously agreed to. It is one that the Navajo allottees and the Navajo Tribe themselves have asked for. It is a graduated arrangement.

Essentially, it provides that the percentage of the owners that have to agree changes as the number of owners in the allotment increases. So that if you have ten or fewer owners, then you have to get 100 percent under our proposal. If you have anywhere from 11 to 50 owners, you have to get 80 percent. If you have over 50

owners, you have to only get 60 percent in order to agree to enter into a lease. That is what we worked out with the Navajo Nation, with the allottees.

It is different from what we have legislated in these other circumstances. In my view, it is appropriate that this tribe have a remedy that they feel comfortable with. This is what they have come up with.

We are going to have some testimony by Ms. Atcitty, who is representing the Shii Shi Keyah, which is the allottees association. That is Navajo, I am advised. Senator Inouye speaks Navajo, and I do not. Shii Shi Keyah means our land. That is their allottee association. They will testify that they feel strongly about this graduated arrangement that we have in the bill. It is one that we worked out with them.

I have letters here that we have obtained from the Navajo Nation, from Governor Johnson of New Mexico, and from various oil and gas exploration companies all supporting this legislation. It is a rifle-shot solution to a particular problem. I hope very much the committee will act favorably upon it and we can pass it. As I said, I also look forward to working with you, Kevin Gover, and others who are concerned about this larger issue of allotments and fractionated lands.

Thank you very much.

[Prepared statement of Senator Bingaman appears in appendix.]

The CHAIRMAN. Thank you.

Secretary Gover, you made most of your comments about S. 1586. Did you have any further comments about S. 1315? I am interested in your reaction to Senator Bingaman's suggestion in his bill that we have this graduated system rather than the 50 percent system.

Mr. GOVER. I actually had a couple of thoughts while Senator Bingaman was speaking. Within a couple of generations, they will all have more than 100 owners and we will end up in the 51 percent situation anyway.

We think that it does make sense to make it as simple as possible. With the different sorts of ownership—different requirements depending on the number of owners—that is just another opportunity to make mistakes in trying to decide that.

I did see some correspondence from Senator Bingaman's office that I thought had a lot of potential talking about family trust and about the owners getting together and making their own agreements about what the percentage requirement would be. That is certainly a concept that I think has a lot of potential for resolving this. Then it really is directly in the hands of the people who matter most, which is the people who own this property.

Senator BINGAMAN. Mr. Chairman, could I just add on that?

I think there was very strong—again, we have a representative here from the allottees association—but I think there is very strong sentiment where there are 10 or fewer allottees, they did not want a simple majority of 50 percent to be able to go ahead and lease the property. If there were some elders there who did not want that property leased for oil and gas, they felt those views should be respected. This family trust idea might be one way to reach that conclusion. Our bill tries to do that by saying that if there is a rea-

sonably small group of allottees, 10 or fewer, then you have to get everybody's agreement.

The CHAIRMAN. Senator Inslee, did you have any comment or opening statement before we go to questions?

Mr. INSLEE. No; except, Mr. Chairman, I will not consider it offensive that you considered me a Senator, even in the House. I am not going to take offense to that.

I appreciate the efforts of those folks who have been working on this issue. I hope I can help in some way.

The CHAIRMAN. Thank you.

On the demonstration project, Mr. Assistant Secretary, how did you negotiate a price when trying to consolidate?

Mr. GOVER. That is done at the reservations and basically evolves from the appraised value of the lands. The reason we chose these particular sites is because the Midwest Region had already undertaken a lot of the research that needed to be done in order to identify parcels for purchase.

What is really interesting about this program is that we have not advertised. We have not sent letters to anybody saying that we want to buy their interest. It is spread by word-of-mouth, and we have enough applications now to spend all the money that was appropriated for this past year. Happily, Senator Gorton and the Appropriations Committee are also giving us some funds for fiscal year 2000 to carry on this program. So we will make a real dent in the number of IIM accounts, the number of probates, and the number of interests.

The CHAIRMAN. So the Indian people themselves seem to support it?

Mr. GOVER. Yes, and the reason is because the land is no good to them right now. It means nothing to them to have a one-one millionth interest in 40 acres because they cannot use it, nobody else can use it, and so they willingly part with it.

The CHAIRMAN. When the Bureau acquires the interest owned by an individual, does it check to see whether it is mistakenly acquiring a person's interest in his homestead?

Mr. MORRIN. Mr. Chairman, we check the title to the property. We do title status reports that are prepared by our office out of Aberdeen that identify all the various encumbrances upon these properties. So all those things are addressed before we actually purchase the interest.

The CHAIRMAN. On the charts you showed us, there seems to be a very good cost-benefit ratio. Do you assume that if this is expanded you will get the same kind of positive ratio?

Mr. GOVER. We are getting the biggest yield in this area because these are the oldest allotments. They date back to 1854. Obviously, as we move out to the plains region and begin to do this, the price of the parcels will go up because the size of the interest goes up from, say, one-one millionth to 1 or 2 percent of the actual ownership. So we will not get the same massive impact or those kind of savings. But certainly over the long run we will experience savings and again, more importantly, the land will be returned to production.

Remember that part of the plan here is to repay these loans from income generated from the property that is acquired. That is actu-

ally more possible and the impact will be felt more quickly when we begin to acquire larger interests than we are right now.

The CHAIRMAN. I am sure the tribes you were working with were aware that this was a pilot project and that we would be trying to expand it. Did you get any positive or negative suggestions from the tribes themselves about how to improve this effort?

Mr. GOVER. Let me defer to Larry Morrin. He is more in touch with that.

Mr. MORRIN. Mr. Chairman, before we initiated this project, we met with all three tribes, tribal chairmen, and members of their councils. We have had discussions over the last several months. The tribes, would like to have a greater role in participating in the acquisition of these interests. I think some of the issues deal with selecting various tracts. Obviously, our focus and emphasis is to focus on the highly fractionated tracts of land.

Given that, we think that the tribes could have some flexibility in selecting tracts of land for acquisition. We certainly look forward to working with them in that regard.

Mr. GOVER. It does bring an important question, though, Mr. Chairman, and one that we are struggling with, and that is, What role do the tribes play in this? Do we want to contract this program to the tribes under 638 or self-governance? We have come to the conclusion that it is probably not a good idea the tribes will have different interests than we will in terms of priorities. Our priority is to close accounts and to avoid probates. And to turn this program to another purpose may well undercut the point of the whole program, which is to get rid of these fractionated interests.

As you know, the other problem is that when we compact with a tribe to carryout a particular function and that function comes to an end, as it does in this case when you eventually acquire all the interests; we are not allowed to take the money back after that, under the self-governance laws. That has come up in several different contexts where it is creating quite a problem for us.

The CHAIRMAN. One last question. At the Department's request, S. 1586 includes a non-controversial provision that allows Indian tribes to sell non-trust lands without Federal approval.

I am somewhat concerned if that provision would threaten our ability to enact legislation concerning consolidation. Do you think that would be the case with section 221?

Mr. GOVER. Mr. Chairman, I am afraid you have stumped the band. We may have to answer that question in writing.

The CHAIRMAN. If you would do that, I would appreciate it. We may be able to do that with some sunset provision or something.

Mr. GOVER. One of the things we do need some clarity on is section 81. It is sort of a problem for us that requires Federal approval of some set of transactions. The problem is that we do not know exactly which ones.

One of the things we have been thinking about at the Department and may well propose to you is that we do away with the approval requirement for off-reservation, non-trust property held by the tribes. We think that section 81 probably does not apply to that now, but nobody is entirely certain. On the other hand, if it is on-reservation, we think that probably a Federal approval require-

ment should apply and then we can address the consolidation issue you just raised.

The CHAIRMAN. Thank you.

Senator Inouye.

Senator INOUYE. Thank you very much.

First, I would like to apologize for being late. Second, I wish to commend my colleague, Senator Bingaman, for introducing this measure.

Mr. Secretary, as I walked in, you were talking about the need for probates being eliminated. Would this mean that wills, estates, and trusts will not be probated?

Mr. GOVER. No, sir; a good many of the probates we do now are for very, very small interests in land, and usually interests that are worth a tiny fraction of the cost of the probate. When we purchase these small interests, we do not have to probate the estate at a later date and we realize considerable savings by paying the owner now for their land, or for their small interest in land, and then we only probate trust estates. So if there is no trust estate, we are not a part of the probate process.

Senator INOUYE. You have testified that this bill be amended to make certain that 25 U.S.C. automatically attaches to lands which are purchased in fee by tribe if those lands are within the reservation.

Mr. GOVER. Yes, sir.

Senator INOUYE. Could this amendment work to the disadvantage of Indian tribes that have lands located outside the reservation?

Mr. GOVER. Certainly it could in some unanticipated circumstance. If a tribe wants the protections of Federal approval for lands off the reservation for whatever that is worth, they are free to apply to have it taken into trust. We certainly would not want to deny them that opportunity.

On the other hand, when the land is located off-reservation; not everything that a tribe owns should be in trust. And the reason it should not be in trust is that it should not be subject to our approval. They ought to be able to do what they choose with it in a much easier way than they do now. So the idea here is to sort of draw a line between the Federal authority that exists and tribal autonomy. We think an obvious dividing line is the reservation border.

Senator INOUYE. So it could work to a disadvantage and it would be up to the owner for the disposition?

Mr. GOVER. That's right. It would be up to the tribal owner who, again, would be free to have the Federal protection apply by asking us to take it into trust.

Senator INOUYE. In looking over the testimony of other witnesses, they suggest that before the Department is allowed to purchase Indian lands lending programs be in place to encourage individual owners to consolidate their interests. Would the administration view this amendment as being proper and authorize a lending program?

Mr. GOVER. Senator Inouye, we would not support such an amendment, which is not to say that we would oppose the legislation if it were so amended. Let me just make that clear. We think

a much better idea is to consolidate ownership in the tribe. The bill does contain provisions that ease transactions between the owners of a particular allotment so that deeds are more readily available and other transactions are more easily done between the various owners. So they are free to consolidate in that way.

We do not think, though, that it is the best policy to allow individuals to buy up other interests because the whole point and the whole underlying principle of our efforts are to reconsolidate tribal land bases, not the individual land bases.

Senator INOUYE. The Intertribal Agricultural Council recommends that they be authorized to create holding companies to consolidate these fractionated lands.

Are you in favor of that?

Mr. GOVER. We think that is much more favorable than consolidating it in the ownership of individuals. They are free right now to create holding companies and consolidate their management of individual parcels. We certainly do not oppose that for any reason.

Our only objection to what the individuals do is that, given that there is only a limited amount of Federal money, and it will be Federal money that finances these acquisitions, that we think the priority ought to be in purchases of land for the advantage of the entire tribe rather than the individual.

Senator INOUYE. And you are testifying that holding companies are presently authorized?

Mr. GOVER. They are available. The allottees are certainly free to make agreements among each other that will allow somebody else to manage their land. There still has to be BIA approval of any transaction involving the property, but the allottees are free to make agreements among themselves governing the disposition of the land as well.

I would assume a holding company would be an available arrangement.

Senator INOUYE. You would approve the transfer?

Mr. GOVER. If it were up to me, I certainly would.

Senator INOUYE. There are other testimonies suggesting that the problem of this fractionated land has been aggravated by the failure of the BIA to promulgate regulations to implement the Consolidation Act. Are regulations published?

Mr. GOVER. I think the safest thing for me to do is to respond in writing. We should take a careful look at it to make sure that we have not overlooked something. We will supplement that answer in writing.

Senator INOUYE. You would not be against the Bingaman sliding scale solution, would you?

Mr. GOVER. No; we would not be against it. We would prefer the 51 percent approach, but the administration would not oppose the bill in its current form.

Senator INOUYE. Thank you very much.

The CHAIRMAN. I would think that regardless we would need one or the other for all the tribes.

We will go in order of appearance.

Congressman Udall, did you have any questions of the Under Secretary?

Senator BINGAMAN. Mr. Chairman, I need to get back to my office. Could I be excused?

The CHAIRMAN. Absolutely. Thank you for appearing before us today.

Senator BINGAMAN. I appreciate the chance to testify very much.

The CHAIRMAN. Congressman Udall.

Mr. UDALL. Thank you, Senator Bingaman, for your leadership on this. It is a pleasure to work with you on it.

As you know, the 2 percent escheat provision has been held unconstitutional in both the *Hodel* case and the *Yupai* case. I was wondering how you deal with that provision in this current bill and how you address the constitutional issue to make sure that the same does not happen this time around.

Mr. GOVER. Now you have asked me a legal question and I am going to pass it on to my lawyers here. [Laughter.]

Mr. NORDWALL. Mr. Chairman, when the original version of the Indian Land Consolidation Act was enacted, the *Irving* v. *Hodel* case was already in progress. Congress amended the act and the Supreme Court never had an opportunity to look at the second version of the act until several years later. But one of the things that it did do in the original case was that in the last paragraph it issued some suggestions as to what might make the act constitutional.

Among those things are providing notice. The original act did not provide notice. It was made effective immediately. This Act requires the Secretary to notify the allottees within 6 months of the provisions of this Act, then it gives them an additional year and a half to write a will or take other action in order to prevent this land from escheating.

The other thing in the original Act that the Court found unconstitutional was that it completely prohibited any device or dissent. Even if you wrote a will, if the land was less than 2 percent, it still escheated. This act does not do this.

The other thing that this act does that is a major difference is that this act provides a means for them to dispose of those 2 percent interests because the act requires that the Secretary, in implementing the land acquisition program, give preference to acquiring those 2 percent interests. So an allottee will have notice and he will have an opportunity to write a will. If he has no heirs and does not want to write a will, he has an opportunity to sell it to the Federal Government.

Only if he fails to take any action and it is less than 2 percent will it escheat and the Supreme Court opined in the last paragraph of Irving that that was probably okay.

I think that the committee, when they wrote that provision, were very cognizant of what the Supreme Court had said in the original case.

Mr. UDALL. Thank you. I think that is a very clear statement. I think you have addressed the issue I wanted to.

Thank you and I yield back any additional time.

The CHAIRMAN. Congressman Inslee?

Mr. INSLEE. I appreciate that.

Has the Supreme Court ruled on any sort of similar inheritance issue, not necessarily involving tribes or otherwise? Have they

passed on a similar type of issue, that as long as you gave notice and opportunity to solve the problem we are going to okay removal of a property right?

Mr. NORDWALL. There were some very old turn-of-the- century Supreme Court cases that basically held that inheritance was a purely statutory right, that in the common law there was no inherent right to inherit property.

They seem to have modified that slightly in Irving. There was an earlier case involving, I believe, the Yakama Tribe where there are about eight or nine special heirship statutes in existence. The Indian Land Consolidation Act was intended to be a generic statute so that Congress did not have to pass specific statutes for each tribe. They held in that case that this type of escheat provision was constitutional. They didn't really discuss what the distinctions were between the earlier case and the case in Irving. They just said that the present version of the act that totally prohibited either willing property or leaving it through intestacy was unconstitutional, that there had to be some mechanism and a little bit of flexibility. But there had been some earlier cases.

Mr. INSLEE. What has been the experience—and I really appreciate the efforts being made to solve this huge problem. I can understand how big a problem it is. But have there been many instances where people have objected to leases, say, on religious grounds? Have we run into situations where tribal members have really—maybe they are one out of 8 or 15 owners—but is there a religious context to this where people might, on a religious basis, object to mineral extraction? Is that an issue?

Mr. GOVER. I have not heard any such objections, except sort of in the broad sense that some people, including some Indian people, believe that any sort of development of property of that type, anything that is invasive, or anything that is potentially polluting should not take place. Whether one describes that as a religious view or a philosophy is unclear.

The larger problem the bill is actually designed to address is not a dissenting owner, someone who does not want to lease. It is really designed to deal with the fact that finding all the owners on any given parcel quite often is simply impossible.

Remember that a lot of these interests are owned not just by Indians who live there on the reservation. Frequently they are either off-reservation or they are not Indian. Many non-Indians own interest in this land, and to them, we have almost no chance of finding them unless they happen to reside on the reservation.

Mr. INSLEE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. I would think if there is any kind of religious concern, it would not be based on consolidating, it would be based on what the land is going to be used for afterward.

Thank you, Mr. Assistant Secretary, for appearing today. Again, congratulations on how well this pilot project is working and I look forward to working with you, as I am sure the full committee does, in trying to expand this through this bill. If you have any suggestions on how to make a pretty good bill a better bill, we certainly would appreciate it.

Mr. GOVER. Thank you, Mr. Chairman. Again, we commend the committee on the bill and look forward to working with you.

The CHAIRMAN. We now go to panel two, which will be comprised of Ross Racine, Natural Resources Director, Intertribal Agriculture Council, Billings, MT; Delmar Poncho Bigby, Indian Land Working Group, Harlem, MT; Roxane J. Poupart, Land Management Director, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac du Flambeau, Wisconsin; Ben Black Bear, Executive Director, Tribal Land Enterprise, Rosebud, SD; and Shenan R. Atcitty, Esquire, Nordhaus, Haltom, Taylor, Taradash and Frye, LLP, Washington, DC, on behalf of Shii Shi Keyah Association.

When we do the hearings here—for those of you who have not been before the committee before—we give quite a bit of latitude to the witnesses from the administration or to other Members of Congress, but we ask other people who are testifying to confine themselves to about 5 minutes of testimony and turn your complete written testimony in where it will be included in the record. When that red light turns on, it is time to let another person who is testifying have the microphone.

With that, we will start with Ross Racine. Welcome to the committee.

STATEMENT OF ROSS RACINE, NATURAL RESOURCES DIRECTOR, INTERTRIBAL AGRICULTURE COUNCIL, BILLINGS, MT

Mr. RACINE. Thank you, Mr. Chairman. Thank you for the opportunity.

I really want to focus my testimony this morning on two areas. One, things that are in place today and the effects of the fractionation problem. At the closure, I want to illustrate a document I have already provided to the hearing clerk.

Let me start by saying that we do not have approval of tribal land consolidation plans and those were brought about as an effect of the Indian Land Consolidation Act. The second piece of legislation which addresses and recognizes tribal authority in laying out what depicts a majority interest is already within Public Law 103–177. I urge you to avoid confusion or even conflict between two laws by enacting first that Public Law 103–177.

Let me get on with the effects. The effects of the fractionated status of Indian allotted land is most keenly felt by the individuals who actually own shares in this land, usually referred to as the allotted landowners. Owners of fractionated lands retain little or none of the benefits of ownership usually attributed to landowners in their society. A fractionated owner cannot clearly identify or locate their holdings, cannot make beneficial use of it without the direct involvement of other owners and the Federal Government. They have no actual equity position in the land for borrowing or net worth purposes and cannot directly access USDA farm programs on their own behalf. They have virtually no direct involvement or authority in its management or use, except as granted by the Federal Government on an individual basis.

As stated almost 60 years ago, these landowners are reduced to the status of destitute, absentee landowners with minimal returns. Perhaps worst of all, the mismanagement of this one remaining valuable asset of Indian nations is the one place in American soci-

ety where the phrase "majority rules" does not apply. The owners have become embittered and antagonistic toward the Federal trustee who is responsible for the control of their lands.

Economic benefits to landowners and the community at large are minimal. Landowners receive small lease payments proportional to their ownership share, which are paid by the lessee to the BIA and redistributed through Treasury to the individual landowners. Because lease income is divided among many separate owners, even the lease rates well over the appraised value result in little meaningful income to the owners. These Treasury checks, while small, are also the primary reason that nearby communities mistakenly believe that Indian people are subsidized in some unique fashion by the Federal Government.

The ownership shares are also worthless as collateral for loans or mortgages. The value of products produced on the land accrue to the lessee—frequently a non-resident of the reservation—and those funds are not available to build the reservation's economic base.

In short, the leasing of millions of acres of fractionated lands makes little or not contribution to the economy of the local community. Off-reservation rural areas income from land has been the basis for the developing of thriving communities based on service, merchandising, and management of the land-based assets. In Indian country, land has produced none of these generally accepted contributions to community.

In addition to the absence of contribution to reservation communities, this problem diverts funds and resources from other critical needs. The increasingly complex administration of fractionated heirship lands to divert limited resources from the positive contribution of land management and economic and social development to a custodial monitoring will continue a worsening situation.

A good example of this is the expenditure or investment in the trust asset accounting management system, which is more than the total resource management budget of the present administration.

A large portion of the remaining Indian reservations and restricted Indian lands in Oklahoma were established by treaty proclamation and law to provide homeland and perpetuity for Native Americans in return for certain concessions of land, mobility, and resources. These homelands were then divided by the trustee, granted to individuals, with the remainder opened up for homesteaders in many areas. Those lands not homesteaded were retained communally by the tribe and have become fractionated to the degree that they contribute no benefit to tribal homeland.

The ideas of homeland wherein the tribes continue to reign in their traditional role is completely undercut when the tribe and its members can only react to Federal non-management of their dwindling assets because there are no true owners and they cannot make direct or beneficial use of their assets. An additional effect is the impact on the relationship between an individual and their ancestral roots, the tribe. In some instances, landowners living away from the reservation may consider their land holdings inherited from their ancestors as their major family, emotional, and cultural tie to their tribe. The fact that their holdings are small, fractionated, and unidentifiable does not diminish this tie with

their roots and complicates the efforts to solve this problem by taking or escheating small interest.

Mr. Chairman, I have submitted another document that addresses holding companies. We do not have that ability today, and I ask you to include the authorization.

The CHAIRMAN. We have a copy of that authorization and your letter, too. That will be included in the record.

Mr. RACINE. Thank you very much.

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

The CHAIRMAN. We now go to Mr. Bigby.

STATEMENT OF DELMAR "PONCHO" BIGBY, INDIAN LAND WORKING GROUP, HARLEM, MT

Mr. BIGBY. Thank you, Mr. Chairman.

My name is Delmar Poncho Bigby. I am a member of the Assiniboine Nation of the Fort Belknap Indian Reservation in Montana. I am also here primarily as the chairman of the Indian Land Working Group, which is an ad hoc committee of dedicated, concerned, interested Indians throughout the United States from all walks of life.

Mr. Chairman, you have heard statistics from the BIA. That is how we in Indian country perceive the bill before you now, strictly an administrative budget process. There is nothing in that bill that I see that deals with the real people involved—the impact to the people. Reservations were created by Congress for people. It was not created for the BIA. The reservations were created for Indian nations to have a place to call home.

Homes do no good to a government. Government does not live in homes. People live in homes. Children live in homes. Grandfathers and grandmothers live in homes. Government does not live in homes.

Land is about people. Without land the people die. Without a place to live the people die. Without a place to go back to, to have their roots, to have their culture, their spirit—it all relates to the land. Everything I have ever seen come out of the halls of Congress and through the BIA have been geared toward the land user—everything—nothing for the landowner, the individual.

The bill before you proposes an acquisition program for tribal governments. The bill completely ignores the needs of the individual—the people who need this land for their homes and their livelihoods.

So as a private citizen, as a member of the Assiniboine Nation, as the chairman of the Indian Land Working Group, we oppose the Bureau's process for acquisition in the name of tribes for land consolidation because it is strictly a budgetary, administrative process that completely ignores the needs of the people that are so directly affected by this legislation.

We need hope for our people. The only hope they can have is to achieve the American dream. The American dream consists primarily of a home, a place to raise your children, and a way to feed your family. Without this hope, there is no future. Without the future, there are no people. We need consideration for the individuals in this process.

The Fort Belknap Indian Reservation in 1984 developed a land consolidation plan. In 1993, we developed an alternative to the Ada Deer proposal. Even though my grandfather was the representative of the Assiniboine Nation of the Fort Belknap Allotment Act in 1921, he saw the future for individual ownership. I see the impact of individual ownership.

I regret that I did not bring the map that shows the fee patent lands within the Fort Belknap Indian Reservation, which is a closed reservation. It was not open to homesteaders. We forget that the economics, the dreams that people have—yes, we need the tribe as a safety net, but we also need the individual entrepreneurship to be able to develop our economies within the reservation. That comes from the individual. It does not come from the Government. Government assists the individual. But it is the individual that makes that economy. We need consideration for the individual in this whole process.

Throughout the history of the Indian nations, treaties have been enacted by Congress and signed by president that deal with building up the civilization for Indian people so that they can achieve the American dream. Without the proper appropriations and the spirit of the treaties—not the spirit of the words in there, but the spirit of the treaty that is behind the words—if the Congress were to fulfill their commitment made to my forefathers and my foremothers that they would assist them to be able to achieve the American dream, we would not be here. We would not be approaching the Congress on an annual basis asking for assistance for our families and our homes. If Congress were to fulfill the spirit of the treaties that our forefathers made, we would not be here.

Mr. Chairman, I thank you for hearing these words. And that is all I have to say at this time.

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

The CHAIRMAN. Thank you. We will have some questions for you in a moment.

We will go now to Ms. Poupart.

STATEMENT OF ROXANE J. POUPART, LAND MANAGEMENT DIRECTOR, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, LAC DU FLAMBEAU, WI

Ms. POUPART. Thank you, Mr. Chairman and members of the committee.

My name is Roxane Poupart and I am the director of the Tribal Land Management Department for the Lac du Flambeau Chippewa Tribe of Wisconsin. I am here as the representative on behalf of our tribal government to provide this committee with information on how the land consolidation pilot project, that is being implemented by the BIA, is working for us.

Lac du Flambeau is one of three reservations selected to participate in the pilot project for fiscal year 1999. I would like to go on record at this time that I am not prepared to comment on the bill that is on the floor. The tribe needs ample time for review, consultation, and commentary.

The Lac du Flambeau Indian Reservation is located in north-central Wisconsin approximately 180 to 300 miles away from any major metropolitan area. If you would refer to exhibit A, that will

illustrate the typical checkerboard ownership status for our reservation.

Lac du Flambeau, as the two other bands, consist of allotted land having been made in the 1850's, well before the enactment of the General Allotment Act of 1887. Fractionations on these reservations are the most severe examples in the Great Lakes area, as previously illustrated by Mr. Gover. Lac du Flambeau has not received a specific amount under the pilot project, but to date the BIA have expended $700,000 toward acquisitions for our tribe.

In addition to the pilot project, the tribe has worked diligently in its own efforts to reduce the severe problem of fractionation. In fiscal year 1998, the tribe appropriated $1.5 million under two separate referendums to acquire allotted and fee lands.

The strongest and most effective part of the pilot project is that it has enabled the tribe to reestablish their land base, which had been decimated by the allotment policy. By 1966, approximately 25 percent 29,101 acres of our original land base was allowed to become alienated and is currently owned by non-band members.

Many of the allotments that have left Indian ownership include our most desirable shorelines around the lakes. To date, the tribe has reestablished 1,181.09 allotment acres. This includes the acquisition of two entire allotments within our designated wildlife area. Exhibit B identifies the allotted land ownership data for Lac du Flambeau.

Fractionated ownership of Indian lands is a problem that not only threatens the administrative ability of the BIA, it makes utilization of the lands very difficult and sometimes impossible. Exhibit C is an example of an attempt to consolidate several parcels under the pilot project. To make this a viable unit, it is time to take this consolidation attempt one step further and acquire those fractional interests greater than 2 percent.

There are only a few residential leases on allotted lands in Lac du Flambeau. The allotment land base has some choice lake shore, but is predominantly forested back land and undeveloped. To recoup proceeds from these inherited land interests, as outlined in the pilot project appropriation language, may be far reaching. For example, the Bureau acquiring an 80-acre allotment from 12 heirs representing 1 percent total undivided interest in the parcel generates zero income. The number of heirs are still too numerous to get the required approval for a lease, and any damages received from a right-of-way may have been waived or already disbursed.

Under the forest management plan, the next timber sale and improvement project is not anticipated for another 10 years. If the parcel is not generating income, how and when will income be generated? It is not clear, nor has the tribe been consulted on how to address the economics of these acquisitions.

Another concern we have is the time period of these title transfers to the tribe. It is not clear whether this process will take days, months, or years. Other areas of encountered dilemmas have been in the transition of payments to tribal members, confusion when payments would be received by members, denial of certain land payments, breakdown in communication and consultation with the tribes, and the regression to the old method of processing land sales.

Under Public Law 93–638, the tribe currently contracts certain real estate functions of the BIA. Our land management program currently has a staff of three that provides real estate services and routinely prepares and processes trust and fee title conveyances. The knowledge and administrative experience of our department has positioned the tribe to administer the consolidation pilot program.

The tribe supports the consolidation pilot project and recommends funds be appropriated in fiscal year 2000 to continue the project's objectives in reducing fractionation of Indian lands. The tribe strongly urges that new allocation language and criteria for the pilot project allow tribal governments the authority to administer the program—in addition, acquire interest greater than 2 percent within a designated time, and allow Indian individual landowners acquisitions for consolidation concurrent with tribal land use plans and acquisition plans, thereby creating greater opportunities in land utilization for new housing development, economic development, and enhancement and management of their natural resources.

In conclusion, on behalf of the tribe, I appreciate the time of the chairman and the members of the committee to allow us to express our concerns and recommendations regarding the pilot project.

[Remarks given in Native tongue.]

[Prepared statement of Ms. Poupart appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Black Bear.

STATEMENT OF BEN BLACK BEAR, EXECUTIVE DIRECTOR, TRIBAL LAND ENTERPRISE, ROSEBUD, SD

Mr. BLACK BEAR. Thank you, Honorable Chairman Ben Nighthorse Campbell and the members of the Senate committee. I also bring greetings from the tribal chairman to the House Resources Committee as well. I have a written statement that I have submitted.

My name is Ben Black Bear. I am the executive director of Tribal Land Enterprise.

The honorable chairman, Senator Ben Nighthorse Campbell, and I have something in common. We are both mentioned in a book that just came out called "Little Big Horn Remembered". I feel greatly honored to have been included in there with Senator Nighthorse Campbell.

Basically, what I want to say—first of all, I brought with me the acting chairman of Tribal Land Enterprise, Ed Charging Elk, who is sitting back here. I would like to request that we be given the opportunity to submit additional testimony.

The CHAIRMAN. We normally extend the comment period for 2 weeks.

Mr. BLACK BEAR. So my comments are pretty much limited. Tribal Land Enterprise—I guess we are in the same business as the legislation and the amendment is attempting to do, and that is to reduce the fractionation problem on the reservations. On the Rosebud Reservation, we have TLE, which is a subordinate organization of the Rosebud Sioux Tribe, and we have been in existence for 56 years now. We have been reducing the problem of fractionation on

the Rosebud Reservation. If we continue at the same rate at which we are going right now, without any change at all, it will take us an estimated 22 years and about $43 million to eliminate the fractionation problem.

We have submitted some attachments to our testimony that give you some figures within the last 3 years about our acquisition of fractionated interest. In there we do indicate some of the 2 percent lands, which is one of our priorities. It is not the only priority, but it is one of our priorities to buy out less than 2 percent ownership from elders. I think the priority is to purchase from elders in the tribe. Incidentally, we also purchase from anybody who has fractionated interest, not just tribal members.

One of the points I would like to make—the issue of the escheat in the 2 percent—like I said, TLE has been dealing with that without having to do that [escheat]. When the original legislation was proposed in 1983, we submitted some comments indicating that we are taking care of that particular problem and the escheat provision was not necessary because we felt that it was not just an economic issue. With a lot of our people there are other issues that are sort of important. The attachment to the land—it does not matter how small the fractionated interest is—the fact that they own interest on the reservation sort of gives them a tie to the reservation. They may be scattered all over the Nation, but they always have a tie to the reservation because of the fact that they own something on the reservation.

We take those kinds of things into consideration, so we make an effort to deal with it on a person-to-person or people level. I concur with Poncho Bigby in that it is a people issue to us. To those of us who are on the ground, on the reservation, it is a people issue. We have heard the Assistant Secretary's testimony earlier and feel that there was a lot of emphasis on the governmental aspect and on the economic aspect. To us from the reservation, it is a lot more than that. It is a people issue. That is the emphasis I would like to make.

In our case, Tribal Land Enterprise has been dealing with it for many years and has dealt with it as a people issue. The organization is a tailor-made organization to the reservation dealing with the problem of fractionation.

I submit that and again I would like to submit additional comment later on.

Thank you.

[Prepared statement of Mr. Black Bear appears in appendix.]

The CHAIRMAN. Thank you.

We will finish up with Ms. Atcitty.

STATEMENT OF SHENAN R. ATCITTY, ESQUIRE, NORDHAUS, HALTOM, TAYLOR, TARADASH AND FRYE, LLP, WASHINGTON, DC, ON BEHALF OF SHII SHI KEYAH ASSOCIATION

Ms. ATCITTY. Good morning, Mr. Chairman and Mr. Vice Chairman. Thank you for the opportunity to testify before you today.

My name is Shenan Atcitty. I am an attorney with the Nordhaus Law Firm in Washington, DC. We are general counsel to the Shii Shi Keyah Allottees Association, which is the premier organization representing Navajo allottees.

The Shii Shi Keyah Allottees Association supports S. 1315 and appreciates Senator Bingaman's efforts and his attempt to address some of the issues concerning the Navajo allottees. The membership is scattered throughout the four corners region. Mainly this bill addresses the issues in the New Mexico portion of the Navajo allottments.

Although the allottees own the beneficial interest to the minerals underlying their properties, for years they have been prevented from realizing the benefits of their lands. One problem has been the failed allotment policy by the Federal Government. The second problem has been the deliberate actions of the Federal Government to prevent the allottees from realizing the property rights they should have had under these allotments.

Like many tribes and tribal peoples in this country, the Navajo allottees and the Navajo people's history is a sad one, but it has to be recognized and acknowledged. In the 1860's, our people were living on our lands peacefully before the U.S. Army began war on our people, herded our people, and forced us on a long walk to a desolate area of the country in southern New Mexico. We were incarcerate there for years. After accepting the terms of a treaty with the United States, we returned back to portions of our original homeland.

Unfortunately, some of the Navajos who resided on their original territory were not included in the newly established reservation boundaries. They experienced an encroachment and were threatened by the non-Indian settlers who wanted their land and their resources.

As a result, the Federal Government expanded the territory of the Navajo Reservation to include the areas where these Navajos were residing. Consistent with the allotment policies in the early 1900's, the Federal Government immediately began allotting those lands out to the individual Navajos. Before the allotment process was complete, the reservation was reopened and the surplus lands not allotted were restored to the public domain for non-Indian settlement.

And to add insult to injury, the Federal Government immediately claimed ownership to the allottees' minerals. We believe that this was an illegal claim of ownership, that the relevant statutes did not authorize the claim to those minerals. However, the Federal Government did do so and made leases with companies on Navajo lands for coal, uranium, oil, and gas. The proceeds or royalties of those leases were exclusively paid to the Federal Government and the State government.

The Navajos were often forced to move off their lands in favor of the exploration. These people eventually filed lawsuits against the United States and ultimately prevailed in their litigation. So even after years and years of fighting against policies and actions of the United States, the allottees are still facing barriers in realizing the economic benefits of their lands. Ironically, this area is one of the wealthiest in natural resources on this continent. It sits on the San Juan Basin and yields enormous wealth to non-Indian companies, the State, and the Federal Government.

Through S. 1315, the allottees are seeking to get some measure of economic benefit from their land. We feel strongly that the grad-

uated approach, as set forth by Senator Bingaman, be respected and be honored by Congress and be allowed to go forward. We negotiated these provisions with Senator Bingaman for a year and we believe it gives respect and accord to Navajo values of avoiding conflicts, and creating harmony among the families. We do not see this as an ultimate, permanent solution. We see this as a temporary one that will allow these properties to be developed and the proceeds to rightfully return to the Navajo owners.

Furthermore, we are exploring options with Senator Bingaman on a family trust concept, which would allow the families to create a trust to be administered by a competent financial trustee to make decisions on behalf of the trust, for the benefit of the people. We will be seeking more input from Senator Bingaman and from financial institutions on this concept.

In closing, I would just like to point out that the time is now for the United States to end its aggression against Navajo allottees and to begin working cooperatively to address the important issues that are facing them.

I also request that my statement be included in the record.

The CHAIRMAN. Without objection, your prepared statement will appear in the record.

[Prepared statement of Ms. Atcitty appears in appendix.]

The CHAIRMAN. Thank you.

Before I ask a couple of questions, I would like to tell this panel that to my knowledge nobody on this committee has ever justified the poor treatment the U.S. Government gave toward Indian people in their historic relationship. In fact, Senator Inouye and I and a number of other members of the Senate have spent a good deal of time trying to rectify it as well as we can, knowing full well that we cannot put everything back together the way it was in pre-colonial times. But I know sometimes Indian people come in here to testify and are justifiably very upset, and they often see everybody back here as the enemy. But there are a number of us who work very, very hard for Indian people, and two of us are sitting right here. I want you to know that.

I want to also ask everybody on the panel, Have you read the bill? You know on page 21, lines 17 through 22, under section 218.

It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions involving individual Indians in a manner consistent with the policy of maintaining trust of allotted lands.

Ms. Poupart, how do you consolidate land owned by dozens, if not hundreds, of people unless you do work with the individuals, somehow? I know, too, that Indian people do not always agree on a piece of land. One may want to plow it up and put a pasture in or raise hay, and another may think that is an absolute sacrilege because their religious beliefs might be that you do not touch that land.

The Bureau testified that in this pilot project they did not seem to have problems with the individual owners of the land, it seemed to be flowing pretty well.

Did you have much disagreements about what the future land use might be under this consolidation program might be?

Ms. POUPART. We did have some feedback from the individual members that inquired about the pilot project. Their concerns are, Do we sell, or——

The CHAIRMAN. Were they concerned about whether they were going to get paid? Or what the future use of the land may be?

Ms. POUPART. The future use was the concern of some individuals.

The CHAIRMAN. How did you handle that?

Ms. POUPART. We explained to them that development would not occur, hypothetically speaking, if development were to occur that we were going to develop the area within a land-use plan and the people or the tribe have the opportunity to comment on that plan.

The CHAIRMAN. Mr. Black Bear, you have had a lot of experience with that. Did you find this a problem in the many instances you have worked with this?

Mr. BLACK BEAR. I do not recall any particular problem in terms of acquiring the land. I think one of the expressions that we keep hearing is that even though TLE provides the opportunity for individual members to consolidate their fractionated land holdings—and they do have the opportunity to do that through the program—one of the things that we usually hear is that they would also like to get the land assignment—where the tribe owns the land and it just gets assigned to them. There have been expressions that they would like to get the land exchanged as allotted land, sort of like trust deed acquisition.

That is one of the expressions we get from individual landowners who have fractional interest. They want to consolidate their holdings in allotted status, I guess.

The CHAIRMAN. Mr. Black Bear, we have tried these pilot programs and they seem to be working well—at least generally, with a few minor glitches—what criteria should the Department use in deciding which tribe should receive funding for land consolidation? There are a lot of tribes that may be interested in this.

Mr. BLACK BEAR. One of the thoughts we had was that if there are tribes that are able to deal with the fractionation problem and have made attempts—I guess—and in consultation with the tribes—I guess that is one of the points I wanted to emphasize also. It is important to consult with the tribes and the people out there who are being directly affected.

I think groups like that would benefit greatly.

The CHAIRMAN. You probably know one of the problems we face—and certainly the Bureau faces, too—is that they deal with the elected representatives of the tribe, which are generally the tribal council—but many times the people who elected that tribal council then find themselves in disagreement with the very people they elected. When we try to make something fit, in negotiating with the tribal councils, we end up with a backlash from individuals within the tribe because we did not listen to them. So it makes it very difficult for us and for the Bureau.

Mr. BLACK BEAR. Yes; I understand that.

The CHAIRMAN. I might also mention—thank you for mentioning that book by Herman Viola—the groundbreaking for the Indian memorial at the battlefield is going to take place November 11, just next week. I wasn't sure if you were aware of that.

Mr. BLACK BEAR. No; I was not aware of that. Wonderful. Thank you.

The CHAIRMAN. The bill was passed 10 years ago, and Senator Inouye and I both worked very hard on that bill. It was a long time in coming—getting the designs and support of the tribe and so on. But you might be interested in attending that groundbreaking event.

Mr. BLACK BEAR. Yes; thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bigby, as near as I can tell in listening to both Assistant Secretary Gover and Ms. Poupart, they are trying to deal with individuals—with people, as you mention it.

How would you make this a better bill so that we deal with people. You seem to be opposed to the bill if we are dealing with tribes as opposed to individual people. Please clarify that and tell me how we deal more with individual people's concerns in this bill.

Mr. BIGBY. Thank you, Mr. Chairman. I was hoping that I could expound on that comment.

Fort Belknap has had a land acquisition program now since the mid-1930's. It has been a very successful program, a revolving credit program where we borrow money from the U.S. Government and then repay it. Fort Belknap is one of the few tribes in the Nation that has a viable revolving credit program.

If this Congress were able to appropriate sufficient money, then we can expand our program as it was envisioned to include individual acquisition. At the present time, if I am the owner of a undivided interest, and I wish to consolidate in a tract of land, I have no place to go for financing. So out of desperation, people will sell to the Bureau. They will sell to the Bureau. They will sell to the tribe. They will sell to anybody who has the money to buy from them.

That is my objection to the Bureau program. They are creating a sale process to where they are the only buyer. There are no options for the individual. In 1994, we have Fort Belknap's alternative to the Ada Deer, which was incorporated into the draft bill by the Indian Land Working Group to provide for a mechanism for individuals to consolidate with a loan and a grant process. That is my objection to the Bureau process.

The CHAIRMAN. So basically you are saying that we should appropriate money to loan to individuals to buy out the other individuals. Is that correct?

Mr. BIGBY. Yes; as part of the process. I will provide you with our alternative so that you can see that it is a two-pronged approach, both tribal and individual consolidation.

The CHAIRMAN. Senator Inouye, while I mull that around a little bit, do you have any questions?

Senator INOUYE. Before I ask, I just want to make a comment. In order to get a meaningful amount appropriated for such a good purpose, we would have to convince the appropriators. And the record of this century would indicate that this Congress has never been generous when it comes to appropriating for Indian country. I can assure you that we here sitting here have tried our very, very best to get whatever we can. But at this time, if the success of the program depends upon large amounts of funding, then I think we are climbing up the wrong tree.

If there are not appropriate, meaningful amounts of money, how would you suggest the Secretary prioritize the allocation among tribes and individuals?

Mr. Racine, I believe you spoke of meaningful funds also.

Mr. RACINE. The statistics are available, I guess, as to where the problem is most prevalent. It appears right now the reason that the Midwest and Great Lakes Region was chosen is because they have the oldest allotments. But I also think that we also must look at the percentage of allocation within any given reservation as an option to look at as one of the alternatives.

As an example, when after allotment on the Blackfeet Reservation, there was only 360,000 acres of land retained in the name of the tribe and the rest of the 1.5 million acres was put into allotment. So the allotment ownership of that reservation is far greater than it was on other reservations. That is a consideration. What percentage of your reservation was allotted? In the Midwest, on some reservations the whole reservation was allotted, and certainly that should be a priority. On other reservations, a minute portion—less than a third—was in the allotment status.

So there are a number of equations to be built, but I think the percentage of allotment is one of those that should be considered.

Senator INOUYE. Mr. Bigby, do you agree with that?

Mr. BIGBY. To a degree, Mr. Chairman. Also, the viability of existing programs. If something is working, why not assist that program to work? In many cases, tribes have many viable acquisition programs, exchange programs that they have developed that meet the needs of their people. Throughout Indian country you have tribal initiatives, and initiatives that are working.

All we need is the support that is already there. There are already appropriation laws on the books. The Indian Reorganization Act authorized appropriations. If Congress were to appropriate that and work with tribes that have viable programs that are working and not try to reinvent the wheel all over again. Just strengthen what is there.

Senator INOUYE. I agree with you. That is why we support self-government and self-determination. But there is a difference between authorization and appropriation. Just a few days ago we were discussing education. The Congress of the United States several years ago authorized that each Indian should receive the equivalent of $6,000 for tribal colleges. They received $2,790, and that has been the amount all these years. So those are some of the problems we have, but we are trying our best.

May I ask, Ms. Poupart, when your tribe was elected for the pilot project, how long did it take for the Department to provide funds for this project?

Ms. POUPART. When we first received notice that the tribe was selected, I would say it was mid-summer, July, and by the time the pilot project got going it was March.

Senator INOUYE. So 10 months?

Ms. POUPART. Maybe 8 months.

Senator INOUYE. If you were authorized and funded to administer the project, would you have done it differently? Or would you have followed the program as set up by the Government?

Ms. POUPART. We would have worked with the program guidelines. We would have liked to have had more input on the development of the guidelines.

Senator INOUYE. Should consolidation plans be consistent with tribal plans? Or should individuals be authorized to go on their own?

Ms. POUPART. I think they should be consistent with tribal plans. At a local level, the tribes know what is happening. Individual tribal members utilize land differently. Particularly, in our area we deal with a lot of exercising of our treaty rights issues. So there are many different factors that need to be considered in these acquisitions.

Senator INOUYE. Mr. Black Bear, you are very proud of your plan in Rosebud?

Mr. BLACK BEAR. Yes, Senator.

Senator INOUYE. Why is it that other tribes have not adopted the plan? They must have studied it. Why does it work there, but apparently not in other places?

Mr. BLACK BEAR. We have gone to meetings and talked about it with other tribes, especially with the Indian Land Consolidation Group. Of course, our organization was established about 56 years ago. At that time, it was sort of more experimental. We were sort of feeling our way at that time to establish that organization. It was very carefully thought out, apparently, because that is what gives it the staying power. It is unique and well suited for the trust arena.

Without regard to funding—if there is no additional funding to be had, for example—TLE did borrow money to sort of accelerate the acquisition of fractional interest at one time. Over a period of 10 years, I think we borrowed $9 million. That is one of the peripheral situations we are dealing with. We are asking the Secretary of Ag if that loan can be written off. We have been paying on it for 30 years now, something like that. That was one of the issues.

But apart from getting direct funding, those are some of the issues we need to deal with. In my testimony I also brought out the issue of the fact that the tribe is dealing with consolidating its land holdings. One of the issues it deals with is getting consolidated areas that include fee land, which touches on the problem of putting that fee land into trust in order to consolidate those tribal areas. That is a very difficult process to get that land into trust. But that is the way the tribe holds land. In order to consolidate their land holdings, that process is necessary.

So those kinds of peripheral issues are important to address. They may not be addressed with the bill here, but those are important issues that would enhance the ability of the tribe to manage its own land and have economic development on these lands.

Senator INOUYE. I suppose you feel strong enough so that your plan should be provided as an option to other tribes if they wish to follow it.

Mr. BLACK BEAR. If they wish to follow it, yes, certainly. We can certainly provide that opportunity to tribes. And we have in fact been doing that by talking about our organization with other tribes.

Senator INOUYE. Thank you very much.

Ms. Atcitty, the administration testimony on the bill recommends that it be amended to permit leasing based on consent of owners of a majority interest rather than a sliding scale as proposed by the Bingaman bill.

If the committee were to amend the bill as proposed by the Administration, would you still support it?

Ms. ATCITTY. No; I am informed by the allottees that they are adamant that their negotiations with Senator Bingaman be respected. They strongly believe it is an issue of self-determination and that it respects the values that are important to the Navajo families in the area.

Senator INOUYE. You have heard the Secretary say they will not oppose it if we pass it. I am one who believes in self-governance and self-determination. So if that is the way you want it, I be for it.

Did the idea of the sliding scale come from the people? Or where did it come from?

Ms. ATCITTY. From the people. The initial proposal was modelled after the Fort Berthold proposal of the simple majority approval. After a year-long discussion with Senator Bingaman's staff and our membership, we felt strongly that that approach would not work for our particular situation.

Senator INOUYE. Mr. Chairman, I have many other questions I would like to submit to the Secretary and to the panel, if I may.

The CHAIRMAN. I also have some certainly.

Senator INOUYE. Thank you very much.

Ms. ATCITTY. Thank you.

The CHAIRMAN. I thank this panel. You have given us a lot of food for thought.

Senator Inouye and I not only serve in this capacity, but we are also on the Appropriations Committee. Believe me, one thing I have learned—and I am sure he has before me, since he has been here longer—is that there is an unspoken couple of laws around here. One is called the law of possibility and one is called the law of probability. Sometimes things might be possible, but they are pretty unlikely. In this day and age, when we talk about additional loans—as you probably know, the Federal Government is getting away more and more from direct loans to any program and going more toward guaranteed loans—for instance, student loans, agriculture loans, and things of that nature. But there may be something we can look into about trying to find a way we can set up a process where consortia or groups could borrow money.

By the way, Mr. Bigby, it is pretty difficult to put a process in place where we can give individual loans when most Indian people do not have the collateral to get the loan. There has to be some way they can get the loans without conforming to a lot of different collateral that a normal bank would require. But that is certainly something we will look into.

With that, I thank the group that is here. We will keep the record open for 2 weeks. If you have any additional comments, letters of support, or things of that nature you can also include them.

Thank you for appearing. This hearing is adjourned.

[Whereupon, at 11:15 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. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Mr. Chairman, I am pleased to join you in welcoming the witnesses who will testify this morning on two bills that address issues related to the fractionation of Indian land.

S. 1586, the Indian Land Consolidation Act Amendments of 1999, addresses an array of issues that stem from more than 100 years of failed Federal policies with respect to Indian lands.

S. 1315 addresses one aspect of the fractionated lands problem by facilitating the leasing of oil and gas on lands allotted to members of the Navajo Nation.

Fully one-fifth of all Indian land in the lower 48 States—about 11 million acres—has been allotted to individual Indians.

Through the operation of Federal and State law, the ownership of the majority of this land has become severely fractionated.

The consequences of this fractionation have been and continues to be severe, adverse, and highly detrimental to the interests of Indian landowners.

These fractionated interests have become an increasingly costly and unmanageable administrative burden to the Federal Government.

The long sad history of the Indian land allotment policy and its consequences is well described in testimony submitted to the committee today. I need not recount it here.

Suffice it to say that, in the 1980's, the Congress twice enacted legislation to consolidate existing fractionated interests and slow future fractionation.

Twice, key provisions of that legislation failed to pass constitutional muster, and what was left has failed to slow the steady increase in the number of fractionated land interests.

Regrettably, these failed efforts have not only made the problem worse, they have led to further ill will between many in Indian country and the Bureau of Indian Affairs, whose duty it is to carry out the laws, popular or not, that are passed by Congress.

Despite this history, we—the Congress, the administration, tribes and individual Indians—must develop consensus solutions for dealing with the fractionation of Indian lands.

Without solutions, Indian people will continue to realize little or no benefit from one-fifth of their lands, and Congress will continue to spend large amounts of money on unproductive administrative costs.

I therefore commend the administration for giving this issue a high priority and for its efforts to date to develop proposals for a legislative solution.

Similarly, I commend the Indian land working group and the inter-tribal agricultural council and others in Indian Country for their efforts to do the same.

I look forward to working with Chairman Campbell and all parties concerned to fashion workable, consensus legislation that will finally enable all of us to gain control of this issue.

To that end, I also commend our colleague, Senator Bingaman, for introducing S. 1315.

This legislation, which is similar to other bills recently reported by this committee, would facilitate the leasing of allotted land for oil and gas development on the Navajo Reservation.

The measure reflects a consensus among the allotment landowners as to what levels of consent they believe are appropriate to enable a lease to be entered into.

Mr. Chairman, I thank you for calling this hearing, and look forward to discussing the testimony with the witnesses.

PREPARED STATEMENT OF HON. DALE E. KILDEE, U.S. REPRESENTATIVE FROM MICHIGAN

5 Good Morning, Mr. Chairman. It is my pleasure to join the Senate in this morning's joint hearing on Senator Campbell's bill amending the Indian Land Consolidation Act and Representative Tom Udall and Senator Bingaman's bills permitting the leasing of oil and gas rights on Navajo tribal land and allotments. These bills deal with fractionated ownership of Indian lands.

Mr. Chairman, the complex issue of fractionated ownership of Indian lands is a result of Federal policy designed to break up tribal lands. Beginning with the passage of the 1887 General Allotment Act, Congress began enacting laws requiring the allotment of tribal land to individual Indians. Allotment laws provided 40, 80, and 160 acre tracts to individual Indians. Congress stopped the allotment process in 1934, after a loss of millions of acres of tribal lands and hundreds of thousands of acres that were lost to taxes that Indians did not know they owed.

Because of the allotment policy, Indian allotees face the complex problem of owning fractionated interests in allotted land. Today, it is common for hundreds of owners to hold an interest in one tract of land. These owners are heirs of the original allotment holder whose land can become more fractionated as the number of beneficiaries increases. This means that hundreds of beneficiaries could own shares in income derived from one tract of land.

Congress has twice attempted to deal with land fractionation by passing the Indian Land Consolidation Act and amendments to that act. The focal points of these measures are the provisions that, upon certain conditions, allow Individual ownership interest of the land to pass or escheat to the tribe. The U.S. Supreme Court found that these escheat provisions were unconstitutional takings violating the 5th amendment to the Constitution.

Today, we gather to hear testimony regarding Senator Campbell's bill that once again attempts to deal with issue of fractionated interest in lands. No one in the House has introduced a similar bill. I look forward to hearing the testimony and working with you in hopes of crafting a similar measure in the House.

With regard to Representative Tom Udall and Senator Bingaman's bills, these measures permit the leasing of oil and gas rights on Navajo tribal land and allotments upon the consent of a specified percentage interest in the parcel. Congress has enacted laws authorizing the Secretary of the Interior to approve oil and gas leases on the Fort Berthold Reservation and this year extended that authority to include seven tribes in Oklahoma. The Navajo Nation and others support these measures and I will support these measures as well.

Mr. Chairman, that concludes my remarks. Thank you.

PREPARED STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

I want to thank Chairman Campbell and Senator Inouye and Chairman Young and Representative Miller for holding this hearing on S. 1315. I'd also like to thank my cosponsors, Senators Hatch, Bennett, McCain, and Domenici and Representative Tom Udall for taking the lead in the House with the companion bill, H.R. 3181, along with Representatives Hayworth and Cannon.

The problems of fractionated ownership are well known to this committee. Around the turn of the century, the Federal Government attempted to force Indian people to assimilate by breaking up traditional tribal lands and allotting parcels of the land to individual tribal members. In New Mexico, this policy created what is known as the "checkerboard," because alternating tracts of land are now owned by individual Navajos, the State, the Federal Government, or private landowners. A Navajo allotment was generally 160 acres. Under the allotment system, the Navajo owner was granted an undivided interest in the entire parcel. The heirs of the original owner also inherit an undivided interest, geometrically compounding—or fractionating—the number of owners of the original 160 acres.

This allotment policy, coupled with other Federal laws governing Indian land ownership, land management, and probate, have not served the Navajo people well during this century. S. 1315 will help address the problem created by fractionation.

Mr. Chairman, I'd like to take a few minutes to illustrate why the legislation I am proposing is needed. If a Navajo was allotted a 160-acre parcel and had four heirs, the heirs did not inherit 40 acres each when the original owner died. Rather, each heir inherited a 25-percent undivided interest in the full 160-acre allotment. Going forward, when the current four owners died, assuming again four heirs each, 16 heirs inherited a 6.25-percent undivided interest in the allotment. The next generation would result in 64 heirs each with a 1.5625 percent undivided interest. And so forth.

What makes this situation so unique is that each heir inherits an undivided interest in the allotment. Over time, individual owners may inherit tiny fractions in many different allotments. In my State, there are about 4,000 individual allotments covering nearly 700,000 acres. At this point, these 4,000 Navajo allotments have a total of 40,000 listed owners, and the number grows every day. It doesn't take a Ph.D. in math to figure out what's wrong with this policy.

In April I held a town meeting with Navajo allottees in Nageezi, New Mexico, a small chapter house in the Northeast section of the Navajo Reservation. The allottees talked about the serious problems that fractionated ownership has caused. Over 100 members of the Navajo Nation came from as far away as Aneth, Utah, to speak at the meeting. As you know, the Navajo Nation extends into three States, New Mexico, Arizona and Utah, and there are allottees living in all three States.

Record keeping of individual land ownership has become a nightmare. In many cases, owners can no longer be located. Also, ownership can be clouded when an owner dies without a legal will—a common situation in Indian country. Some individuals do not even realize they own one or more of these allotments. Often, individuals are surprised to find out that they are an heir to an allotment on another reservation.

At the meeting in Nageezi, I committed to work with the allottees to develop legislation to facilitate oil and gas leasing on allotted lands. This bill, S. 1315, is the result of that effort.

We all recognize there are serious problems going back several decades with BIA's management of its trust responsibilities for allotted lands in New Mexico. The management problems were brought out very clearly at a joint Senate hearing in March. The hearing also revealed the extent to which the government's allotment policy contributed to BIA's current trust management problems.

On the Navajo Reservation, a 5-year pilot project is underway in Farmington, NM, to try to unravel some of the management problems with allotted Navajo lands. This project, called the Farmington Indian Minerals Office, or FIMO, is trying to cut through the redtape created by three different Bureaus in the Department of the Interior, BIA, BLM, and MMS, which share responsibility for management of allotted lands. The FIMO has worked hard to assist Navajo allottees determine who their fellow allottees are and what land each allottee owns. I support the efforts of FIMO. If this legislation is passed, FIMO could accomplish even more on behalf of the Navajo allottees in the three States.

Over the years, Congress has tried to deal with the problem of fractionated lands, and has failed every time. The long history of trust management problems is not going to be corrected quickly. Developing and implementing a comprehensive solution is going to take time. The Indian Land Working Group is one of the leaders in this area and has submitted a proposal for Congress to consider. I applaud the efforts of Senators Campbell and Inouye and the members of the Senate Committee on Indian Affairs, as well as the House Resources Committee, for taking on this complex issue. Some of the proposals include improve record keeping, probate and estate planning programs, and new processes for consolidating fractionated lands. I look forward to working with the committee to craft a comprehensive solution.

While the larger issue of fractionated ownership is being considered by Congress, I believe it is appropriate to consider a stop-gap measure to help stimulate near-term economic development on fractionated Navajo lands. There is an abundance of oil and gas beneath the Navajo allotments, yet the allottees are unable to benefit from this wealth because of Federal laws that make it very difficult for Indian allottees to lease their land. To illustrate, during the last 12 years, $7 million in leasing bonuses has been paid to the state and Federal Government for leases in the checkerboard region of New Mexico, while only $27,000 has been paid to owners of Navajo allotments.

The problem lies in the 1909 Mineral Leasing Act. The act requires all persons who have an undivided interest in any particular parcel to consent to any lease. In the case of Navajo allottees, 100 percent of the allottees must consent to a lease of

their land. Because of the fractionated land problem, obtaining 100 percent consent is often impossible because many owners cannot be located. Consequently, the Navajo allottees are precluded from the beneficial use of their land.

This bill will facilitate the leasing of Navajo allotted land for oil and gas development. In the case of non-Indians, most States already allow mineral leases with less than 100 percent consent of the owners as long as all persons who own an interest receive the benefits from the lease. My bill simply extends similar benefits to Navajo allottees. The bill would authorize the Secretary of the Interior to approve an oil or gas lease connected to Navajo allotted land when less than 100 percent of the owners consent to such a lease. A similar bill was passed in the 105th Congress to facilitate mineral leasing of allotted lands on the Fort Berthold Reservation in North Dakota and this year legislation was passed for seven tribes in Oklahoma.

My bill proposes a graded system for approval of oil and gas leases. If there are 10 or fewer owners of an allotment, 100 percent of the owners must consent to a lease. However, if there are 11 to 50 owners of an allotment, only 80 percent of the owners need consent. And, with more than 50 owners, 60 percent consent would be required. Other mineral leases, such as coal and uranium mining, would still require consent of 100 percent of the owners.

This graded system was chosen by the Navajo allottees. They recognize that this is a higher standard than the two previous bills and higher than the administration or Chairman Campbell proposed; however I believe there are different conditions on each reservation, and we should respect the wishes of the allottees. In my view, it is a matter of self-determination.

Mr. President, unemployment on the Navajo Reservation now exceeds 50 percent. The opportunities for economic development on this land are few. It is not appropriate for the Federal Government to continue to deprive the legal owners of Navajo allotted lands the option to develop their land as they choose. This bill is a small step toward correcting the mistakes of the past and a bigger step toward providing economic prosperity for future generations of Navajo allottees.

In celebrating American Indian Heritage Month, we should seek to preserve the Navajo culture by providing economic security for the elderly and economic benefits for the future generations of Navajo allottees.

I look forward to the testimony of the Shii Shi Keyah Allottees Association. I also ask consent that letters supporting S. 1315 from the Navajo Nation, Governor Gary Johnson of New Mexico, and various oil and gas exploration companies be included in the record of the hearing.

Thank you for this opportunity to testify. I look forward to working with you to move this legislation forward in both the Senate and the House. I'd also like to ask the two committees' permission to join you now to listen to the administration's testimony on the bill.

THE NAVAJO NATION

KELSEY A. BEGAYE
PRESIDENT

TAYLOR McKINLEY, M.D.
VICE PRESIDENT

ESTELLE BOWMAN, ESQ.
EXECUTIVE DIRECTOR
WASHINGTON OFFICE

May 18, 1999

The Honorable Jeff Bingaman
United States Senate
703 Hart Senate Office Building
Washington, DC 20510

RE: Proposed Bill to Permit the Leasing of Oil and Gas Rights on Certain Lands in New Mexico Held in Trust for the Navajo Tribe or Allotted to a Member of the Navajo Tribe, in any Case in which There Is Consent from a Specified Percentage Interest in the Parcel of Land under Consideration for Lease

Senator Bingaman:

Thank you for scheduling the April 8, 1999 meeting at the Nageezi Chapter. The Navajo Nation appreciates your interest in the problems faced by Navajo people regarding their allotted lands in northwestern New Mexico.

The Navajo Nation supports your efforts toward solving the problems engendered by increasingly fractionated interests held by Navajo individuals in allotted lands. We support the intent of the bill, provided that it is supported by a consensus of Navajo individuals that will be affected. In addition, we can support most of the particulars of the bill, although the Navajo Nation would request some minor revisions to the bill before it is introduced, as explained below.

Initially, we are concerned whether a consensus of affected Navajo individuals support the proposed bill. The Navajo Nation is concerned that the Shii Shi Keyah Association apparently opposes the bill, as indicated in a letter to you dated March 11, 1999 from the Association's attorney, Alan R. Taradash, copy attached. We understand that the Shii Shi Keyah Association is a respected organization comprised of Navajo individuals numbering in the thousands.

The approach suggested by Mr. Taradash, the conveyance of fractionated interests into family trusts, appears to have much to commend it. However, we are not sure that the

family trust approach and the approach reflected in the proposed bill are mutually exclusive. The Navajo Nation respectfully requests that your office continue to work with affected Navajo individuals to assure that the bill reflects the best approach or combination of approaches to solve the problems facing those individuals. The Navajo Nation would be happy to work with your office in this regard, and stands ready to provide any assistance your office may need.

In addition, the Navajo Nation is very concerned with the effect of section 1(b)(3)(A) of the proposed legislation, which would appear to make the Navajo Nation a party to any lease of oil and gas rights in allotted lands in which it might own a minority interest. While the Navajo Nation has no objection to any minority interest it might hold being leased in accordance with the provisions of the bill, if that is the approach that a consensus of affected Navajo individuals support, the Navajo Nation must oppose being made a party to any such lease. The Navajo Nation has very deliberate policies and requirements regarding terms and conditions in leases to which it is a party. In the present judicial climate, lease terms and conditions can have a profound effect on the sovereignty of an Indian nation. Therefore, we must respectfully request that section 1(b)(3) of the bill be changed to read in its entirety as follows:

> (3) EFFECT OF APPROVAL.– On approval by the Secretary under paragraph (1), an oil or gas lease or agreement shall be binding upon each of the beneficial owners that have consented in writing to the lease or agreement and upon all other parties to the lease or agreement and shall be binding upon the entire undivided interest in the Navajo Indian allotted land covered under the lease or agreement.

Finally, the Navajo Nation respectfully requests that all references to the "Navajo Tribe" be changed to refer to the "Navajo Nation," and that the reference be deleted in section 1(a)(3) to the Navajo Nation as "including the Alamo, Ramah and Cañoncito bands of Navajo Indians." The term "Navajo Nation" is the legal name of the Navajo Nation, and by Navajo Nation statute is preferred over the term "Navajo Tribe." We must object to the reference to the three bands (but not others) because of the possible negative inference that there exists some ambiguity as to whether such bands are constituent parts of the Navajo Nation. There is no such ambiguity now, and we wish to avoid creating any. The reference can safely be deleted without causing any uncertainty in the definition.

Unfortunately, fractionated interests remains a significant problem within the Navajo Nation, as we understand it is also within other Indian nations. The Navajo Nation would like to work your office and with other members of Congress on comprehensive, long-

term solutions to this problem. If you have any questions, or need additional information, please contact the Navajo Nation Washington Office.

Sincerely,

Estelle J. Bowman

Enclosure

OFFICE OF THE GOVERNOR
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

GARY F. JOHNSON
GOVERNOR

(505) 827-3000

October 22, 1999

The Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC 20510-3102

RE: S. 1315 concerning the leasing of oil and gas rights on Navajo lands

Dear Senator Bingaman:

The State of New Mexico wishes to express its full support for passage of S. 1315. This bill would permit the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation, in any case in which there is consent from a specified percentage interest in the parcel of land under consideration for lease. The bill would help to alleviate the problem oil and gas operators encounter in obtaining the consent of all the owners of these lands.

New Mexico believes enactment of this bill will greatly aid oil and gas operators in developing oil and gas resources on these lands, which in turn will benefit the Indian owners of the lands and the State of New Mexico.

We urge prompt passage of this bill.

Sincerely,

Gary E. Johnson
Governor

JAS:rc

ipaa
America's Oil & Gas Producers

November 03, 1999

The Honorable Jeff Bingaman
United States Senate
Washington, DC 20510-3102

Re: Support for Senate Bill 1315, Concerning Oil and Gas Leasing on Navajo Allotted Lands

Dear Senator Bingaman,

The Independent Petroleum Association of America (IPAA) is a national oil and gas trade association representing over 8,000 of America's oil and gas producers. IPAA members are dedicated to increasing domestic production through increased access to public and offshore lands. The IPAA encourages regulatory and legislative initiatives which will make federal lands more competitive with private leases.

IPAA concurs with the Independent Petroleum Association of Mountain States that S.1315 is a well thought-out piece of legislation that meets the needs of Navajo Allottee mineral owners and has the whole-hearted approval of the oil and gas industry. IPAA members look to Indian lands as a last resort for oil and gas development. S.1315 will make the Navajo allotted lands more competitive with other mineral leases.

Thank you for your time and consideration. We appreciate your support for the passage of this legislation in the remaining days of this congressional session.

Sincerely,

Ben J. Dillon

Ben J. Dillon
Vice President of Public Resources
Independent Petroleum Association of America

MERRION

OIL & GAS

August 20, 1999

The Honorable Jeff Bingaman
703 Hart Senate Office Bldg.
Washington, DC 20510-3102
Fax # (202) 224-2852

RE: Support for S1315

Dear Senator Bingaman:

Merrion Oil & Gas supports S1315 concerning Oil & Gas Leasing on Navajo Allotted lands.

We appreciate your efforts to get it passed.

Sincerely,

T. Greg Merrion

T. Greg Merrion
President

TGM/so

610 Reilly Avenue • Farmington, New Mexico 87401 • 505-327-9801 / 505-326-5900 (Fax)

DISCOVERY
EXPLORATION
INCORPORATED

621 17th Street - Suite 1535, Denver, Colorado 80293 (303) 296-7553

The Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC 20510-3102

Re: S. 1315 concerning oil and gas leasing on Navajo allotted lands

Dear Senator Bingaman,

As a member of an oil and gas exploration group trying to explore on and around Navajo allotted land, I applaud your effort to make the leasing of allotted land possible for the Indian allottee mineral owners as well as the Oil and Gas Industry. By reducing the percentage of allottee signatures required to obtain a valid lease this bill will greatly enhance the possibility that significant allotted acreage will be pursued by industry in the future.

I am in contact with many small and large oil companies here in the Rocky Mountain area who are working "around" allotted land in their various exploration plays. They agree that passage of this bill would make it feasible for them to include allotted lands in their programs.

I urge you to continue to work for prompt passage of this bill so that my exploration efforts in the San Juan basin can include as many allotted tracts this year as possible.

Sincerely,

Jeff Kirn
CEO, Discovery Exploration Inc.

IPAMS
Independent Petroleum Association of Mountain States

620 Denver Club Building • 518 17th Street • Denver, Colorado 80202-4167 • 303/623-0947 • FAX: 303/893-0706 • www.ipams.org

November 02, 1999

The Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC 20510-3102

Re: Support for Senate Bill 1315, Concerning Oil and Gas Leasing on Navajo Allotted Lands

Dear Senator Bingaman,

IPAMS is a non-profit, non-partisan trade association representing the interests of independent oil and natural gas producers, royalty owners, industry consultants, and service and supply companies operating in a thirteen-state Rocky Mountain area that includes the states of Wyoming, Colorado, New Mexico, Montana, Utah, Nebraska, North Dakota, South Dakota, Nevada, Arizona, Idaho, Washington, and Oregon.

IPAMS wishes to express its full support for the passage of S.1315. Leasing statistics show a dramatic disparity between the leasing of Indian lands as compared to federal, state and private lands. We believe this disparity does not reflect a preference by Indians to not lease lands, rather it is the result of a convoluted system of government regulations that has proven to be a deterrent to the oil and gas industry and other mineral industries. Senate Bill 1315 is a well thought-out piece of legislation that meets the needs of Navajo Allottee mineral owners and has the whole-hearted approval of the oil and gas industry.

Thank you for your time and consideration. We appreciate your support for the passage of this legislation in the remaining days of this Congressional session.

Best Regards,

Marc W. Smith
Director of Lands and Environment

PENWELL ENERGY, INC.
1100 ARCO BUILDING
600 N. MARIENFELD
MIDLAND, TEXAS 79701
OFF: (915) 683-2534
FAX: (915) 683-4514

November 4, 1999

The Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC 20510-3102

Re: Senate Committee hearings on S.1315

Dear Senator Bingaman,

Our company has been engaged in an exploration venture for three years in an area of New Mexico encompassing a great deal of Navajo allotted lands. The complicated and burdensome leasing requirements for these Indian lands have given us a great deal of heartache, and have kept the Indians from accruing greater benefit from our leasing and exploration efforts.

I want to thank you for your efforts to bring S. 1315 before committee. It is a bill that will benefit exploration companies such as ours, but just as importantly it will benefit the Indian allottees. I know for a fact that many companies such as our will avoid oil and gas plays which fall on Indian lands due to the added expense, difficult terms, and inordinate amount of time involved to obtain leases.

I applaud your efforts thus far, and urge you to continue to push for passage of S.1315.

Sincerely,

PENWELL ENERGY, INC.

John D. Bergman

JDB/cl
JDB/@bingaman.ltr

STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE JOINT HEARING OF THE HOUSE RESOURCES COMMITTEE AND SENATE COMMITTEE ON INDIAN AFFAIRS, ON S.1586, THE "INDIAN LAND CONSOLIDATION ACT OF 1999"

November 4, 1999

Good morning Chairman Young, Chairman Campbell and Members of the Committee. I am pleased to appear before you today to provide the Department's views on S.1586, a bill that will amend the Indian Land Consolidation Act to more fully address the problem of the fractionated ownership of Indian lands. Resolution of this issue is critical to the economic viability of Indian country and the successful implementation of the Department of the Interior's ongoing efforts to implement trust reform. I would like to thank the House and Senate Committees and their staffs for the efforts they have put forth to resolve this complex issue. The fact that this hearing is a joint hearing serves to underscore the importance of this issue and the commitment of Congress to resolve it.

HISTORY

The origin of the fractionation problem has been documented many times. Although several treaties provided for the allotment of Indian land, the process became a nationwide policy in 1887 with enactment of the General Allotment Act (GAA). The GAA directed that tribal lands be divided into small parcels and given or "allotted" to individual Indians. The purpose was to accelerate the civilization of the Indians by making them private landowners and, ultimately, to assimilate them into society, at large. Many Indians sold their land, but few assimilated into the surrounding non-Indian communities, resulting in wide-spread homelessness and impoverishment for Indians. By the 1930s it was widely accepted that the GAA had, for the most part, failed. In 1934 Congress, in Section 1 of the Indian Reorganization Act, stopped the further allotment of tribal lands. A direct result of the GAA was the loss of over 100,000,000 acres of land from the Indian trust land base between 1887 and 1934. An indirect result was fractionated ownership of land allotments.

As originally envisioned by the drafters of the GAA, allotments would be held in trust by the United States for their Indian owners for no more than 25 years. At the end of the 25 years, the land would be conveyed in fee simple to its Indian owners. Many allottees died during the 25 year trust period. In addition, it became evident that many allottees continued to need federal protection. As a consequence, Congress enacted limited probate laws and authorized the President to extend the trust period for those individuals who were not competent to manage their lands. The presumption was, however, that at some point in the foreseeable future the lands would be conveyed to their Indian owners free of federal restrictions. As a consequence, Congress did not amend the probate laws even though it continued to extend the period of trust protection. As individuals died, their property descended to their heirs as undivided "fractional" interests in the allotment. In other words, if an Indian owning a 160 acre allotment died and had four heirs, the heirs did not inherit 40 acres each. Rather, they each inherited a 1/4th interest in the entire 160 acre allotment. As the years passed, fractionation has expanded exponentially to the point where there are hundreds of thousands of tiny

fractional interests spread throughout Indian country.

The fractionated ownership of Indian lands is taxing the ability of the Department to administer and maintain records on Indian lands. Fractionated heirship also threatens the integrity and viability of the Department's trust funds management. The Department is charged by statute with maintaining Federal Indian land records on these hundreds of thousands of fractional interests and with probating the estates of every Indian individual who owns a fractional interest in an allotment, regardless of how small that interest may be. The Department also maintains Individual Indian Money (IIM) accounts to receive, distribute, and account for income received from these fractional interests. In many cases, the fractions are so small that the cost of administering the fractional interests and maintaining the IIM accounts far exceeds both their value plus any income derived therefrom.

THE INDIAN LAND CONSOLIDATION ACT

In 1984, Congress attempted to address the fractionation problem with passage of the Indian Land Consolidation Act (ILCA). The ILCA authorized the buying, selling and trading of fractional interests but, most importantly, it provided for the escheat to the tribes of land ownership interests of less than 2 percent. Over 55,000 of the 2 percent-or-less fractional interests escheated since passage of the ILCA in 1984. However, the problem of fractionation continues to worsen and, in fact, since the Supreme Court declared the current escheat provision unconstitutional in *Babbitt v. Youpee*, 117 S.Ct. 727 (1997), is accelerating. This is because interests that would have escheated are now passing to the heirs and further fractionating, and because numerous estates will have to be reopened in order to revert the 55,000 escheated interests. The costs of maintaining heirship records and administering the land is inordinately expensive for the BIA. Approximately 50 - 75 percent ($33 million) of the BIA's realty budget goes to administering these fractional interests making funds unavailable for more productive investments in lands. Other programs such as trust funds management, forestry, range, transportation, and social services, are likewise adversely impacted. Utilization and/or conveyance of the fractionated property by the numerous owners is also difficult because of the need to secure the numerous consents which are required.

ACTIONS BY THE DEPARTMENT

In 1994, my office distributed a consultation package to tribal leaders to address the issue of fractionation and followed it with a letter to owners of trust and restricted Indian lands. The package included a proposal in the form of draft legislation and invited comments and suggestions for alternatives to the concepts contained in the draft legislation. The letter to landowners was sent to more than 126,000 individuals. The landowners letter described the proposal and included a questionnaire. More than 12,000 persons, 90 percent of whom reported themselves as members of federally recognized tribes, responded in writing during 1995. Sixty-five percent (65 percent) of the respondents in the survey of landowners agreed with the basic concepts of consolidating small fractional interests in the tribes through an acquisition program and preventing and slowing further fractionation.

S. 1586

In order for any initiative to have a measurable impact on the fractionated heirship problem, it must have two major components – first, it must eliminate or consolidate the number of existing fractional interests and, second, it must prevent or substantially slow future fractionation. S.1586 accomplishes both of these objectives. S. 1586 provides an acquisition fund to eliminate existing fractional interests and contains limitations on the devise and descent of trust property that will materially slow the future fractionation of allotted lands. Savings from the cost of probating Indian estates alone justifies the cost of the acquisition program. The average value of a less than 2 percent fractional interest in allotted lands on twelve reservations studied by the General Accounting Office (GAO) in 1992 was estimated to be less than $200. Comparatively, upon the death of an Indian owner, it costs the BIA between $1,500 and $2,000 to probate the landowner's estate. Additional costs are borne by the Department's Office of Hearings and Appeals. In many cases, the simple fact of the matter is that it will be cheaper to simply acquire the interests than it will be to probate them, allow them to further fractionate, and to pass them on to more heirs, which in turn allows them to continue to fractionate.

FRACTIONATED HEIRSHIP PILOT PROJECT

In FY 1999, the Congress authorized a fractionated heirship pilot project and appropriated $5 million for that purpose. 34 tribes applied for the pilot. After reviewing the applications and examining such things as the severity of fractionation on the various reservations, the condition of the probate and realty records, the availability of appraisal data, and the tribe's willingness to contribute to the program, three tribes from Wisconsin were selected: Bad River, Lac Courte Oreilles, and Lac du Flambeau. All of these reservations have very old (1850s vintage) pre-GAA allotments. Approximately 85 percent of ALL of the interests on the reservations were less than 2 percent, and several 80 acre allotments had in excess of 1,000 owners. After meeting with the tribes, establishing procedures for determining value, how to make rapid payment to the landowners, and how to speed up the deed recording process, the project was initiated in April of this year.

Initially it was anticipated that notices would be sent to landowners and advertisements placed in local newspapers and perhaps notice of the project announced on local radio stations. However, the opportunity to sell fractional interests spread quickly by word of mouth and the BIA has been inundated with requests to sell interests. To date, over 8,000 interests have been purchased and over 4,000 acres have been returned to the tribes. Over 600 deeds (combining multiple sales of fractional interests into one document) have been recorded and the need for over 250 probates and new IIM accounts have been eliminated. With over $1 million in additional acquisitions currently being processed, the entire $5 million for the pilot project will likely be used to purchase additional fractional interests by February 2000. The success of the pilot project demonstrates not only that the number of fractional interests can be dramatically reduced through an acquisition program, but, more importantly, that there are significant numbers of individual Indians that are in the market to voluntarily dispose of these interests.

ECONOMIC VIABILITY OF INDIAN LAND

S. 1586 addresses one of the most serious ramifications of the fractionated state of Indian land ownership. Before the Secretary can lease land for purposes such as grazing, drilling, mining or rights of way, the owners of that land must approve the lease. In some cases under federal law, such as agriculture, a majority in interest of the owners must approve the lease. In others, such as oil and gas drilling, all owners must approve the lease before it can go forward to the Secretary. With scores or even hundreds of owners on a single allotment, potential lessees simply find it too burdensome or costly to locate and obtain the approval of all owners. As a result, land frequently goes unleased and the owners lose the economic benefit of their property.

S. 1586 would adopt a uniform standard for all leases, rights-of-way, sales of natural resources or similar transactions regardless of the use to which the property will be put. It would authorize the Secretary to approve such a transaction if it is supported by the owners of a majority of the interests in a parcel of land.

I would also like to bring *SEC. 221. REAL ESTATE TRANSACTIONS INVOLVING NON-TRUST LANDS* to your attention. There has been considerable confusion and litigation about whether 25 U.S.C. §177 applies to lands acquired in fee by Tribes.

The Administration believes that Section 221, as proposed, should be amended to make it clear that §177 automatically attaches to lands that are purchased in fee by a Tribe if those lands are within the boundaries of its current reservation. Such a provision would greatly enhance the federal and tribal goal, evidenced by statutes such as 25 U.S.C. § 465, of rebuilding the Tribal land bases that were decimated by the allotment of Tribal lands. We believe that such a provision is consistent with the goals of the majority of Tribes, who generally are interested in preserving lands within reservation boundaries in Tribal ownership for the benefit of future generations. The right to sell, mortgage or otherwise dispose of interests in land that are outside of current reservation boundaries without Congressional or Secretarial approval will better enable Tribes to pursue economic development and self-sufficiency.

CONCLUSION

In 1997, the Administration submitted a draft bill that was introduced and hearings were held. Representatives of some of the allottees, principally the Indian Land Working Group, testified on that bill and also presented their own legislative proposal to Committee staff.

Following the hearing, a meeting was held with Senate Committee staff, the Administration and the Indian Land Working Group to discuss the two proposals. The Senate Committee staff then took the comments received at that meeting and drafted S.1586. The Committee staff has done a remarkable job in combining the best features of both proposals and are to be commended for their efforts. There will, no doubt, be concern expressed by some witnesses over the inclusion of an escheat provision in S.1586 and emphasis placed on the fact that the Supreme Court has twice ruled

that the escheat provisions in the existing version of ILCA are unconstitutional. To that argument we quote from the final paragraph of the Supreme Court's opinion in *Hodel v. Irving*:

> There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. [Citation omitted.] It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interest by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.

S.1586 was drafted in full awareness of and in response to the quoted language. S. 1586 specifically addresses defects that rendered the earlier versions of the ILCA unconstitutional. First, it requires that notice of the amendments be given to the allottees within six months of passage of the amendments and gives them a minimum of eighteen months to comply with the amendments. Second, it also has liberal provisions of the devise of property and does not totally prohibit the devise of less than 2 percent interests as the earlier versions of the ILCA did.

The Administration wholeheartedly supports passage of S.1586. We will submit a list of technical corrections and relatively minor suggestions to the Committee, shortly. Passage of S.1586 is, in fact, imperative if the current trust reform initiative is to succeed. Without a legislative resolution of the fractionation problem, the ever quickening growth of fractionation will outpace any efforts to implement meaningful trust reform.

Thank you for the opportunity to testify on this important piece of legislation. I will be happy to answer any questions you may have.

Testimony of Kevin Gover
Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Before the Committee on Indian Affairs
United States Senate
and the
Committee on Resources
United States House of Representatives
Joint Hearing on S. 1315

November 4, 1999

Good morning Chairman Young, Chairman Campbell and Members of the Committees. Thank you for the opportunity to present the views of the Department of the Interior on S. 1315, a bill to permit the leasing of oil and gas rights on certain lands held in trust for the Navajo Nation or allotted to a member of the Navajo Nation, in instances where there is consent from a specified percentage of the Indian landowners in the parcel of land under consideration for lease. We commend Senator Bingaman for this legislative initiative to relieve Indian mineral owners of an onerous burden presently imposed by federal law which impedes Indian minerals from being competitive in the mining industry.

The Department sees S. 1315 as a complement to the Department's ongoing efforts to deal with the issue of fractionated ownership of Indian trust and restricted land. We support enactment of S. 1315 if amended.

BACKGROUND

S. 1315 addresses the problems created by a ninety-year old statute, the Act of March 3, 1909 (25 U.S.C. 396) (Act), which requires that the consent of all the owners of a tract of trust or restricted land be obtained prior to the approval of a mineral lease by the Secretary of the Interior.

Because of peculiarities in federal Indian law, title to trust and restricted allotments made to individual Indians has become vested in the heirs of the allottees without division of the land. As each generation passes, their heirs become owners of undivided interests in the allotment. As a consequence of the 1909 Act's requirements, that all owners in a tract consent to a mineral lease, mineral exploration and development firms are less likely to lease Indian lands because of the cost associated with locating and acquiring the consent of all owners. We believe the unintended result of this requirement is that Indian mineral owners are precluded from fully participating in mineral exploration and development and thus, precluded from gaining the maximum economic benefit of their trust lands.

During the 105th Congress and in the first session of this Congress, the Department has provided

testimony and letters of support for similar legislation that authorized mineral leasing of certain trust and restricted lands when the consenting mineral owners represented a majority interest in the tract. Those federal statutes, Public Laws 105-188 and 106-67, provided majority interest lease authority for members of the Fort Berthold Tribe and several Tribes in western Oklahoma.

ANALYSIS OF S. 1315

Our proposed amendments suggest revision of S. 1315 to make it consistent with the relief accorded other restricted and trust mineral owners of the Fort Berthold Tribes and the western Oklahoma Tribes; that of leasing authority when the consenting landowners hold a majority interest in the tract. We believe that this formula provides a realistic and practical approach to the leasing of trust and restricted lands in the competitive mineral markets.

The formula provided in *Section 1. Leases of Navajo Indian Allotted Lands*, subsection *(b) Approval by the Secretary (1) In General* and *(2) Percentage Interest* predicates Secretarial approval of Navajo allotted lands upon a sliding scale based upon the number of Indian owners in a parcel of land. According to this subsection, if there are 10 or fewer owners, 100 percent of the owners must consent to the lease; if there are more than 10 landowners, but fewer than 51, the lessee must obtain 80 percent of the landowners consent; if there are 51 or more, then the lessee must obtain 60 percent of the owners consent. In some circumstances the sliding scale formula set forth in S. 1315 would not adequately relieve the problem S. 1315 seeks to eradicate. Furthermore, under each prong of this formula, an accurate count of the landowners would be required when a lease is approved to defeat the potential for legal challenges to the leasing authority. This requirement is relatively impractical in that notice to the Bureau of Indian Affairs of the death of an undivided interest owner is often months, and sometimes years, after the fact. Finally, under each prong of the formula, landowners who represent a minority interest in the parcel could frustrate the desires of landowners holding the majority interest in the parcel to lease their mineral rights. Lease acquisition costs would remain unacceptably high and as the number of fractional owners increases, within a generation or two, any beneficial effects of this legislation will become, like its predecessor, the Act, invalid.

We propose that subsections *(b) Approval by the Secretary (1) In General* and *(2) Percentage Interest* be deleted in their entirety and the following language be added in lieu thereof, "The Secretary of the Interior may approve any mineral lease affecting individually owned Navajo Indian allotted land if the owners of a majority interest in the trust or restricted land consent to the mineral lease and the Secretary determines that approval of the lease is in the best interest of the Indian owners."

CONCLUSION

We applaud Senator Bingaman's efforts to remove the impediments which currently prevent owners of Indian trust lands from realizing the maximum economic benefits of their lands. We suggest that

the standard of requiring consent of those holding over 50 percent of all interest in the parcel, regardless of the number of owners, be applied here and on all allotted Indian lands. A simple majority would be fair and manageable. Finally, given the fact that the Navajo landowners are not the only Native Americans losing opportunities as a result of the Act, we ask that future legislation look at the broader picture that would include all Tribes who have allotted lands. We also urge passage of S. 1586, the Indian Land Consolidation Act amendments to help stop the problem of continued fractionation and the constraints this imposes on tribal economic development.

This concludes my prepared statement. We look forward to working with the Committee to amend the language of S. 1315. I will be happy to answer any questions you may have.

Extent of Fractionation
1849-1999
Total Interests by Tribe
Interests 2% or Less
120%
100%
80%
60%
40%
20%
0%
Percent
38818
32311
35960
31978
19904
17341
BR
LCO
LDF

Total Actual & Projected Savings as a Result of LCPP

$ 7,560.00	IIM Maintenance Costs
$ 401,150.00	Realty Administrative Costs
$ 378,000.00	Probates cases eliminated
$1,764,000.00	Future probates eliminated
$2,550,710.00	Total Savings

Accomplishments

- 8,023 interests purchased
- 4,843 acres returned to Tribes
- 622 deeds approved
- 252 probates & potential IIM accounts eliminated

Intertribal Agriculture Council
100 North 27th Street, Suite 500, Billings, Montana 59101-2054 (406) 259-3525

Testimony of the Intertribal Agriculture Council
Before the U. S. Senate
Committee on Indian Affairs
S. 1586 "Indian Land Consolidation Act Amendments of 1999"

Mr. Chairman, I am Ross Racine; Director of Programs for the Intertribal Agriculture Council located in Billings, Montana. I am an enrolled member of the Blackfeet Tribe; Browning, Montana and one of eleven expected heirs to my parents trust land. The address of fractionated heirship land is about to effect me personally as my father is 72 years old.

This testimony is submitted by the Intertribal Agriculture Council, an organization of dues paying member Tribes who together control over 80 percent of the 56 million acres held in trust by the United States for Indian people. Founded by 84 Tribes in 1987 to promote improvement in Native American and Alaskan Native agriculture. The IAC is governed by a Board of Directors elected by the Tribes from each of the twelve regions of Indian Country reflecting the diverse character of Indian Agriculture. Our main purpose in the IAC is to promote the Indian use of Indian resources for the betterment of Indian people.

On behalf of the Tribes we serve, we appreciate the opportunity to provide testimony on S. 1586 "Indian Land Consolidation Act Amendments of 1999." We have to commend those who attempt to create solutions to the problem of fractionated interest land ownership. However, true and workable solutions must come from those closest to the problem, the Indian Land Owners and their respective Tribal Governments.

The BIA has been engaged, before and since the enactment of the Indian Land Consolidation Act of 1983, in attempting to develop plans to address the problem of fractionated title to Indian trust allotments or, in Oklahoma, restricted fee patents. The problem was recognized as early as 1910 when Congress enacted a statute to authorize Indians to write wills to control the devise of their trust allotments, provide for the descent of such trust properties in the event of intestacy, and provide for probate of trust estates.

The problem was discussed in the Meriam Report commissioned in 1928; was minimally addressed in the Indian Reorganization Act of 1934; and was not again addressed until the 97th Congress in 1983 with enactment of the Indian Land Consolidation Act. Significant amendments were adopted in the 98th Congress following extensive hearings by the Senate Select Committee on Indian Affairs.

The Indian Land Consolidation Act was a major step forward in recognizing the rights of Tribes to adopt codes of law to regulate inheritable interests in Indian owned land within reservations, authorizing establishment of land consolidation plans with concomitant authority to sell or trade tribal lands for land consolidation purposes, establishing certain rights of Tribes to purchase fractional interests in trust or restricted lands to consolidate titles, and extending certain provisions of the Indian Reorganization Act to Tribes not covered by that Act.

To prevent devise or descent of minimal fractional interests in trust or restricted lands believed to be of little or no monetary value, ILCA provided for escheat to a Tribe of any fractional interest in a parcel of land that constituted less than 2 percent of the title interest in the land unless it could be shown that such property interest was capable of generating income. Tribes were authorized to override or supersede this escheat provision through adoption of their own code and many did. The only restriction being that fractionation below the 2 percent interest would not be allowed.

The IAC Board of Directors, on advice of counsel and legislative contacts, has voted to support the BIA effort to have hearings and introduce legislation on Fractionated Heirship because the Congress and administration are agreeable to dealing with this issue and recommending funding - a situation with has not existed in the recent past.

The problem of fractionated hiership land has been compounded since the passage of the Indian Land Consolidation Act by the failure of the Bureau of Indian Affairs to fully implement regulations for that Act. The failure to develop regulations and procedures has prevented any tribally prepared land consolidation plans from being approved since passage of the ILCA. Any authorization or development of programs enabling the Federal Government to purchase property within the exterior boundaries of Indian Reservations must be put on immediate hold until the Department of Interior develops the necessary regulations for the ILCA and PL. 103-177 "Indian Agricultural Resources Management Act of 1993."

The "Indian Agricultural Resources Management Act" is included here because within that law is the provision recognizing Tribal Government authority in the development and passage of law defining what determines "majority interest" and taking action to directly address fractionated interests. This law specifically identifies Tribal Government authority in determination of land use, resource management planning, preference in leasing, and determining fair market value in leasing and permitting. Regulations and implementation of PL. 103-177 must take place prior to passage of another law which may conflict with established law.

Ownership of lands within established reservations should be a right reserved to Tribal Governments, any Indian owner of property, or any descendent of an Indian landowner within the confines of the respective reservation. To authorize the purchase of land by the Department of Interior diminishes the right of Tribes,

Indian landowners or their descendents and puts Tribes and Indians in unfair competition with the Federal Government. Direct federal ownership also raises conflicting issues with Tribal Government authorities where federally-owned land falls under Tribal jurisdiction. The opportunity for first right of ownership must be the priority consideration of any legislation addressing consolidation.

Bureau of Indian Affairs Credit programs, as well as USDA Indian Land Consolidation lending programs were never funded to the authorized limits, which severely limited the ability of Tribes and Indian landowners to utilize these programs for their intended purposes. Most attempts at borrowing, by owners of small fractions of heirship lands, were discouraged or turned down because the loans did not cash flow. Individual landowners are not eligible for the USDA Indian Land Consolidation loans only Tribal Governments. This program has only been funded at 1.5 million for the last 3 years, an amount one Tribe could totally obligate in less than one year. Prior to the allowance of the Department of Interior to purchase Indian land, programs must be put in place which encourage and enable the rightful owners to consolidate interests. Such programs include lending programs available to individual Indians and their respective Tribes. True consolidation through purchase will only take place when the income from the purchased interest is coupled with other income and applied to a principal in a specified time frame. The proposed purchase plan will require the purchase of about 8 million acres of land by the Federal Government, which will never in real time be returned to the rightful owner. At present appropriation levels for the present plan, it would require at least 200 years to accomplish.

The proposed "SEC. 206. DESCENDENT AND DISTRIBUTION OF TRUST OR RESTRICTED LANDS; TRIBAL ORDINANCE BARRING NONMEMBERS OF AN INDIAN TRIBE FROM INHERITANCE BY DEVISE OR DESCENT" is in direct violation to constitutionally guaranteed right to ownership and the only government that should be addressing right to inheritance is Tribal Government.

Any proposed corrective action to the problem of fractionated heirship land should provide all opportunities given to any other landowner of this country. One such opportunity is the formation of a holding company, corporation, partnership or other instrument for the purpose of combining and holding trust property interest in a single ownership name. The "Holding Company" would be recognized as a single owner, the tracts treated as single owner tracts and distribution of income would be made to the "Holding Company." Individuals owning interest included in the "Holding Company" would elect representatives to have authority to enter into leases, rights of ways etc. on behalf of the "Company" members. Recognition and authorization of such companies would create more one owner tracts than any purchase program and would not require the incurrance of debt.

"Section 218. TRUST AND RESTRICTED LAND TRANSACTIONS" is a positive step in the encouragement of individual interest owners to consolidate their interests and will facilitate the administration of such actions in a short time frame. Today the process of "gift deed" takes on the average three years.

Owners often get frustrated and give up on the process prior to completion because of the time involved. This section will remove the current time necessary to complete such transactions and assure completion.

In 1995, a draft bill and supporting language was developed by a informal, unaligned working group (Representatives from Umatilla, Fort Belknap, Navajo, Oglala, Turtle Mountain, Fort Hall, Coeur D"Alene, Crow, Red Lake, Salish & Kootenai, and Rosebud) to develop specific alternatives which would allow the Tribes to choose between several statuatory mechanisms to address fractionated heirship issues in a manner which protects landowner rights and meets the cultural concerns of the local community. The bill developed by this unaligned group address the shortfalls of S. 1586 while providing no-cost opportunities to the present owners of the land and allows the purchase of Indian land by the Federal Government only after a Tribe fails to take corrective actions within a 5 year time frame.

Our approach is to offer significant amendments to the proposed legislation to bring it into conformity with the views and desires of Indian Country. It is possible that some Tribes would accept the proposal for direct BIA purchase and ownership of heirship lands, but other options should be available to Tribes and landowners which more specifically meet the needs of the individual communities and address the constraints we identified earlier. It is therefore necessary for Indian Country to come-up with a series of potential solutions from which individual Tribes and communities can pick authorized actions to meet their needs.

Many potential solutions have been discussed and concept papers prepared by various working groups. In addition, specific tribal governments have also formally developed and proposed their own solutions to the problems of fractionated heirship. Any legislative proposal must embrace, or at least authorize, these solutions proposed and developed from within Indian Country.

Following is the overview and legislative proposal of the unaligned working group:

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Introduction

The problem of fractionated heirship is simple:
There is no landowner with ownership rights.

The Federal Government maintains the responsibility as trustee on Indian lands and has evolved a method of recording and maintaining ownership on Indian lands. In attempting to preserve ownership rights, the actions of the federal government on Indian lands which have passed to various heirs has resulted in a

land with a unique and untenable ownership. This unique ownership, referred to variously as Fractionated Heirship or Undivided Interest, is a failed attempt to maintain private ownership of land without taking action to specify which tracts are being inherited. The result is a large number of individuals who have some undefined ownership rights in a specific tract of land, which they share in unequal portions with other individuals. Unlike the expected situation, these various individuals who share ownership are not legally associated in any manner, which allows associational decision making for the benefit of the whole. By federal action, these individual owners of undivided interests must remain separate, with individual ownership rights and authorities.

There is no counterpart in this or any past civilization available to use as a model for administering or utilizing this unique form of ownership. If inherited land had been partitioned into subdivided tracts these problems would not have occurred. If the owners were in some manner an association, so that a method of decision making was implemented, a democratic system could be put in place and the problems faced by Indian landowners today would not occur. If the land was held communally by all heirs, a system for administering the land would become readily available based on Asian or Oriental precedents, and again today"s disenfranchised owner would not exist. If the land had remained in Tribal ownership, no problems faced today would have materialized. Finally, if the federal government had deferred to an established tribal decision-making process for the inheritance of property, the situation would have resolved itself in traditional tribal channels.

Unfortunately, none of the established methods of dealing with real property was applied in the case of Indian allotted lands. Instead, the federal government, in attempting to exert its responsibility as trustee, implemented the heretofore-unknown process of passing land tracts, in undivided form, to heirs and descendants as fractionated interests in the whole. When the original allottee of a 160-acre tract of Indian land passed away, each of his or her heirs inherited an equal, yet undivided share of the 160 acres. If there were four heirs each would own a share proportional to 40 acres, but no method has ever been implemented to determine which 40 acres is owned by whom. As generations continue to be replaced, the fractionation of the ownership progresses exponentially.

The Problem Defined

The problems resulting from Fractionated Heirship (AKA Undivided Interest) can only be successfully addressed if care is taken to separate real problems from those which may occur but are peripheral to the issue, and to separate the causes of heirship fractionation from the effects of fractionation. This section focuses on the problems from an Indian viewpoint, rather than a federal or administrative viewpoint, because the BIA has its own working group focusing on internal problems.

Problems resulting from attempts to administer the lands, such as a failed title plant, are not specifically a result of fractionated heirship, nor do they contribute

to fractionated heirship - these are factors which are affected by, but are neither the direct cause nor a direct result of fractionated heirship.

Causes

The causes of the fractionated heirship of millions of acres of Indian-owned lands can be summarized under three interrelated factors:

1. Imposition of non-traditional values on the American Indian culture: The primary cause of this problem is the policy of the federal government, as spelled out in the Dawes Act and reiterated in various allotment acts, to divide communally held ancestral lands into small tracts owned by individuals, who had no cultural history, experience or tradition of private ownership of real property. The private ownership of real property, taken for granted in the United States is not a globally held concept. Private ownership of real property originates, in part, in the English Common Law and is uniformly missing from other cultures, including the aboriginal American cultures. At the time of allotment, the tribal leaders and individual allottees had no basis for understanding or addressing these land allotments, and the wholesale loss of lands to the Indian community, the fractionation and therefore devaluation of the remaining assets, and the alienation of individuals from their traditional ties to the land was to be anticipated.

2. Failure of the American Indian culture to adapt: The second causative agent of the fractionated heirship status of Indian allotted lands is tied to the first, but reflects the decisions and culture of the Indian community, not the federal government. This contributor to the problem is the lack of provisions on the part of the landowner for the distribution of their assets after their demise. The lack of a tradition of private ownership resulted in a lack of formal wills or other conveyance documents, which would have prevented the current situation. This situation may not have become a problem if left to traditional tribal remedies, because the established tribal decision making process would have re-allocated the holdings. However, the allotments were made under federal provisions, and therefore the distribution of a decedent"s assets were also based on the English Common Law, not the local law or tribal cultures understood by the affected individuals.

3. Failure to implement available solutions: The third causative agent, is the failure to take those actions available under existing laws to curtail this long recognized and increasing problem. Written positions by early BIA officials stated the existing problems, predicted the upcoming crisis and recommended action. Most eloquent among these was the 1936 report of Commissioner Collier. However, no meaningful action has been taken to actually reduce this problem using available authorities. Procedures, which are available to address this issue administratively, include:

- Counseling Indian landowners to prepare wills,
- Negotiating or forcing land partitionments of fractionated tracts,
- Developing a federal probate code,
- Utilizing authorities for land acquisition and sales among surviving heirs,

- Promoting land exchanges to consolidate holdings,
- Promoting gift deeds to simplify probates in the case of elderly landowners,
- Developing the regulations necessary to implement laws of escheatment,
- Recognition of mandated land consolidation plans.

The BIA has authority to undertake the above actions, but no effort is ongoing to deal with this problem, so no forward progress is made.

Effects

A second attribute of this problem, and perhaps the most important of the two in developing equitable solutions, is the effects on the Indian lands, communities and owners caused by the heirship status. For any solution to be effective it must mitigate the primary effects of the problem. The effects identified by this working group can be generally lumped into five separate headings: Ownership Effects, Economic Effects, Tribal Homeland Effects, Development Effects, and Administrative Effects. These are overlapping in many areas but are discussed separately for clarity.

1. Ownership Effects: The effects of the fractionated heirship status of Indian allotted lands is most keenly felt by the individuals who actually own shares in this land, usually referred to as allotted land owners. Owners of fractionated lands retain little or none of the benefits of ownership usually attributed to landowners in this society. A fractionated owner cannot clearly identify or locate their holdings; cannot make beneficial use of it without the direct involvement of the other owners and the federal government; have no actual equity position in the land for borrowing or net worth purposes; cannot directly access the USDA farm programs on their own behalf; have virtually no direct involvement or authority in its management or use, except as granted by the federal government on an individual basis; and as stated almost 60 years ago, are reduced to the status of a destitute absentee landlord with minimal returns. Perhaps worst of all, the mismanagement of this one remaining valuable asset of the Indian Nations is the one place American society where the phrase "majority rules" does not apply, and the owners have become embittered and antagonistic toward the federal trustee who is responsible for the control of "their" lands.

2. Economic Effects: Economic benefits to the landowners and to the community at large are minimal. Landowners receive small lease payments, proportional to their ownership share, which are paid by the lessee to the Bureau of Indian Affairs and redistributed through Treasury to the individual landowners. Because the lease income is divided among many separate owners, even lease rates well over appraised value result in little meaningful income to the owners. These Treasury checks, while small, are also the primary reason people in nearby communities mistakenly believe that Indian people are subsidized in some unique fashion by the federal government. The ownership shares are also worthless as collateral for loans or mortgages.

The value of products produced from the land accrue to the lessee, frequently a non-resident of the reservation, and those funds are not available to build the reservation economic base. In short, the leasing of these millions of acres of fractionated lands makes little or no contribution to the economy of the local community. In off-reservation rural areas, income from the land has been the basis for developing thriving communities based on service, merchandising, and managing the land based assets. In Indian Country, the land has produced none or these generally accepted contributions to the community, has not provided the foundation for community development, and generally is not contributing to the development of meaningful reservation economies.

In addition to the absence of a contribution to reservation economies, this problem diverts funds and resources from other, critical needs. The increasingly complex administration of Fractionated Heirship lands divert limited resources from the positive contribution of land management and economic and social development to custodial monitoring of a continually worsening situation.

Other adverse economic impacts of fractionated heirship lands come from the billing and collection process utilized by the Bureau of Indian Affairs on fractionated lands under irrigation projects. If a heirship tract of land is not leased, the BIA bills each heirship interest owner the full amount of the total owed for irrigation operation and maintenance for the total tract. If the operation and maintenance charges are not paid in full on an annual basis, they become a debt against the property which accrues on an annual basis. This process diminishes the value of the property and further reduces owner income.

3. Tribal Homelands Effects: A large proportion of the remaining Indian reservations and restricted Indian lands in Oklahoma, were established by treaty, proclamation and law to provide a homeland, in perpetuity, for Native Americans in return for certain concessions of land, mobility and resources. These homelands were then divided by the trustee and granted to individuals, with the remainder opened for homesteaders in many areas. Those lands not homesteaded or retained communally by the Tribe have become fractionated to the degree that they contribute no benefit to the tribal homeland, and in fact are less a homeland than a lessee-hold interest, held by non-Indians and administered by the federal government. The ideals of a homeland wherein the Tribes continue to reign in their traditional role is completely undercut when the Tribe and its members can only react to federal non-management of their dwindling assets because there are no true owners, and they cannot make direct or beneficial use of their assets.

An additional effect is the impact on the relationship between an individual and their ancestral roots with the Tribe. In some instances, landowners living away from the reservation may consider their land holdings, inherited from their ancestors, as their major family, emotional and cultural tie to their Tribe. The fact that their holdings are small, fractionated and unidentifiable does not diminish this tie with their roots, and complicates efforts at solving this problem by taking or escheating small interests.

4. Development Effects: Under existing administration, which is generally limited to open market leasing of surface and sub-surface estates, fractionated lands are not and cannot be developed to their potential. Most remain in an undeveloped, grazing state, which generates the least possible return to the landowners, and does nothing to improve the equity in the land. There is a strong economic dis-incentive for lessees to develop these lands because they cannot retain ownership of the improvements and the lease cost will increase in subsequent years under the current management. Best case economic management for a lessee is to conduct the absolute minimum maintenance required by the terms of the lease, in order to avoid attracting competition during the next open market bidding process.

Community development is also severely curtailed due to the large quantity of land which is maintained in marginal development and condition. Rather than fueling an expanding economy based on retail sales and service delivery, these marginally productive lands accrue income to off-reservation sources and the income available within the reservation community is artificially low. Land development is a primary source of initial income in developing economies, and Indian reservations have yet to go through this preliminary phase of economic development common to all developed economies in the world today.

5. Administrative Effects: Land titles and records are generally maintained at the county level in American communities, however when Indian lands are recorded the entire process is safeguarded within the BIA. There can be no other single organ of government, which maintains the quantity, and type of individual land ownership records maintained by the Bureau. Despite this experience, which should be expected to confer some level of expertise, the Bureau Titles and Records division is the brunt of continuous and expanding criticism from landowners, Tribes, and branches of the BIA itself. It is not possible to develop a data maintenance system, which is completely error- free, especially if human input, is involved. However, due to the vast quantity and financial nature of the records maintained, even a tiny standard error results in tens of thousands of record errors in a single year. The problem here is not institutional incompetence, rather it is the inability of any governmental or private sector entity to effectively carry out such overwhelming and diverse responsibilities.

Administrative problems are not limited to this single branch. Lease payments from all sources, including surface, agricultural, commercial, mineral and oil and gas are distributed to the individual landowners based on their individual shares as currently recorded in the titles section. With the undivided nature of the ownership, this requires that hundreds of individual federal checks are written each year for each allotment, many well below the actual administrative cost to the government of writing the check. Perhaps even more damaging to efforts at improving governmental efficiency is the requirement that each of the undivided interest landowners be involved, in some manner, with the leasing or permitting of their land, no matter how small their share. Rather than using the leasing or mineral program to advance reservation development, the staff is occupied processing mass mailings of form letters to thousands of individuals. Few of

these form letters are actually understood by the landowners, and fewer still are signed and returned.

Land and resource management functions within the BIA, and in some cases the Tribe, are similarly tied into ineffective and self-serving communication with absentee and disinterested landowners rather than resource development and management to achieve local goals for economic development. Disenfranchised landowners, receiving contact from the agency on land issues, are generally just reminded of their own ineffectiveness in exercising any control over the lands they own.

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Constraints

Having listed the above items as important effects of the Fractionated Heirship status of Indian lands, it is necessary that any proposed solutions actually work to reduce those identified problem areas. In addition, the working group has described seven constraints which they feel must be addressed in any proposed solution. These are:

1. Recognition and provision for the cultural and emotional ties that Indian landowners may have to their inherited lands, no matter how small.

2. Equalities of economics, not just the short-term income derived, but also the long-term equity value of the landowners, as well as the required investments, if any.

3. The reservation (and former reservations in Oklahoma) as the ancestral homeland for the members of the Tribe, in perpetuity.

4. The rights of landowners to will their lands to whomever they please, whether a tribal member at that reservation or not, and the rights of individuals to inherit lands without regard for their enrollment status.

5. Any solution must reflect the individual cultures and governments of the individuals Tribes, address their individual methods of problem resolution, and advance or maintain tribal sovereignty.

6. Solutions should acknowledge and embrace tribal efforts at solving this problem, including the development and implementation of tribal inheritance codes.

7 Finally, and foremost, any solution must protect the constitutionally guaranteed rights of landowners and specially provide methods for landowners to utilize their own lands on their own behalf.

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A BILL

To preserve original Indian homelands, reduce fractionated ownership of Indian allotted lands, protect property rights of individual Indian land owners and for other purposes -

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

Section 1. Short Title:

This act may be referred to as "The Indian Land Preservation and Consolidation Act of 1999."

Section 2. Findings.

The Congress finds and declares that -

(1) The United States and Indian Tribes have a government to government relationship;

(2) There exists an undisputed general trust relationship between the United States and the Tribes through which the United States has a trust responsibility to protect, conserve, and provide for the utilization and management of Indian lands, consistent with its fiduciary obligation and its unique relationship with Indian tribes:

(3) In the last century and the early part of this century, the United States sought to assimilate Indian people into the "mainstream" by allotting tribal lands to individual tribal members, to eliminate large tribal landholdings by treaties, allotment acts and making tribal land available for homesteading, surplus sales, and other uses not consistent with its fiduciary obligation to Indian people and its unique relationship with Indian tribes;

(4) During this period and continuing today allotments were removed from trust by forced fee patent, sale by both the Indian landowners and the federal government, probates under state inheritance codes, foreclosures, and Tribal treaty lands declared "surplus" and sold by the federal government, resulting in over 90 million acres of Indian homelands passing out of Indian hands during the allotment period;

(5) Federal policy has created an ownership of allotted lands whereby allotted estates are divided on paper, and continued in federal trust without the benefit of physical partitionment or division so that Fractionation of Indian land ownership has occurred and continues at an accelerating rate;

(6) These archaic federal Indian-land policies have hindered the current policy of self-determination and government to government relationships, and despite the passage and amendment of the Indian Land Consolidation Act the number of fractional interest continues to grow; Indian homelands continue to shrink and the increased growth of unpartitioned interests in trust allotments makes it unfeasible for most heirs to make practical use of the land themselves;

Section 3. Purposes.

The purposes of this Act are to -

(l) Fulfill the trust relationship of the United States to Tribes and individual Indians and to promote self-determination by providing for the resolution of Fractionated Heirship and other land issues in a manner consistent with Tribal goals and priorities.

(2) Protect the remaining Indian homelands and curtail the passage of land out of Indian ownership and Tribal jurisdiction.

(3) Authorize and require the Secretary to take part in resolving the consolidation of Indian Land ownership, in a manner consistent with Tribal goals and priorities.

(4) Recognize the authority of the Tribal Governments to seek and implement innovative solutions which reflect local needs and cultures.

(5) Provide for the beneficial use of Indian lands by the Indian people who own those lands.

Section 4. Definitions:

(1) "Indian" means any individual who is recognized as a member by a North American tribe, band, nation, pueblo or other organized group of native people who are indigenous to the Continental United States.

(2) "Indian Landowner Holding Company" means an organization of landowners who have formed a real property holding company which may take the form of a corporation, partnership or other instrument recognized by the Tribal Government for the purpose of combining and holding trust real property interests in a single ownership name.

(3) "Land Consolidation Plan" means a plan developed through a documented community based planning process and enacted by the tribal government, defining land consolidation goals and a means of reducing fractionation through gift deed, sale, purchase, and exchange among owners and/or other Indians or tribes.

(4) "Secretary" means the Secretary of the Interior;

(5) "Tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), which is recognized eligible for the special programs and services provided by the United States to Indians because of their unique status as "Indians";

(6) "Tribal Government" means the body that governs the tribe, by custom, tradition, constitution or governing document;

(7) "Trust or Restricted Land" means a tract of land, all or a portion of the title to which, is owned by one or more individual Indians or a tribe and is held in trust for them by the United States or is owned by one or more individual Indians subject to federal restrictions on alienation.

Title I - Land and Ownership Consolidation

Section 101. Purpose.

The purpose of this section is to:

(1) Prevent the further fractionation of trust allotments;

(2) Consolidate fractionated interests and ownership of those interests into usable parcels;

(3) Vest title to such parcels in Indian people or the tribes;

(4) Promote Indian self-sufficiency and self-determination;

(5) To enhance the government-to-government relationship between the tribes and the United States.

Section 102. Tribal Land Consolidation Plan.

Notwithstanding any other provision of law, any tribe, acting through its governing body, may [1] adopt a land consolidation plan providing for the sale, purchase or exchange of any tribal lands or interest in lands for the purpose of eliminating undivided fractional interests in Indian trust or restricted lands or consolidating its tribal land holdings; Provided, that -

(1) Except as provided in Section 103 part 3 and Section 401 part 3 of this Act, the sale price or exchange value received by the tribe for land or interests in

[1]Deleted □with the approval of the Secretary . . .□ Most tribal constitutions require secretarial approval, and for those this phase is redundant. For those few tribal constitutions without this specific requirement, this is in direct conflict and abridges the established authorities. However, this approval has been interpreted by the past Congress as required in order to pass funding through the BIA.

land covered by this section shall be no less than within 10 percent of the fair market value;

(2) If the tribal land involved in an exchange is of greater or lesser value than the land for which it is being exchanged, the tribe may accept or give cash in such exchange in order to equalize the values of the property exchanged;

(3) Any proceeds from the sale of land or interests in land or proceeds received by the tribe to equalize an exchange made pursuant to this section shall be used exclusively for the purchase of other land or interests in land pursuent to the Tribal Land Consolidation Plan. Upon completion of the land consolidation project at the local level, any residual funds shall revert to the tribe.

(4) The Secretary shall maintain a separate trust account for each tribe and shall release such funds for the purpose of implementing Title 2, section 202 of this act.

Section 103. Indian Landowner Holding Companies.

In order to maintain ownership shares when desired by the landowners and still achieve the objective of reducing owners of record and administrative quagmires, owners of fractionated heirship interests in trust properties are authorized to form real property holding companies for the purposes of combining ownership shares into a single ownership for administrative purposes, while maintaining individual shares in the holdings of the Holding Company; Provided, that -

(1) Such holding companies may take the form of family trusts. corporations, partnerships or such other form as may be approved by the Tribal Government.

(2) The Holding Company shall elect from among its members, a president, chairman or other leader who shall represent the interests of the consortium to the Secretary, and who shall have authority to enter into and sign various land agreements, such as leases, rights of ways, etc. on behalf of the consortium members.

(3) The Secretary shall hold in trust title to lands or interest in lands held by such Holding Company, when the ownership shares are held by Indians eligible to have lands held in trust. For purposes of applicable law, the Secretary shall identify the Holding Company as a single owner, and the tracts shall be treated as single ownership lands. Distribution of income or other proceeds from the land will made directly to the Holding Company.

(4) It shall be the responsibility of the Holding Company to maintain its internal shareholder records, redistribute land income to its shareholders, and in all other ways administer its own internal functions as a separate entity and landowner, in accordance with section 103 paragraph (l).

(5) The Secretary is authorized to transfer title to fractional interests of individuals directly into holding Company ownership without the need for appraisal, gift deed, or other conveyance document on the specific written request of the landowners.

Section 104. Tribal Purchase Option.

When a tribe has adopted a Land Consolidation Plan, that tribe may purchase, at no less than the fair market value, part or all of the interests in any tract of trust or restricted land within that tribe"s jurisdiction with the consent of the owners of such interests. The tribe may purchase all of the interests in such tract with the consent of the owners of over 50 percent of the undivided interests in such tract; provided, that-

(1) Any Indian owning any undivided interest, and in actual and continuous use and possession of such tract for at least three years preceding the tribe"s offer to purchase, may purchase such tract by matching the tribal offer;

(2) If, at any time following the date of acquisition of such land by an individual pursuant to this section, such property is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date it is notified of such offer or petition to acquire such property by paying to the owner the fair market value as determined by the Secretary;

(3) The tribes shall be eligible for funding through the Acquisition Fund established in Title II of this Act for all Tribal purchases and exchanges initiated under this section

Section 105. Individual Co-owner Acquisition Program[2].

When provided for in a Tribal Land Consolidation Plan, a current owner of interest in a fractionated heirship tract may purchase, at no less than the fair market value, part or all of the remaining interests in the tract of trust or restricted land with the consent of the owners of such interests, and when such purchase will act to reduce or eliminate the continuing fractionation of interests. Interests purchased under this part may before direct use of the purchaser or to consolidate holdings for trade or exchange with the Tribal Government or other Indian landowner; Provided, that -

(1) Any Indian owning any undivided interest, and desiring to purchase additional interests for purposes of trade or consolidation shall, as part of the purchase offer, submit an Estate Planning document to the proper local authority that prevents further fractionation;

(2) If, at any time following the date of acquisition of such land interest by an individual pursuant to this section, such interest is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date

[2] Section 106 and 107 are already authorized under existing regulations. These sections are included here not to supercede existing authorities, but to insure that these options are not overlooked.

it is notified of such offer or petition to acquire such interest by paying to the owner the fair market value as determined by the Secretary;

(3) Tribes may set-up a loan/grant program to assist Indian co-owners to consolidate holdings. This program would utilize funding from the Acquisition Fund established in Title II of this act to establish a matching loan/grant program with a maximum loan of $10,000 per individual and a maximum matching grant of $10,000.00 per individual to be used solely by co-owners to purchase the interests of other owners in their jointly owned tracts. Principal and interest payments made pursuant to this part will accrue to the Acquisition fund at that location.

Section 106. Individual Non-owner Acquisition Program [2]

When provided for in a Tribal Land Consolidation Plan, an Indian who is not a co-owner in a tract may purchase, at no less than the fair market value, interests in the tract of trust or restricted land with the consent of the owners of such interests in order to eliminate the fractionation of interests. Lands purchased under this part may before direct use of the purchaser or to trade or exchange with the Tribal Governing Body or other Indian landowner in order to consolidate landholdings; Provided, that-

(1) Any Indian desiring to purchase lands under this act shall, as part of the purchase offer, submit an Estate Planning document that prevents further fractionation;

(2) If, at any time following the date of acquisition of such land by an individual pursuant to this section, such land is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date it is notified of such offer or petition to acquire such interest by paying to the owner the fair market value as determined by the Secretary;

(3) Tribes may set-up a Loan program to assist Indian people to acquire all the interests in fractionated tracts where they currently own no land interests, or desire to acquire land for the purposes of establishing a base of operations. This program would utilize funding from the Acquisition Fund established in Title II of this act with a maximum loan of $10,000 per individual to purchase all the interests in fractionated tracts.

Section 107. Federal Acquisition Program.

Unless the Tribal Government has adopted and implemented a Land Consolidation Plan as defined in section 103 of this act and has implemented, as a part of that plan, all or part of the above elements, or other vehicles to directly reduce current fractionation of ownership and eliminate future fractionation of ownership, in a five year period from enactment of this act, the Secretary is authorized to acquire, in his discretion, and with the consent of its owner and at fair market value, any fractional interest in a trust allotment on that reservations or area of tribal jurisdiction.

(l) Administration of Acquired Fractional Interests.

[2] Section 106 and 107 are already authorized under existing regulations. These sections are included here not to supercede existing authorities, but to insure that these options are not overlooked.

(a) The Secretary shall receive the rents or other revenue from the fractional interests acquired pursuant to this Act. All such revenue shall be deposited in the Acquisition Fund created pursuant to Title II of this Act.

(b) The Secretary is authorized to include interests acquired pursuant to this Act in leases of the affected parcels including, but not limited to, business leases, timber sales and permits, grazing permits, agricultural leases, and mineral leases, and to grant easements and rights-of-way across said parcels. All revenue derived from such leases, permits and rights-of-way shall be deposited in the Acquisition Fund created pursuant to Title II of this Act.

(2) Consolidation of Acquired Fractional Interests.

(a) The Secretary may continue to acquire fractional interests in a trust allotment until either all of the interests have been acquired or the Secretary determines sufficient interests have been acquired to warrant partition of the trust allotment. The Secretary shall then cause the trust allotment to be partitioned, and full title to one or more of the partitioned parcels shall vest in the United States. Provided, that if the trust interests in the mineral estate have been severed from the trust interests in the surface estate, only the surface estate will be partitioned.

(b) The Secretary shall transfer the title of all full parcels acquired or partitioned pursuant to subsection (a) to the tribe on whose reservation the parcel is located or which has jurisdiction over the parcel.

(c) The Tribe receiving a parcel pursuant to subsection (b) may treat the parcel as any other tribally-owned parcel within the tribe"s territory including, but not limited to leasing the parcel, selling the resources, granting of rights-of-way, or engaging in any other transaction affecting the parcel authorized by law. Provided, that until the purchase price paid by the Secretary for the parcel has been recovered, any lease, resource sale contract, right-of-way or other transaction affecting the parcel shall contain a clause that all revenue derived from the parcel shall be paid to the Secretary. The Secretary shall deposit all such revenue in the Acquisition Fund created pursuant to Title II Section 201 of this Act.

Title II - Acquisition Fund.

Section 201. Purposes.

The purposes of the acquisition fund shall be to:

(1) Establish specific auditable accounts to administer the funds used to implement the purposes of this act;

(2) Provide financial re-sources to the- Tribes or the Federal Government, or loans and grants to individuals, for the sole purpose of purchasing fractionated heirship interests to consolidate ownership.

(3) Reduce federal administrative expenses caused by the highly fractionated title on these specific tracts by reducing the number of owners and ownership shares.

(4) Eliminate Fractionated heirship as an ownership category of Indian Lands.

Section 202. Administration.

The Secretary is directed to establish an Acquisition Fund to disburse appropriations authorized to accomplish the purposes of this Act and to collect all revenues received from the lease, permit, or sale of resources from interests in trust allotments acquired by the Secretary pursuant to this Act. All proceeds from leases, permits or resource sales shall be deposited in interest bearing accounts. Provided that:

(1) The Secretary shall identify the specific funding needs at each allotted reservation and former reservation and allocate the funds appropriated into the Acquisition funds of each reservation in a manner proportionate to the needs of the that reservation.

(2) Where a Tribal Land Consolidation Plan includes any or all of the options listed in Sections 102, 103, 104, 105, and 106 of this Act, this Acquisition fund will be available to the Tribal Government to operate the requisite purchase, lending and grant programs. All loan repayments including principal and interest as well as proceeds from leases, permits or resource sales from interest acquired by the tribes shall be deposited to this account at that location.

(3) ***Insert section 218 of the present S. 1586***

Title III - Inheritance and Estate Planning

Section 301. Purposes.

The purposes of this title shall be to:

(1) Eliminate the current practice of passing Indian real property intestate to multiple heirs in undivided status.

(2) Eliminate, over time, the fractionated ownership of Indian heirship lands,

(3) Encourage and assist Indian landowners in all aspects of estate planning to reduce intestate succession.

(4) Provide for Tribal Governments to develop probate codes which shall supersede and replace use of state or local codes at that location

(5) In the absence of a Tribally adopted probate code provide a federal Indian probate code which shall supersede and replace state or local codes and provide uniformity throughout the country on distribution of Indian real property through probate.

Section 302. Estate Planning.

The Secretary shall implement estate planning programs at appropriate levels within the structure of the BIA to inform, advise and assist Individual Indian landowners in understanding and using the4various methods and documents to secure for themselves their rights to devise, through will or otherwise, their lands to those heirs whom they chose; Provided, that-

(l) It shall be the purpose of this program to dramatically increase the use of wills, revokable family trusts, and other methods of devise among Indian Landowners.

(2) The desired effect of this program is to substantially reduce the quantity and complexity of Indian estates which pass intestate through the probate process while protecting the rights and interests of the Indian landowners.

(3) The Secretary is authorized to contract with, retain, hire or otherwise acquire the necessary expertise to provide this service at the local level to individual Indian Landowners.

(4) The Secretary shall prepare a report to Congress on the implementation and activities of this program on the first year anniversary of passage of this act, and every year thereafter.

Section 303. Tribal Inheritance Codes.

Notwithstanding any other provision of law, any Indian tribe may adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe"s reservation or otherwise subject to that tribes jurisdiction. Such codes may provide, among other things, that non member Indians may be entitled to receive by devise or descent interests in trust or restricted lands within that tribe"s reservation or otherwise subject to that tribe"s jurisdiction; for the creation of life estates for spouses or children who are not

qualified to receive property by devise or descent; and for the renunciation of a devise by an ineligible person in favor of an eligible person.

Section 304. Federal Indian Inheritance Code.

Unless the Tribal government adopts and implements a Tribal inheritance code as defined in section 303 of this act and which will eliminate future fractionation of ownership in a reasonable period of time the following federal probate code shall be supersede and supplant all state or local codes for all Indians and Indian property under the jurisdiction of the Secretary.

(1) Descent or distribution[3]: Full or Undivided interest"s shall descend by intestacy or devise. Provided, that;

(a) Fractional interest: Nothing in this section shall prohibit the devise of a fractional interest to any other eligible owner of trust or restricted land.

(b) As to decedents who die two years from the date of enactment of these amendments or thereafter, interests in trust allotments may descend by testate or intestate succession only to members of the tribe on whose reservation the trust allotment is located or which has jurisdiction over the trust allotment.

(i) For those estates passing by intestate succession, only spouses and heirs of the first degree (parents and children) and second degree (grandchildren, grandparents, brothers and sisters), who are not prohibited from taking by subsection (b) of this section, may inherit interests in trust allotments.

(ii) If a person who is prohibited by subsection (b) from acquiring an interest in a trust allotment is a surviving spouse and/or child of an intestate decedent and would have except for the provisions of subsection (b) received a devise of an interest in a trust allotment, a life estate shall at the request of the spouse during the probate of the decedent"s estate be created for that spouse as defined in subsection (e) of this part, and the remainder shall vest in the Indians or tribal members who would have been heirs in the absence of a qualified person taking a life estate;

(iii) Any ineligible devisee shall have the right to renounce his or her devise in favor of an individual who is eligible to inherit.

[3] This proposed bill does not contain a 2% escheat clause. Additionally, the term "escheat" applies only to real property of an individual who has no heirs and is not the proper term to use in case of small interests of Indian land. Therefore we use the term □revert to the Tribe□ in place of the □escheat to the Tribe□ since the vast majority of these lands were originally in tribal ownership before the Federal Government took them for allotment.

(iv) If no individual is eligible to receive the interest in a trust allotment as provided in subsection (c), the interest shall revert to the tribe having jurisdiction over the trust allotment, subject to any life estate that may be created pursuant to paragraph (i) of this subsection.

(v) If an intestate Indian decedent has no heir to whom interests in trust or restricted lands may pass, such interests shall revert to the tribe, subject to any non-Indian or non member spouse and/or children"s rights as described in paragraph (l) of this section;

(c) Except as provided in subsection (d), upon the death of an individual holding an interest in a trust allotment which is located outside the boundaries of a reservation and is not subject to the jurisdiction of any tribe, such interest shall descend by testate or intestate succession in trust to spouses and heirs of the first or second degree who are members of a tribe, and any residual will pass to the tribe in which the decedent was enrolled, subject to section (ii) and (iv) of this part.

(d) Upon the death of an Indian holding an interest in a trust allotment issued pursuant to the Acts of May 17, 1906, 34 Stat. 197, as amended, or May 25, 1926, 44 Stat. 629, as amended, such interests shall descend by testate or intestate succession in trust to Indian spouses and Indian heirs of the first or second degree, and in fee status to any other devisees or heirs."

(e) Life estates: The right to receive a life estate under the provisions of this section shall be limited to

(i) a spouse and/or children who, if they had been eligible, would have inherited an ownership interest of 10 percent or more in the tract of land, or

(ii) a spouse and/or children who occupied the tract as a home at the time of the decedent"s death.

(g). Full faith and credit to tribal actions under tribal ordinances limiting descent and distribution of trust or restricted or controlled lands. [§ 2202 [(208)]]: The Secretary in carrying out his responsibility shall give full faith and credit to any tribal actions taken pursuant to section 303 of this title, which provision shall apply only to estates of decedent"s whose deaths occur on or after the effective date of tribal ordinances adopted pursuant to this chapter.

Title IV - General Provisions

Nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land or the creation of reservations for Indians with respect to any specific tribe, reservation, or state. [§ 2202 [(204)]]

Section 401. Conveyance Authority and Requirements. [§ 2208[(209)]].

(l) The Secretary shall have the authority to issue deeds, patents, disclaimers or such other instruments of conveyance or transfer as may be needed to effectuate or perfect a sale, partition, exchange, or transfer of tribal lands and individual trust or restricted lands or interests therein which are made pursuant to the terms of this Act or of Sections 372, 378, 379, 404 or 405 of Title 25 of the United States Code, provided, that for those lands that do not conform with an existing public land survey, land descriptions utilized in conveyancing documents authorized herein may be drawn by metes and bounds but must be accompanied by a survey plat which is capable of recordation in the jurisdiction in which the land is located.

(2) The Secretary must execute such instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that such sale or exchange [4] is not in compliance with the tribal land consolidation plan.

(3) The Secretary may execute instruments of conveyance for less than fair market value to effectuate the transfer of lands used as homesites held, on December 17, 1991, by the United States in trust for the Cherokee Nation of Oklahoma. Only the lands used as homesites, and described in the land consolidation plan of the Cherokee Nation of Oklahoma approved by the Secretary of February 6, 1987, shall be subject to this subsection.

Section 402. Trust Responsibility. [§ 2209 [(210)]]

Title to any land acquired under this chapter by any Indian, Indian Consortium or Indian tribe shall be taken in trust by the United States for that Indian or Indian tribe. Nothing in this Act shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands. Nothing in this act shall be construed as authorizing the Secretary to hold lands in trust for entities which are ineligible to have lands held in trust for them.

Section 403. Tax exemption. [§ 2210 [(211)]]

All lands or interests in land acquired by the United States for an Indian or Indian tribe under authority of this chapter shall be exempt from Federal, State and County taxation.

Section 404. Authority of Tribal Government. [§ 2211 [(212)]].

Nothing in this act shall be construed as vesting the governing body of an Indian tribe with any authority which is not authorized by the constitution and by-laws or other organizational document of such tribe.

Section 405. Secretarial Approval.

The Secretary shall, within 30-days after receipt of the Tribal action, approve such action unless the Secretary provides written notification detailing the reasons for

[4] Deleted "...is not in the best interest of the tribe or..." It is the Tribal Government□s responsibility to determine what□s in the best interest of the tribe, not the Secretary or his staff.

disapproval. If the Secretary fails to approve or disapprove a tribal action within the stated 30-day time period, such tribal action shall be deemed approved.

Section 406. Establishing Fair Market Value [5]. [§2215 (216)].

(l) For the purposes of this Act, the Secretary shall develop a system for establishing the fair market value of various types of lands and improvements, which shall govern the amounts offered for the purchase of interests in trust allotments and for the establishment of value for the purpose of section 207; provided that the application of the values established hereunder may be challenged as follows -

(a) first, by demonstrating to the Secretary that a particular trust allotment or interest has a value materially different from the value established by the Secretary and if the matter is not resolved,

(b) by judicial challenge to the adequacy of, or conclusions reached by, the system of establishing values described above, or

(c) by judicial challenge to the value assigned to a particular trust allotment or interest therein.

(2) Exclusive jurisdiction over judicial challenges described in subsection (b) above is hereby vested in the United States District Court for the District of Columbia.

(3) Exclusive jurisdiction over judicial challenges described in subparagraph (c) above is hereby vested in the United States District Court for the District in which the particular trust allotment or interest is located."

Section 407. Compliance with the National Environmental Policy Act. [§ 2217 [~218)]].

No sale of land, partition, exchange or other transaction affecting title accomplished pursuant to this act shall be deemed to be a major federal action for the purposes of the National Environmental Policy Act of 1969, as amended. (42 U.S.C. § 4321 et seq.).

Section 408. Notification.

Within 180 days of the enactment of these amendments, the Secretary shall notify tribes and individual owners of the provisions of these amendments. The notice shall list estate planning options available to owners under these amendments and other laws.

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[5] The requirement for fair market value is repeated throughout this proposed Act, and is compatible with current BIA Reality practices. However, the appraisal program is under funded and understaffed, and notoriously slow as a result. This Act would greatly increase the immediate workload of Reality and Appraisals for the next few years. An alternative which could accomplish the purposes of this Act and reduce the administrative bottleneck is to allow negotiated prices between □Mutually Informed Adults□ and thereby reduce the formal appraisal requirements. A Cooperative Market Analysis could be created for various land types within a reservation and given to individuals as a basis for informed negotiation, and the Secretary would not be bound to □fair market value□ if the parties in a sale or exchange formally agree to a price.

Section 409. Severability.

If any provision of this Act, or the application of any provision of this act to any person or circumstance, is held invalid, the application of such provision or circumstance and the remainder of this Act shall not be affected thereby.

Section 410. Authority for Appropriations.

There are authorized to be appropriated such sums as are necessary to carry-out the purposes of this Act."

Overview and Section by Section Summary.

This contains the BIA work, restructured into formal bill format, with the addition of purchase options by the tribes and individual Indian people to solve fractionated heirship issues without deeding the land to the Department of the Interior or abridging Indian land ownership rights. It is a composite work, drawing from many different sources, and using existing tribal and individual recommendations for specific programs.

Specific sections of the Act are described below.

Section 1. Title: The title has been changed to reflect the purpose of the Act.

Section 2. Findings: has been edited and reduced, and includes basic tenants of current Indian policy.

Section 3. Purposes: has been changed to reflect trust responsibility and government to government relationships, and is plagiarized from previously passed Acts. Each separate title, (except Title IV) begins with an additional purpose section which defines the purposes/policies of that specific title.

Section 4. Definitions: has been edited to include specific definitions from previously passed acts to maintain uniformity in Indian Affairs. New items, such as "Indian landowner consortium" are included as required for the subsequent section of the Act.

Title I- Land and ownership consolidation

Section 101- Purposes: a purpose section is added to give guidance on the reasons for the language in this title.

Section 102. Tribal Land Consolidation plans: Authorizes the Tribes to enact Tribal Land Consolidation Plans as called for in the original ILCA and expands their purpose to include resolving Fractionated Heirship issues. This version deletes the requirement for secretarial approval as redundant - additionally, secretarial approval is addressed in Section 405. Few if any Tribal Land Consolidation Plans have been approved by the Secretary since the passage of the ILCA, in part because no regulatory guidelines for approval have been developed. This removes that stumbling block to the process.

This section also relaxes guidelines on fair market value to facilitate the purposes of this Act, and requires the establishment of a new Trust fund account for each tribe to implement the Act - the fund is addressed in Section 202.

The section vesting authority to define Reservation boundaries in the Office of the Solicitor is deleted - it is both unnecessary and usurps existing authorities and legal recourse.

Section 103 Indian Landowner Consortiums: Provides a vehicle for landowners to consolidate their Fractionated heirship with other owners into a single ownership type, such as a holding company. The intent is to provide a vehicle for Individuals who inherit or own fractionated heirship to maintain ownership of that interest while still achieving the objectives of reducing federal requirements, and providing a non-federal decision making body over the land to exercise ownership prerogatives. This option may be most effective in maintaining family holdings which are fractionated among

various family members who have no desire to dispose of their ancestral lands and joint inheritance.

This section also streamlines the administrative process for individual landowners to consolidate their holdings in a consortium.

Section 104. Tribal Purchase Option: this section is effectively identical to the similar section in prior drafts and removes the previous "stranger to the title limitations so that any willing seller can sell to the tribe without consent of his co-owners. It provides a first right of refusal to existing owners who are using the land, and further provides the tribe with a follow-up first right of refusal if that owner subsequently determines to sell the land.

Section 105 Individual Co-owner Acquisition Program: this section extends the purchase options to include purchase of fractionated interest by co-owners in the tract when authorized by the Tribal Land Consolidation Plan. It requires that in exercising this option the buyer must take some action, in the form of an undefined Estate Planning Document, to ensure that interests acquired in this part are not again fractionated through the devise and decent process. It follows the same rationale rights of refusal as the Tribal Purchase option in Section 104, and provides for the creation of a tribally operated Loan/Grant program to assist co-owners in exercising this option.

Section 106. Individual Non-owner Acquisition Program: This section extends the purchase option afforded to co-owners in Section 105 to individuals who are currently not co-owners but who desire to establish a land base, or consolidate their holdings. The "strange to the Title"
limitations previously imposed are not included in the Act, so that a willing seller can sell to a willing buyer without undue outside interference. The clauses on rights of refusal, etc. contained in sections 104 and 105 are repeated here.

Section 107. Federal Acquisition Program: This section includes the prior versions of the federal acquisition program, as a fall back position if the tribal government chooses not to implement its own Land Consolidation plan within five years of the passage of this Act.

Title II - Acquisition Fund

This title includes the acquisition fund proposed in prior drafts, modified to include tribal participation.

Section 201. Purposes: the purposes described here are self explanatory.

Section 202. Administration: This section requires the Secretary to establish the revolving acquisition fund, and defines the basic parameters under which it will operate.

Paragraph 1 requires the secretary to identify the specific funding needs at each allotted reservation, and distribute the acquisition funds appropriated in a fair and equitable manner proportionate to the established need.

Paragraph 2 requires the Secretary to make these funds available to the tribal governments with Land Consolidation Plans.

Title III Inheritance and Estate planning

Section 301. Purposes: The purposes in this section are self explanatory.

Section 302. Estate Planning: This section instructs the Secretary to implement a program to assist individual Indian landowners with estate planning using wills and other documents to eliminate intestate succession of land. It provides authority for the Secretary to contract for the
necessary expertise, and requires a yearly report to Congress on Estate Planning activities.

Section 303. Tribal Inheritance Codes: This section again authorizes Tribes to adopt their own codes governing descent and distribution of Trust estates.

Section 304. Federal Inheritance Code: This section provides that unless a tribe has adopted an inheritance code, a federal code will be created to supersede all state or local codes used in Indian Inheritance. The desire is to have a single probate code for all parts of the country if the tribes do not pass a separate code. The section, as written, largely repeats prior drafts with the exception that the " "escheat" clause that refers to interests of less than 2% is removed. The "escheat" requirements of the ILCA continue to be constitutionally questionable and remain source of expensive litigation and disparate application. Therefore an effort is made to address the passing of small fractionated interested through probate without following the "escheat" methods. We have added language on interests which cannot be inherited in trust under the proposed draft to "revert" to the tribe, both in the cases of true escheat (no heirs) and in the cases of no legal "trust" heirs, and have addressed off-reservation lands as reverting to the decedent"s tribe rather than passing out of trust into fee simple status as in the original draft.

Title IV - General Provisions

This title contains all the "housekeeping" comments needed for the over all Act. The first paragraph, which is not numbered in this draft, is a disclaimer stating that this law does not change the authorities of the Secretary to acquire lands for reservations.

Section 401. Conveyance Authority and Requirements: This section contains the authority for the Secretary to take action on conveyances and is from the Ada Deer draft. In paragraph 2 we eliminated the discretionary authority of the Secretary to disapprove tribal sales or exchanges if he determines it is not in the best interest of the tribe because its the tribe"s responsibility to make those decisions, not the Secretary.

Section 402. Trust Responsibility: This section is a disclaimer indicating that the Act does not modify the trust responsibility, nor authorize the Secretary to hold lands in Trust for entities not eligible to hold trust lands.

Section 403. Tax Exemption: This section indicates that lands acquired under this Act are exempt from Federal, State and County taxes. We changed this from the Ada Deer draft by inserting "County" in place of "local" because the prohibition against local taxation could be interpreted as
preventing a tribe from instituting a property or other tax code under its jurisdiction, which is not the intent.

Section 404. Authority of Tribal Government: This section is a disclaimer that indicates that this Act does not supersede tribal constitutions or other governing documents.

Section 405. Secretarial Approval: This section establishes that if the Secretary fails to take negative action on a Tribal action made pursuant to this Act within 30 days, then that tribal action is approved. Basically, the Secretary needs take no action to approve tribal action, only to disapprove it.

Section 406. Establishing Fair Market Value: The phrase "Fair Market Value" is used through-out this Act and other acts pertaining to Indian land and is generally the result of separate, specific appraisals. Due to the potential bulk of transaction requests which may follow this Act, a simplified method of ensuring fair market value is authorized, and a method for reviewing these determinations if desired is established.

Section 407. Compliance with the National Environmental Policy Act: This section is to comply with the referenced Act.

Section 408. Notification: This section requires the Secretary to notify the tribes and individual landowners of their options under this Act within 180 days of passage.

Section 409. Severability: This section establishes that if any provision of this Act is found to inapplicable, it does not affect any of the rest of the Act.

Section 410. Appropriations: This section authorizes appropriations. No target figures are included in this Act, as separate Congressional Committees deal with authorizing legislation than with appropriations. By leaving the specific appropriations out of this Act it is unnecessary to include the appropriation committees in the debate until the Act is passed. It is anticipated that extensive work will be required with the appropriations committees to fund this undertaking one the authorization is approved.

April 23, 1999

Keith Beartusk, Area Director
BIA, Billings Area Office
316 N. 26th Street
Billings, MT 59101

Dear Mr. Beartusk:

I have been asked to assist my parents in the preparation of their wills. The family has agreed to leave the land as an undivided entity and the family corporation would hold title to the land. This desire raises several questions and leads me to this letter. I have been advised that the Area Solicitor may be the key to the answers I am searching for.

One of the questions raised is as follows: "Can a corporation hold title to trust lands if the stockholders in the same corporation are enrolled members of the reservation where the land is located?" Does every member of the corporation have to be an enrolled member? Can this corporation through their corporate charter restrict ownership of corporate shares?

I understand the Indian probates in this state are handled according to the probate laws of Montana. What restrictions within probate administration do we, as a family need to be aware of that could possibly prevent our desire to pass our lands on in such a manner? I am aware that a corporation does now hold title to trust lands on the Blackfeet Reservation. I am aware there has been an extended legal case concerning the passage of one of that corporation's members. I still believe that the formation of trust family corporations is a solution to the problem of fractionation.

Please assist my family in the development of a process by which my father can leave his trust property to his direct descendents without facing the problems of fractionation or partitionment. My father is 70 years old, thus it is important that I expidite the development of his wishes. Your cooperation in this endeavor is greatly appreciated.

Sincerely,

Ross R. Racine
100 N. 27th Street
Billings, MT 59101
(406) 259-3525

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Billings Area Office
316 North 26th St.
Billings, Montana 59101

1849-1999

Real Estate Services
Code 310

JUL 21 1999

23

Ross R. Racine
100 North 27th Street
Billings, Montana 59101

Dear Mr. Racine:

Your April 23, 1999, and June 7, 1999, letters requested information on forming trust corporations and whether or not trust corporations can hold title to trust lands through probate.

We consulted with the Billings Field Solicitor's office who is our legal advisor for the drafting of Indian Wills covering trust and restricted interests in land.

In reply to your inquiry, an Indian will cannot transfer the legal title to trust property to a private trust since the legal title is already held by the United States, as trustee, under a trust provided for by Federal law.

We enclose for your further disposition a copy of their advisory opinion of July 13, 1999.

We apologize for the delay in responding and hope that this information will assist you and your family in your estate planning efforts.

If we can be of further assistance, please contacct our Division of Real Estate Services at (406) 247-7935.

Sincerely,

Keith Beartusk

Area Director

Enclosure

United States Department of the Interior

OFFICE OF THE SOLICITOR
P.O. Box 31394
Billings, Montana 59107-1394

1849-1999

July 13, 1999

RECEIVED
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BAO/BIA
REAL ESTATE SERVICES

MEMORANDUM

TO: Area Director, Indian Affairs, Billings
Attn: Real Estate Services

FROM: Richard K. Aldrich, Field Solicitor
Pacific Northwest Region (Billings)

SUBJECT: Estate Planning Advice

By memorandum received May 5, 1999, you requested advice to assist a Blackfeet tribal member in the preparation of his Last Will and Testament. Apparently, the testator wants to leave his trust property to direct descendants without facing problems of fractionation or partitionment. It appears that the family is considering having the trust lands held by a private trust or a corporation.

First, when writing or interpreting a will, the primary objective is to ascertain the testator's intent. Unless you visit with the testator, you may not understand what his testamentary plan is or how you might be able to accomplish his objectives through a will. If it is impossible to accomplish his intentions through a will, you need to assist him in finding another way to accomplish his objectives, if possible. Your responsibility is to the testator, not to individual beneficiaries or the family. Therefore, it is critical to counsel the testator, not his family, concerning his testamentary plan. To avoid any issue of undue influence, I recommend that the testator receive assistance with his will from an attorney or a BIA will scrivener. It is unwise for a family member who will benefit from the will to be involved in drafting the will or providing advice.

Your standard advice to trust landowners concerning estate planning is sound. There are certain devices available to the testator if he is concerned about fractionation or partitionment. *See, e.g.*, Will Drafting Manual, pp. 14-27 (January 1988). However, for reasons stated below, trust lands may not be placed in a private trust, and the United States may not hold individual Indian trust lands in trust for the benefit of a corporation.

Indian trust lands are held in trust by the United States. It is not possible to create a private trust since the lands are already in trust. Therefore, an Indian testator holding trust lands may not create a private trust consisting of trust lands as an alternative to disposition by a will.

If the testator holds title to trust lands on a reservation organized under the I.R.A., he may devise them in accordance with 25 U.S.C. section 464. The catchall devise is for "[a]ny other person for whom the United States can hold property in trust status." If a family corporation existed (it could not be created by a will), your question appears to be whether the testator could devise his trust lands to the corporation. The answer appears to be no because a corporation is not a person for whom the United States can hold trust property.

The Indian land regulations found in 25 C.F.R. Subpart H uniformly define Indian land or trust land as land held by the United States in trust for individual Indians or tribes. *See, e.g.*, 25 C.F.R. § 150.2(h); § 152.1(d). "Individual Indian" is defined in § 151.2(c) as a person meeting certain requirements. The definition does not include an entity or organization, such as a corporation. Therefore, the testator could not devise his trust land to a family corporation. It also follows that the testator could not gift or deed his property to a corporation, since individual Indian trust land must be held by the United States in trust for the individual Indian(s).

The testator may wish to consult a private attorney for estate planning advice. The attorney could counsel him on the advantages and disadvantages of continuing to hold the property in trust versus taking the property out of trust and creating a private trust or a family corporation.

If you have any questions concerning the foregoing advice, please feel free to call upon the undersigned at 247-7583.

Sincerely,

Karan L. Dunnigan
For the Field Solicitor

Statement of Chairman Delmar "Poncho" Bigby
Indian Land Working Group
on
S. 1586, the Indian Land Consolidation Act Amendment of 1999
before the
Senate Committee on Indian Affairs and the House Committee on Resources
Thursday, November 4, 1999
Room 106, Dirksen Senate Building
Washington, D.C.

I am extremely honored that you invite me to provide testimony on behalf of the Indian Land Working Group. My name is Delmar "Poncho" Bigby, a member of the Assiniboine Nation (Tribe) of the Fort Belknap Indian Reservation, in Montana. I am especially grateful to the members of the Indian Land Working Group for allowing me to testify on their behalf as Chairman of this wonderful organization. Our organization is an "Ad Hoc" group of dedicated individuals from all walks of Indian life. Some of us are Tribal Employees, Tribal Council members, employees of the Bureau of Indian Affairs and extremely concerned private citizens who are directly affected by all of the policies and procedures of the United States Government in the administration of Indian lands.

The Bureau of Indian Affairs has proposed amendments to the Indian Land Consolidation Act (P.L. 97-459; 96 STAT.2515 - dated January 12, 1983, as amended by H.J. Resolution 159 (P.L. 98-608; 98 STAT. 3171 - dated October 30, 1984) introduced by you, Chairman Campbell, as S.1586

We would much prefer that the proposed amendments be rejected by the Committee and the alternative developed by the Indian Land Working Group be the vehicle for the 'management of our remaining resources'. But, we are here to provide the Committee with our understanding and interpretation of the proposed amendments and to offer our suggestions and recommendations on how to improve the proposed amendments so that they are not only beneficial to the Congress and the Bureau of Indian Affairs but also to Tribes and Individual Landowners, and non-Landowners, in their Trust Responsibilities to Tribes and Individual Indians (Native Americans) in the management and administration of our trust resources in accordance with the exacting "highest fiduciary standards" developed by Congressional Acts and Court Decisions.

We respectfully urge you, as Chairman of the Senate Committee on Indian Affairs to conduct field hearings throughout Indian Country, including Alaska, on the proposed amendments. The history of the Indian Land Consolidation Act, and its amendment, is not a very good one. The voice of the grass-root Native American most impacted by this

type of legislation, have not been heard by the Bureau of Indian Affairs, and to a certain degree, our Congressional Representatives. We are not aware of any single Tribal Government or any potential heir, or current beneficiary of Trust Lands that is in agreement with the ESCHEAT portion of the Indian Land Consolidation Act. There are several Tribal Governments who have chosen to compensate heirs of 'Escheated' lands because they do not want to receive any property of their members without just compensation.

We offer the following for consideration by the Committee:

TITLE II

Sec. 2 - FINDINGS: Congress finds that --

(1) - before the semi-colon (;) at the end of the sentence: ADD: and to weaken and destroy Traditional Tribal Governments.

(2) - before the semi-colon (;) at the end of the sentence: ADD: and by the United States Government at the behest of non-Indians desirous of securing FEE SIMPLE TITLE to Indian lands;

(3) - before the semi-colon (;) at the end of the sentence: ADD: until abolished by the United States Congress;

(4) because of the (ADD: lack of comprehensive) inheritance provisions ----

(8) —, which was enacted in 1983; (ADD): further, many individuals blame the "Tribes" for loss of their anticipated inheritance;

(12) –, and requires a solution under Federal law, (ADD) which recognizes the Government-to-Government relationship with Tribes and requires equal participation of Tribes in arriving at solutions that are applicable to the lands under their jurisdiction.

ADD: (13) the descent and distribution of Trust or Restricted Lands is not a racial issue but a Trust issue.

Sec. 3 - DECLARATION OF POLICY - It is the policy of the United States --

(2) to consolidate fractional interests and ownership of those interests into usable parcels (ADD) by the Tribes and individual Indians;

(4) to promote tribal (ADD: and individual Indian) self-sufficiency and self-determination

ADD: (5) to prevent fee patents and foreclosure of Trust Lands and to preserve the Trust Status of Indian lands.

Sec. 202 - For the purpose of this title ---

(5) "heirs of the first or second degree" means patents, children, grandchildren, (ADD: great-grandchildren), grandparents, (ADD: great-grandparents), brothers and sisters of a decedent.

Sec. 205: (a) In General:

Subject to subsection (b), any Indian tribe may purchase — with the consent of the owners of (DELETE: over 50 percent) (ADD: 100% if ten (10) or less owners; 80% if between eleven (11) and forty (40) owners; 60% if forty-one (41) or more owners; PROVIDED: Those members of the Tribe who desire not to sell may require a PARTITION of their fractionated share or an exchange of Tribal lands in accordance with existing and approved Tribal land exchange policies) of the individual interests in such tract.

(B) Conditions applicable to purchase: Subsection (a) applies on the conditions that –'

"(1) Any Indian (ADD: who is a member of the Tribe of the Reservation where the land is located) owning ----

Sec. 206: DESCENT AND DISTRIBUTION OF TRUST OR RESTRICTED LANDS; TRIBAL ORDINANCE BARRING (ADD: NON-INDIANS OR) NONMEMBERS OF AN INDIAN TRIBE FROM INHERITANCE (ADD: OF TRUST LANDS) BY DEVISE OR DESCENT.

(a) Tribal Probate Codes:

(b) Secretarial Approval:

(2) Review and Approval:

(A) NO COMMENT.

(B) QUESTION: Who makes the determination that a Tribal Probate Code is approved "ONLY TO THE EXTENT THAT THE TRIBAL PROBATE CODE IS CONSISTENT WITH FEDERAL LAW"?

(C) NO COMMENT.

ADD: (c) The Secretary must compile any and all Tribal Probate Codes and must provide them to any Probate Proceedings upon request.

QUESTION/COMMENT ON Sec. 206 is "How does a mandate to follow Federal law accomplish the policy enumerated in SEC 3 - DECLARATION OF POLICY: It is the Policy of the United States –

(4) to promote tribal self-sufficiency and self-determination.

Sec. 207 - DESCENT AND DISTRIBUTION; (DELETE: ESCHEAT OF FRACTIONAL INTERESTS)

COMMENT: All of this section must be deleted from this proposed amendments. Administrative/ Bureaucratic proposed solutions will not 'solve' the fractionated heirship problems. The only real positive solutions must be developed at the local Tribal level, which does take into account the means necessary to "protect and preserve the Reservation as an abiding place for present and future generations" and to "provide lands for eligible members for homes and livelihood".

In the event this section is not deleted, we offer the following suggestions to "improve" the proposed amendments.

(a)

(4) The Indian tribe with jurisdiction over the lands devised;

COMMENT/QUESTION: Does the 'Turtle Mountain' reservation located in Belcourt, North Dakota have jurisdiction over 'Turtle Mountain Public Domain Allotments' located in the State of Montana? If no, does the Tribal Government of the B.I.A. Agency having administrative responsibility have 'jurisdiction' over the lands? (EXAMPLE: Fort Belknap B.I.A. Agency administers some 50,000 acres of Turtle Mountain Public Domain Allotments in the State of Montana.)

(C) Devise of Interest in the Same Parcel to more than 1 Person:

(4) Notification to Indian tribes: Not later than 180 days — the Secretary shall, (DELETE: to the extent that the Secretary considers to be practicable) notify Indian Tribes and individual landowners of the amendments made by the Indian Land Consolidation Act Amendments of 1999 ADD: by Certified Mail - Return

Receipt Requested to serve ACTUAL NOTICE. The notice shall list estate planning options available to the owners.

(5) Descent of off-reservation lands:

(A) Indian reservation defined:

(iii) ADD: the boundaries of lands identified by Tribes in accordance with a Tribal designation of aboriginal/historical land base.

COMMENT: What the B.I.A. fails to understand, or is totally unwilling to understand, is that to very many of our People it makes no difference what the economic value of a tract of land may be. The real value to them is not economic, but tied to that tract of land are their culture, memories, and a sense of belonging that no money ($) can equal. An increasing number of our members are forced to make an economic living off the reservation. To them and their descendants, this tract of land, no matter how small the interest may be, is their direct link to their ancestors and their roots. Without this link, they would be as lost as the vast majority of the dominant society. The dominant society searches for their roots to establish a personal sense of connection of who they are and where they came from, which is very sad.

Sec. 207: Descent and distribution; escheat of fractional interests

(B) Escheatable fractional interests

COMMENT: This provision must be deleted from the bill in its entirety!!!!
If the B.I.A. is successful on 2% interest or less escheating, than what is to prevent them from increasing the escheatable interest amount to 10%, 25%, 50%, 75%, 99%?????

Sec. 213. Acquisition of Fractional Interests:

COMMENT: This section must be contractable by Tribes. The 'lien' placed on acquired interests by the B.I.A. prevents individuals from 'consolidating' in a tract.

We thank you for this opportunity to provide some initial comments on the proposed amendments to the Indian Land Consolidation Act. We respectfully request that the record be kept open indefinitely, or until a Bill is actually signed into Law, so that we, and other interested persons, may revise and extend our remarks. We also respectfully request that you conduct field hearings throughout Indian County, including Alaska, so that the local individuals who are so impacted by the proposed amendments have an opportunity to comment.

INDIVIDUAL / TRIBAL LAND CONSOLIDATION PROGRAMS:

The Fort Belknap Indian Community has developed a viable working consolidation program that is worthy of funding for implementation. The concept of the Fort Belknap Consolidation Program has received support of the ILWG, and to a degree, the IAC, in that the concept has been incorporated into the ILWG proposed legislation and also the DRAFT legislation submitted by IAC during the hearing before the Senate Select Committee on Indian Affairs on November 4, 1999.

The Fort Belknap Indian Community Council, on behalf of it's membership and the Tribes themselves, offer the following solution to the PROBLEM OF UNDIVIDED INTERESTS OF LAND WITHIN THE FORT BELKNAP INDIAN RESERVATION.

PURCHASE OF LANDS BY THE FORT BELKNAP INDIAN COMMUNITY AND OR IT'S MEMBERS

****

The Fort Belknap Indian Community has an on-going Revolving Credit Program. The Tribal Revolving Credit Program consist of two major components: (1) Tribal Land Acquisition Program (2) Re-lending Program to Individual members of the Community for Economic Development, which includes Land Acquisition.

Various loans from the U.S. Government have been executed to finance both the Tribal Land Acquisition Program and the Individual Re-Lending Program which have had an impact on the problem of undivided interests and economic development, but does not fully solve the problem because of budget limitations (no funds). We are requesting annual Congressional appropriations of $3,500,000 (three million five hundred thousand) for the next

five (5) years for re-lending to qualified Individual members of the Community and to fund the Tribal acquisition of lands in accordance with the following categories of Loan Programs.

As of this date we have applications from 155 individuals representing 87,160 acres of land with an estimated acquisition value of $2,350,000.00.

The most recent information available to the Fort Belknap Community Council indicates that there are 208 individuals who have mortgaged 136,027.86 acres of land with an estimated value of $27,547,065.63, which if "foreclosure/adverse possession" options were exercised by the lending agency would be subject to foreclosure under existing law.

I. TRIBAL OWNERSHIP OPTION

A. Annual $1,250,000.00 appropriation for a period of five (5) years totaling Seven Million Two Hundred Fifty Thousand ($7,250,000) in the form of a loan/grant for the purchase of lands from those individuals who make application for sale to the Tribe. The application for sale from individuals may be for sole ownership lands or fractionated interest lands.

This appropriation would also include funds for those lands which are being foreclosed on by Lenders. Of the total of $7,250,000.00 requested, the budget would be amended so that sufficient funds would be available to purchase lands which are being "foreclosed" by lending agencies.

As an integral part of this program a **PRIORITY RIGHT OF PURCHASE to the Fort Belknap Indian Community, over and above all other purchasers must be passed into law so that ALL sellers, including outside lenders must offer the land to the Tribe before any other individual or entity** in accordance with the procedures developed for Farmers Home Administration, a Federal Agency that has been directed by Congress to follow the process described below when FmHA finally institutes foreclosure proceedings on Trust lands for which they hold a mortgage (FmHA Instructions 1955.66):

1. Member-owner will be offered leaseback/buyback rights
2. Spouse and children of the former member-owner will be offered leaseback/buyback rights
3. Leaseback/buyback rights offered to:
   a. an Indian member of the Indian Tribe that has jurisdiction over the reservation within which the real property is located
   b. an Indian corporate entity

c. the Indian Tribe

4. If the real property is not leased or purchased by any individual, Indian corporate entity or Indian Tribe pursuant to the above, and all appeals have concluded, the State Director shall "TRANSFER THE PROPERTY TO THE SECRETARY OF THE INTERIOR"

5. When Section III POLICY AND BACKGROUND of the MEMORANDUM OF UNDERSTANDING BETWEEN THE B.I.A. AND FmHA (FmHA Instruction 2000-NN has been implemented the title to the subject land will be conveyed to the United States in trust for the tribe having jurisdiction over such land.

The process described above is currently applicable to members of the Tribe on whose reservation the land is located. This process must be amended to include non-members or non-Indians owning lands within the reservation boundaries, with the exception of the leaseback/buyback option not being offered to the non-member or non-Indian spouse or children of the owner of mortgaged lands.

In order for Fort Belknap to MAINTAIN THE FORT BELKNAP INDIAN RESERVATION AS AN ABIDING PLACE FOR HOME AND LIVELIHOOD FOR IT'S MEMBERS and to PRESERVE THE RESERVATION AS A "HOMELAND", **the process FmHA, as amended, is required to follow MUST BE MADE INTO LAW THAT IS APPLICABLE TO ALL FINANCIERS WHO HOLD A MORTGAGE ON TRUST LANDS.**

B. Annual $250,000.00 appropriation for a period of five (5) years for a total of One Million Two Hundred Fifty Thousand ($1,250,000.00) in the form of a **GRANT** for the purchase of lands from those individuals whose share may be subject to 'ESCHEAT' as contemplated by the Indian Land Consolidation Act, AND/OR to purchase tracts or interests in tracts that are not economically feasible for individuals to retain or acquire through purchase or exchange because they have limited income producing capabilities. Through consolidation of these diminutive interests in the Tribe, the cost of administration to the Federal Government will be significantly reduced. In order to comply with the Constitutional mandate to protect and preserve the reservation, the Tribal Government must acquire those diminutive interests which have limited income producing capabilities.

II. PURCHASE OF UNDIVIDED INTERESTS BY INDIVIDUALS:

INDIVIDUAL CO-OWNER OPTION

A. Annual $1,000,000 appropriation in the form of a **$500,000 Grant Program and $500,000 loan program (50% Grant - 50%**

loan) over a five (5) year period totaling Five Million ($5,000,000.00) available to individual co-landowners who wish to consolidate would be made available to enrolled members of the Fort Belknap Indian Community who, as of the date of the appropriation legislation, are co-owners in the tract, or tracts, of land in which they wish to consolidate.

As a condition to approval of the loan/grant, **the applicant must submit, as a part of the loan application, a non-revocable ESTATE PLANNING document that provides for "inheritance" to a sole owner and prevents further fractionation of the ownership interest in the tract.** The ESTATE PLANNING document must be non-revocable during the term of the loan/grant contract PLUS seven (7) years after final payment of the loan.

The collateral to be used would be a mortgage or an assignment of lease income to the Fort Belknap Indian Community for those shares acquired under this program, in addition to the share they currently own. Provisions must be made to allow for 'mortgage' of an undivided interest in a tract of land to the F.B.I.C. in the event of foreclosure proceedings on a tract in which the client has borrowed from the Revolving Credit Program to acquire an undivided interest under this program. The F.B.I.C. currently acquires an undivided interest in a tract(s) of land through purchase or exchange so there should be no reason that the F.B.I.C. cannot acquire an undivided interest through foreclosure proceedings.

Attached for your convenience and reference is the **"DECLARATION OF POLICIES AND PLAN OF OPERATION of the TRIBAL CREDIT PROGRAM of the FORT BELKNAP COMMUNITY TRIBAL GOVERNMENT"** which will be utilized for the INDIVIDUAL ACQUISITION OPTION.

TERMS: 20 to 40 years
INTEREST: 3% - 5%
MAXIMUM LOAN: $10,000.00
MAXIMUM GRANT: $10,000.00

FORECLOSURES IN ACCORDANCE WITH ORD. 3-78 adopted November 6, 1978

APPLICATION: In accordance with established Revolving Credit Loan Program in existence.

CONDITIONS: **Applicant MUST BE a co-owner** of a tract, or tracts, of land AS OF THE DATE OF THE CONGRESSIONAL ACT. Applicant(s) who acquired an interest in a tract, or tracts, of land after the date of the Congressional Act, except for inheritance (intestate or by will), will not be eligible for this program.

Applicant must participate in a "Individual Development Account (IDA)" which provides that the participant must 'save' up to 10% of the amount of the loan. A history of payment of rental (in the case of HUD low rent project); mutual home buyer payments (in the case of HUD mutual help project); electrical bill without requesting special assistance from the Tribe or other sources; telephone bills; utilities; etc. may qualify as a portion of the 10% IDA.

III. PURCHASE OF ALL UNDIVIDED INTERESTS IN A TRACT BY INDIVIDUALS WHO CURRENTLY OWN NO LANDS OR UNDIVIDED INTERESTS:

Many Adult (18 years or older) Enrolled members of the Fort Belknap Indian Community do not own any lands or interests in land and those that do have very limited finance options to acquire additional land. Annual appropriation of $1,000,000 for a period of five (5) years totaling $5,000,000.00 in the form of a loan program available to individuals who do not own any lands or wish to acquire additional lands. This program would be available to individuals who will be acquiring 100% interest in lands in which they have no current ownership. As a condition to approval of the loan, **the applicant must submit, as a part of the loan application, an ESTATE PLANNING document that provides for "inheritance" to a sole owner and prevents further fractionation of the ownership interest in the tract.** The ESTATE PLANNING document must be non-revocable during the term of the loan contract PLUS seven (7) years after final payment of the loan.

The individuals participating in this program would be required to offer to purchase **ALL (100%)** interests in a tract of land. ALL of the lands acquired under this program would be mortgaged to the Fort Belknap Indian Community. The program would be available only to those individuals who make application. A higher priority of approval would be extended to those individuals who are not currently in a position to become agricultural operators because they are pursuing a 'secondary education (college or university) or who are in the Military.

As a contractual condition for receipt of this funding, the individual must complete **"ESTATE PLANNING"** and must retain the property in their ownership and it cannot be sold or exchanged for a period of **seven (7) years** from date of final payment of the loan amount(s).

Attached for your convenience and reference is the **"DECLARATION OF POLICIES AND PLAN OF OPERATION of the TRIBAL CREDIT PROGRAM of the FORT BELKNAP COMMUNITY TRIBAL GOVERNMENT"** which will be utilized for the INDIVIDUAL ACQUISITION OPTION.

TERMS: 20 to 40 years
INTEREST: 3% - 5%
MAXIMUM LOAN: $10,000.00
FORECLOSURES IN ACCORDANCE WITH ORD. 3-78 adopted November 6, 1978
APPLICATION: In accordance with established Revolving Credit Loan Program in existence.

CONDITIONS: Applicant MUST purchase 100% of the ownership in the tract, or tracts, for which the loan is being requested. Applicant MUST NOT own any interest (undivided or sole) in any tract of land within the Fort Belknap Indian Reservation.

Applicant must participate in a "Individual Development Account (IDA)" which provides that the participant must 'save' up to 10% of the amount of the loan. A history of payment of rental (in the case of HUD low rent project); mutual home buyer payments (in the case of HUD mutual help project); electrical bill without requesting special assistance from the Tribe or other sources; telephone bills; utilities; etc. may qualify as a portion of the 10% IDA.

To verify the proposed acquisition/consolidation efforts described, a survey was conducted on Fort Belknap with the following results:

INDIAN LAND WORKING GROUP (SURVEY)
AGE GROUP (18-19) 3 responses (30-49) 6 responses (50+) 11 responses GROS VENTRE
(18-29) 3 responses (30-49) 10 responses (50+) 3 responses ASSINIBOINE

(MOST COMMON RESPONSES RECORDED)

1. Do you know the "History" of the Fort Belknap Indian Reservation (Yes) 2 (No) 3
   a. If so, how did you learn about the History?
   - Elders, Parents, College Classes, Reading
   - My Mom
   - reading and listening
   - Somewhat, from grandparents and family
   - Stories from elders which I heard
   - From a relative who is very knowledgeable and a history major.
   - From Elders, 100 years of Fort Belknap paper
   - Old Indian stories told
   - Grand parents
   - My Grandmother and other elders

2. Do you own land? (Yes) 2 (No) 4
   a. Is it undivided (estate) lands that you share with other people? (Yes) 1 (No) 2
   b. Is it sole owner (only you)? (Yes) 1 (No) 3
   c. How did you come to own the land?
      - willed by my father
      - inherited
      - Father
      - Through my mother
      - Inherited - gift deeded
      - Inherited - grandparents
      - Gift deed
      - Inheritance

3. Did you inherit your land? (Yes) 2 No) 3
   a. Who did you inherit from?
      - My father
      - Grandparents and parents
      - Father
      - Grandpa

4. Do you know why you did not inherit any land? (Yes) (No)
   Why?
   - Mother didn't have enough land to give
   - I did inherit

5. Are there any co-owners in your estate land that you feel (believe) are not entitled to share in your land? (Yes) (No) 6
   a. If so, why do you feel this way?
      - No Blood relationship

6. If you own undivided (estate) lands, have you ever wanted to become sole owner of a certain piece of your estate land? (Yes) (No) 6

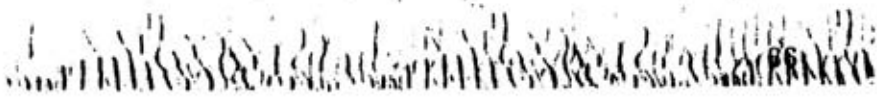
7. If you ever wanted to do this, how would you go about doing it?
   - Buy some from someone
   - Tribal Land Committee
   - Borrow from Revolving Credit or from whatever institute will help me
   - Go to the land office and find out
   - Estate
   - Purchase the remaining land
   - I would like to own ranch

8. Do you wish you owned land? (Yes) 4 (No)

9. Are you a land user? (Yes) 1 (No) 2
   a. How do you use the land?
   - I would build a house on it
   - Lease income
   - Hay land - graze cattle
   - Ranching

10. Do you think you should be able to buy land from the Tribe? (Yes) 5 (No)

11. How would you get the money to buy land if you wanted to buy some, either from the Tribe or some other person?
   - Bank, or ask the Tribe to get some funds.
   - Earn it
   - I have no desire to buy land
   - Bank or Turtle Mountain
   - Savings
   - Tribe
   - Loans
   - Tribe
   - Most likely a loan
   - Bank loan
   - Short term loan
   - Tribe
   - Borrow from revolving credit
   - Make out a loan from the bank
   - Hard to find financing, but would borrow from Tribe or a bank



12. How do you feel about non-Indians (Whites) inheriting land on the reservation?
- Not fair to the enrolled Indians. The enrolled Indians should come first.
- I don't think they should
- I don't think they should be able to get it. They already took all our land
- If it was willed to them - I think it should be their choice to keep it or sell it
- Don't know
- They should not
- They should never have it
- I don't think it's a good thing - the Tribal Government should do something about this
- This should not happen, this is our land.
- I don't think they should own any reservation land.
- They should never own
- It's not fair. I have no land at all. Why should a white man hat land.
- They took enough - every effort should be made for 100% Indian
- There are more Whites and Half-Breeds own land than I do
- No way
- They should never own it
- Non-Indians should never own land on our Reservation.
- I believe the FHA should not get tribal lands, must stay within enrollees
- I think that if your enrolled member, you could inherit land
- Oppose it

13. Do you understand why you do not pay taxes on "Indian Land"? (Yes) 3 (No) 3

14. Who do you think should be responsible for informing you about the land?
- The Tribe, and the council member who is assigned to the Land Department.
- The Tribe
- The person I got it from
- Bureau of Indian Affairs
- The Tribe
- Bureau of Indian Affairs and Tribal Council
- BIA and Tribal Governments
- Tribal land personnel, along with Tribal Land Chair
- Myself and from Land Department
- Tribal Land Office
- Land own and BIA
- The Government
- Tribe
- Tribe
- The Tribal Land Department
- Community meetings, -you parents

15. Would you go to any "workshops" on land ownership, land leasing, land purchase, land exchange, homesites, etc. if the Tribe or BIA were to hold any? (Yes) 5 (No) 1

16. What is the most important thing about land to you?
- Build off it, farm, ranching
- Quality
- A place for cows and other animals
- Housing and leasing
- Having a home on it
- It provides me with belonging somewhere
- To own land for the future generations and keep it in trust and not be like Crow, Ft. Peck, etc.
- It is sacred and provides home sites. It belongs to us to live off.
- Owning your own piece of land is something you should keep in your family.
- I would own it
- Being able to own it
- A place to live and work white anyway
- Ownership
- Inherited
- It belongs to me
- Its value and should stay within the family
- I really don't know right now

17. Do you think there should be a 'limit' on how much land an individual Indian should be able to own on the reservation? (Yes) 2 (No) 4

18. If you had the power and could do anything you wanted to about land issues that concern you, what would it be?
- I would buy as much land as I could.
- The fact that it should be kept amongst Indians
- I would give every family the same amount of land
- Assist people with undivided lands, help people purchase land
- Get rid of all the fee land on the Reservation make 100 percent Indian owned
- I would give all enrolled members 300 acres apiece to live off, build homes, and pass down generation to generations
- To let tribal people buy tribal land
- Getting back the land taken by government
- To give myself some
- By more land - increase reservation land base
- Build a house and cattle on it
- Goes into family
- Make sure all land stays with Tribe or enrolled members
- To make sure it stayed with enrollees and in the family - no destruction of lands
- Get land
- Allow individuals to consolidate their undivided interests

19. Do you have any information on how it was decided in the past where a person/family could camp in the camp grounds?
- No (3)
- It was by your position in the band you came from. What you earned.
- Yes, my mother told me about different families camp; who was responsible for set up

20. Did the ancestors have certain places where they camped through-out the year?
- Winter time would move to the mountains. Moved to different areas.
- Yes, they followed the Buffalo around
- Where ever they like

21. Were certain individuals (families) allowed to pick certain spots that were 'theirs' for picking berries, medicines, etc. Or did everyone have the same right to pick in any area?
- No, cause we would move all the time to pick sweet grass. We shared
- They had their own spots, and allowed others access when asked.
- Everyone had the same right to pick any area
- First come, first served

22. Is there anything about the land that you would be willing to tell about that has not been asked?
- All Tribal enrolled Gros Ventre members should be able to have land no matter what, instead of getting the per-cap each tribal member should be able to get allotted a piece of land.
- Is the Fort Belknap Reservation ever going to be truly enrolled member owned? Is this possible? In the future will the Gros Ventre and Assiniboine own Land?
- What about O&M charges

23. In your opinion, does the Tribal Council do a "good" job in working on land issues, either from a land user, land owner, or someone who owns no land viewpoint? (Yes) 1 (No) 2
- Don't know much about this issue, but as far as I know that the land planner lets the people know about certain issues
- I think they do a good job but need to inform people more on their land
- XXXX was running his cattle on estate land and had them trespassed, impounded, and was harassed by the BIA and Tribal Governments while other people were doing the same thing and nothing was done about it. Lets be fair and treat everyone equal.
- They have no concern for people who don't have land if these people have concerns. The Council are only interested in prime land for themselves and their family members.
- I own no land so I cannot judge this issue at this time.
- They are to concerned about petty issues and not what can benefit the people
- I don't know - never had to work with the Council on land issues
- No, because politics become involved
- Tribal Council needs to first be positive in order to conduct their meetings before working on any issues!
- I don't think the council really cares about this issue. The Tribal Council is not that honest
- Only certain people or political families can get satisfaction

24. Does the BIA do a "good" job in administering land issues, either from a land user, land owner, or someone who owns no land viewpoint? (Yes) 1 (No) 2

- Really don't know about BIA area. No help at all.
- I think they do a good job. Need more information on private land
- The BIA will trespass an Indian on short notice but it takes forever to trespass an outsider on Non-Indian
- The couldn't care less! Even though their workers are enrolled here. Everyone is for themselves! They need to get rid of the BIA - they don't care about our people or our communities. Some workers are not from Fort Belknap and they don't care, nor do they have any investment in our community and our land issues.
- I own no land so I cannot judge this issue at this time.
- To caught up in doing minimum of work to help you
- I don't know
- In my opinion we do not need the BIA
- It seems that the BIA wants control of land or any issue
- Bureaucratic management from the BIA has never helped our people. Only certain individuals that have an "in" would benefit or be updated. Also BIA appraisals take far to long to get finished

DRAFT PROPOSAL TO ADDRESS FRACTIONATION
ON INDIAN TRUST LAND

Compiled by the Indian Land Working Group
Revised April 1997

To advance the self-determined management, use and control of allotted and fractionated trust lands by Indian people; to promote the consolidation of fractionated land interests into viable economic units by the removal of regulatory barriers; and to create and enhance the necessary programs and process for this purpose.

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 Trust Estate Planning and Land Title management Improvement Act".

SECTION 2. FINDINGS:
Congress finds that:

(1) The United States has a trust relationship with Indian Tribes and people which includes a trust responsibility to protect, conserve, and provide for the utilization and management of Indian lands;

(2) The United States sought to assimilate Indian people into the "mainstream" and acquire additional lands by allotting tribal lands to individual tribal members, declaring remaining lands surplus, and making tribal land available for homesteading, surplus sale, and other uses in direct violation of treaty agreements;

(3) During this period, allotments were removed from trust status by forced fee patent, sale by both Indian landowners and the federal government, probate proceedings under state inheritance law, foreclosures, and surplus sale of treaty land, resulting in over 90 million acres of Indian homelands passing out of Indian ownership; some of these practices continue today.

(4) With the passing of each generation, the number of owners per trust allotment increased, so that today it is not uncommon to find numerous allotments on many reservations having multiple owners often numbering in the hundreds; with many Indian landowners holding interests on multiple reservations;

NOTE: Along the Canadian Border, many Tribal Nations have members on both sides of the lines. An example is the ASSINIBOINE Nation have Assiniboines in Canada and the United States. If a Canadian Assiniboine inherits land on Fort Belknap or Fort Peck, a FEE PATENT is issued to the Canadian and the land goes out of Trust status. Historically, the

taxes are not paid on the land and some person, usually a non-Indian, will pay the taxes on the land for a period of time, usually seven (7) years, that apply for a TAX DEED from the County Courthouse. Through this process a person can become the owner of land on the reservation for a very small amount of the value of the land.

(5) Indian landowners encounter a federal maze of regulations along with the increasing growth of trust interests held in common, making it difficult for many heirs to make practical use of the land;

(6) Archaic federal Indian land policies and over-regulation have helped to perpetuate the paternalistic management of Indian land over the past 100 years.

SECTION 3. PURPOSE:
It is the policy of the United States and the purpose of this Act to:

(1) Fulfill the federal trust responsibility to Tribes and individual Indians which exists under Treaties, executive orders, court decisions, and Acts of Congress related to maintaining the trust status of the land; and managing the land for highest and best use purposes;

(2) Facilitate estate planning and real estate transactions which provide for the beneficial use of Indian lands by the Indian people who own the lands;

(3) Support tribal communities in the development of land ownership data bases; fractionated land acquisition lending and grant programs; and tribal inheritance laws which enable the Indian land owner to consolidate fractionated title to create viable economic units of land;

(4) Preserve the trust status of Indian lands located both within and outside the reservation boundaries;

SECTION 4. DEFINITIONS:
In this Act:

(1) "Alaskan Native" means an individual who is an Alaskan Indian, Eskimo, or Aleut, or any combination thereof. This term includes an individual who is regarded as an Alaskan Native by the Alaska Native Village or group of which he or she claims to be a member and whose father or mother is (or, if deceased, was) regarded as an Alaskan Native by the Alaska Native Village or group. The term includes any Alaskan Native as so defined, either or both of whose adoptive parents are not Alaskan Natives.

(2) "Indian means any individual who is a member, or a descendant of a member, of a North American tribe, band, Pueblo or other organized group of native people who are indigenous to the

continental United States, or who otherwise has a special relationship with the United States through treaty, agreement, or some other form or recognition. For purposes of this Act, the term also includes an Alaska Native.

COMMENT: This definition is in 'conflict' with body of the draft because of the proposal to limit inheritance to only enrolled members of a Tribe.

(3) "Indian Landowner" means an individual Indian owner of an interest(s) in trust or restricted land.

(4) "Undivided Interest" means the portion or rights in property owned by tenants in common or joint tenants whereby each tenant has an equal right to make use of and enjoy the entire property.

(5) "Fractionation" means to divide or break-up into undivided interests.

(6) "Fractionated Land Consolidation Plan" means a plan developed through a documented community based planning process and enacted by the tribal government, defining fractionated land consolidation goals and a means of reducing fractionation through gift deed, sale, purchase, and exchange among owners and/or other Indians or tribes.

(7) "Grantor" means one who has control or authority over real property which includes the right to give, confer, consent, allow, surrender or transfer this property with or without compensation.

(8) "Lease Council" means the entity authorized to act for the landowners under a landowners agreement.

(9) "Landowners Agreement" means a management agreement among landowners.

COMMENT: The 'agreement' should not be limited only to the landowners of a single "tract", but should be expanded to mean those individual owner's of multiple tracts in a georgraphic area my enter into an agreement for a "Lease Council" to act on behalf of multiple tracts .

(10) "Lineal Descendant" refers to descent by a direct line of succession in ancestry; includes and adopted child who is an Indian.

COMMENT: This definition may be in conflict with the "inheritance" portion of the draft.

(11) "Trust or Restricted Land means a tract of land, all or a portion of the title to which, is owned by one or more individual Indians or a tribe and is held in trust for them by the United States or is subject to federal restrictions on alienation.

(12 "Secretary" means the Secretary of the Interior unless otherwise specified.

(13) "Tribal Government" means the elected body that governs a tribe by custom, tradition, constitution or other governing document.

(14) "Tribe" means a distinct political community of Indians which exercises powers of self-government; this includes those Alaskan Tribes included in the Federal Register listing of February 16, 1995.

(15) "Tribal Corporate Entity" is an entity recognized by the Tribe.

SECTION 5. EFFECTIVE DATE; SAVINGS.

(1) Except as otherwise specifically provided herein, this Act and the amendments made by it shall be effective upon enactment; the repeals or amendments shall not be effective so as to prevent the completion of any transaction pending approval or other action by the Secretary if such transaction is completed within six months of enactment of this Act.

(2) The authorizations in this act are in addition to and not in derogation of any other authorizations.

TITLE I - ESTATE PLANNING

SECTION 101. PURPOSE.

To require the establishment and maintenance of an estate planning program to:

(1) Dramatically increase the use of wills and other methods of devisee among landowners;

(2) Substantially reduce the quantity and complexity of Indian Estates which pass intestate through the probate process while protecting the rights and interests of Indian landowners.

(3) Require the provision of adequate services to achieve these purposes.

SECTION 102. ESTATE PLANNING.

(1) The Secretary shall implement an estate planning program to inform, advise, and assist Indian landowners in accessing the necessary records, and using the various methods, to facilitate transfer of lands to heirs of choice.

(2) Activities under this title shall be executed within the guidelines of the established tribal probate code or fractionated land consolidation plan.

(3) The Secretary shall conduct or provide for regional estate planning workshops for tribes and landowners every six months.

SECTION 103. REPORT AND NOTIFICATION TO LANDOWNERS:

(1) Within two years of the enactment of this provision, the Secretary shall provide each Indian landowner of trust or restricted interests, a report listing their landholdings, other co-owners, and each owners percent of ownership in the respective tract.

(2) This notification shall include information on estate planning options under federal and tribal law, that are available for consolidation or disposal of the interests, including but not limited to: preparing and executing a will; joint tenancy with right of survivorship, negotiated sale, gift deed, and exchange.

SECTION 104. PROVISION OF ADEQUATE SERVICES.

To carry out this title and other provisions of this Act, the Secretary and/or by contract, grant, or compact with tribes or lease councils, shall provide for estate planners/outreach workers, appraisers, realty staff, credit staff, and certified surveyors.

SECTION 105. REPORT TO CONGRESS.

The Secretary shall report to congress annually on the implementation of this title immediately prior to submission of the President's Budget.

TITLE II - TRUST LAND RECORDS MANAGEMENT

SECTION 102. PURPOSE.

To improve land records administration in order to facilitate the consolidation of fractionated title in the areas of probate and real estate transactions.

SECTION 202. LAND RECORDS SYSTEM REQUIREMENTS.

The Secretary shall promote the formation and maintenance of a computerized land ownership records/payment dispersal system at the local level to enable tribal communities to:

(1) Evaluate and implement plans to consolidate fractionated title;

(2) Certify title status reports for mortgages, probates, appraisals, and other land transactions;

(3) give owners a meaningful accounting of their land (including income derived and allotment from which it is derived) to assist in land consolidation and estate planning initiatives;

(4) Reduce the number of ownership records.

SECTION 203. STAFFING, RESOURCES AND SAFEKEEPING.

(1) The Secretary shall provide for the necessary staff and resources for local design and administration of a land records system by making funds available to an appropriate, tribally

approved agency or organization.

(2) An appropriate, tribally approved agency or organization will serve as a repository for land records, but the daily use, maintenance, and control of these records will remain at the local level.

SECTION 204. AID TO TRIBES AND LEASE COUNCILS.

The Secretary shall make grants to tribes, landowner associations, and lease councils to aid in the development and implementation of programs for the creation and maintenance of accurate and accessible land ownership data bases. The data bases shall include, but not be limited to, information on ownership, locations (mapping), yields and income, zoning, lease contracts/ permits, current and potential uses, rights-of-way, and legal descriptions.

TITLE III - REAL ESTATE TRANSACTIONS

SECTION 301. PURPOSE.

To remove the regulatory and administrative barriers which obstruct consolidation of fractionated title.

SECTION 302. FRACTIONATED LAND CONSOLIDATION PLAN.

(1) Any tribe may adopt a land consolidation plan to address fractionation providing for the sale and exchange of any trust or restricted interests for the purpose of consolidating fractionated title.

(2) If a tribe elects to develop a plan as described in Sec. 302(1), the plan shall be developed in consultation with the owners of the trust or restricted interests who will be impacted.

(3) Unless restricted by a tribe's fractionated land consolidation plan or tribal law, all real estate provisions of this Title shall apply on trust or restricted land.

SECTION 303. APPRAISALS.

(1) An appraisal is an opinion of value supported by facts which shall include land use designations as determined by tribal ordinance or Indian landowner use, where a tribal ordinance is not in effect.

(2) An appraisal will be required unless waived in writing by the grantor.

(3) An appraisal prepared for the BIA, Tribe, or Indian landowner, shall comply with the uniform Standards of Professional Appraisal Practice (USPAP) standards as promulgated by the Appraisal Foundation in Washington, D.C.

(A) Any appraiser commissioned by the BIA, Tribe, or Indian landowner to prepare an appraisal, must be licensed or certified within the State in which the Indian land is located.

COMMENT:

(B) The type of format followed in preparation of the appraisal report must be approved by the entity commissioning the appraisal and must follow USPAP guidelines.

(C) The BIA or tribe shall maintain a data base on real estate transactions which will be available to appraisers, tribes, and landowners to assist them in determining fair market value/land valuations.

SECTION 304. TRUST AND RESTRICTED LAND TRANSACTIONS.
(1) The sale or exchange of trust or restricted interests may be less than the fair market value.

(2) An individual may sell or exchange a trust or restricted interest(s) to, first any lineal descendant of the original allottee of the tract, then a co-owner in the tract, then to any tribal member and then to the Tribe.

(2) Notice of the sale or exchange will be given to all interested parities to include those entities listed in 304(2).

(4) The party first in order will have 30 days to exercise the right to purchase or exchange a trust or restricted interest(s)

(5) An Indian may gift deed a trust or restricted interest to the tribe or another Indian and may reserve any rights-of-way, water, or mineral rights. The Secretary shall not require an appraisal, or that the grantee be a lineal descendant as a prerequisite to such a transfer.

SECTION 305. PRESERVATION OF TRUST OR RESTRICTED STATUS.
(1) Any person who seeks to petition to obtain a fee patent on their land, must first, 30 days prior to the petition, advertise in local media of their intent to obtain a fee patent.

(2) If a petition is filed with the Secretary for a patent in fee for land or interests therein, which is then offered for sale, each of the co-owners, if applicable, other members, then the tribe shall have 180 days from the date of notification of such petition or sale, to acquire the interests. Funds appropriated under Title IV of this Act may be used for this purpose.

(3) In the event of default under a federally approved lending program on a loan secured by trust land or interests therein, the following foreclosure proceedings shall apply:
(A Member-owner will be offered leaseback/buyback rights;
(B) Spouse and children of the former member-owner will be offered leaseback/buyback rights;
(C) Leaseback/buyback rights offered to:
(a) Indian member(s) of the Indian Tribe having jurisdiction where the property is located.
(b) A tribal corporate entity;
(c) The Tribe having jurisdiction where the property is

located.

(D) If the real property is not leased or purchased by any of the aforementioned entities, and all appeals have concluded, the property will be transferred to the Secretary of the Interior and held until such time as one of the eligible entities can purchase/ lease the land.

SECTION 306. INDIAN LANDOWNER AGREEMENTS.

(1) Indian landowners may enter into an Indian landowners agreement for the purpose of managing and administering a lease in multiple ownership. A lease council elected by the landowners may act in their behalf in all matters related to the lease as defined by tribal code and/or federal regulations.

SECTION 307. REPEAL AND AMENDMENT OF PROVISIONS.

(1) Sec. 201, 202, 203, 204 subsections (a) and (b), 205, 208 - 212 of the Indian Land Consolidation Act (P.L. 98-608) is repealed.

(2) Section 3(a) of P.L. 101-301, "A bill to make miscellaneous Amendments to Indian Law and for Other Purposes" is amended by striking out "section 2 and 17" and insert in lieu thereof, "sections 2, 5 and 17" and by adding a colon and the following proviso before the period at the end thereof "Provided, that nothing in this section is intended to supersede any other federal provisions of Federal law which authorizes, prohibits, or restricts the acquisition of land or the creation of reservations for Indians with respect to any specific tribe, reservation, or state(s).

TITLE IV - FINANCIAL ASSISTANCE

SECTION 401. PURPOSE.

To provide financing to tribes and individual Indian landowners for consolidation of fractionated interests. Tribes must have a fractionated land consolidation plans to access funds provided for in this title.

SECTION 402. LOANS FOR ACQUISITION.

(1) Funds shall be appropriated under the Department of Agriculture "Indian Land Acquisition Fund" to provide loans to tribes and individual Indians for acquisition and consolidation of fractionated trust or restricted interests.

(2) The Secretary of Agriculture may make loans to tribes for relending to individual Indians for the acquisition and consolidation of fractionated trust or restricted interests.

(A) A Tribe receiving loans under this subsection shall deposit the funds in a federally insured financial institution of choice.

(B) Amounts collected in repayment of loans and as interest or other charges, may be utilized in making additional loans, and for the payment of interest and repayment of principal to the

Secretary of Agriculture.

SECTION 403. GRANTS FOR ACQUISITION.

(1) Funds appropriated under the Department of Agriculture Indian Land Acquisition Fund, may be used by the Secretary of Agriculture to make grants to tribes and individual Indians for the acquisition and consolidation of fractionated trusty or restricted interests.

SECTION 404. LAND STATUS.
(1) Any lands purchased with funds from this section will remain in trust or restricted status.

TITLE V - PROBATE

SECTION 501. APPLICATION OF TITLE.

(a) The provisions of this title shall apply to all trust or restricted lands administered by the United States except as hereinafter provided. Tribes may, by formal resolution filed with the Secretary, elect to opt out from application of this title or any provision thereof.

(b) Upon receipt of a formal subsection (a) resolution, the Secretary shall immediately notify all Department of Interior agencies and tribes performing inheritance functions of such resolution or code.

(c) The Secretary shall publish a list of tribes, with date of action, that have opted out from application of this title.

(d) Tribal intestate succession codes legislatively enacted prior to the date of this legislation are not superseded by Section 504.

(e) The trust preservation limitations set forth in Section 502 shall be read in pari materia with existing federally legislated inheritance codes. Tribal codes, if more restrictive, shall apply.

(f) Subject to Secretarial approval, special tribal inheritance codes and changes thereto, may be enactED to apply to lands on reservations or otherwise subject to a particular tribes jurisdiction in lieu of the provisions of this title.

(g) A compilation of approved codes and changes thereto, indicating approval date, shall be maintained by the Secretary. Notification of code approval and approval of changes shall be immediately provided to the Department of Interior agencies and tribes performing probate functions.

SECTION 502. PRESERVATION OF TRUST STATUS.
Non-Indian inheritance of trust or restricted lands shall be limited to receipt of a life estate with remainder over to the next Indian heirs in line of inheritance. Non-Indian heirs-at-law shall receive a life estate to the extent of their standard intestate

share. Eligible non-Indian devisees shall receive a life estate in the full share devised to them by will.

SECTION 503. ELIGIBLE WILL DEVISEES.
(a) No person shall be entitled to receive trust or restricted lands by devise except the decedent's heirs-at-law relatives within the first and second degree, members of the tribe with jurisdiction over the lands devised or the tribe with jurisdiction over the devised lands.

(b) A decedent without family members in any of the identified categories in subsection (a) may devise his estate or particular assets thereof to any devisee related by blood.

(c) Devises to multiple beneficiaries shall be construed as joint tenancies subject to right of survivorship.

SECTION 504. INTESTATE SUCCESSION.
(1) Except as limited by Section 502, whenever any Indian dies possessed of any interest in trust or restricted land and has not executed a will disposing of such interests, such interests shall descend as follows:
(a) A live estate to the surviving spouse
(2) The entire estate shall descend as follows:
(a) To the decedent's children in equal shares by right of representation;
(b) If the decedent is not survived by children or issue thereof, to the decedent's parents in equal shares or to the survivor of the two;
(c) If the decedent is not survived by children, issue thereof, or parents, to the decedent's brothers and sisters without right of representation.
(d) If the decedent has no heirs under subsections (a), (b), or (c), the assets of the estate pass to the tribe with jurisdiction over the interests.

(e) As to off-reservation interests not subject to the jurisdiction of any tribe and for which no heir exists under subsection (a), (b), or (c), the Secretary shall maintain and administer said interests in trust, in a land pool designated to hold allotted land interests not eligible for inheritance under Section 104 (2) (a) - (2) (d).

SECTION 505. PRETERMISSION.
If an Indian testator dies without having made a will to include afterborn children, and the omission is the product of inadvertence rather than an intentional omission, afterborn children shall be given a life estate in all trust or restricted assets of the estate in all trust or restricted assets of the estate in the amount of the child's intestate share.

SECTION 506. REPEAL; SAVINGS.
Section 207 of the Indian Land Consolidation Act is hereby repealed but neither such repeal nor the enactment of this act

shall invalidate any law or pert thereof enacted by a tribe under said section 207.

TITLE VI - GENERAL PROVISIONS

SECTION 601. TAX EXEMPTION.

All lands or interests in land acquired for an Indian or Indian tribe under authority of the Act shall be exempt from Federal, State, and County taxation.

SECTION 602. AUTHORITY OF TRIBAL GOVERNMENT.

Nothing in this Act shall be construed as vesting the governing body of an Indian tribe with any authority which is not authorized by the constitution and by-laws or other organizational document of such tribe.

SECTION 603. WAIVERS.

A tribe can at any time waive a 25 CFR provision which restricts implementation of a tribal fractionated land consolidation plan.

TESTIMONY OF ROXANE J. POUPART, DIRECTOR OF TRIBAL LAND DEPARTMENT
LAC DU FLAMBEAU BAND
OF
LAKE SUPERIOR CHIPPEWA INDIANS
BEFORE THE
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON S. 1586
THE INDIAN LAND CONSOLIDATION ACT AMENDMENTS OF 1999
NOVEMBER 4, 1999

Mr. Chairman and Members of the Committee, my name is Roxane J. Poupart, and I am the Director of the Tribal Land Management Department for the Lac du Flambeau Chippewa Tribe of Wisconsin. I am here as the Representative on behalf of the Lac du Flambeau Tribal Government to provide the committee information on how the Land Consolidation Pilot Project implemented by the Bureau of Indian Affairs is working for Lac du Flambeau. Lac du Flambeau is one of three Reservations selected to participate in the Land Consolidation Pilot Project for fiscal year 1999.

The Lac du Flambeau Indian Reservation is located in northcentral Wisconsin, approximately 180-300 miles from any major metropolitan area. There are more than 1600 Tribal Members of the Lac du Flambeau Band that reside on the reservation. **Exhibit A illustrates Lac du Flambeau Land Ownership Status.** The Reservation is approximately 86,000 acres in size established and defined pursuant to the Treaty of 1854 between the United States and the Chippewa Indians of Lake Superior and Mississippi; dated September 30, 1854 (10 Stat. 1109). The Tribe has a very diverse ecosystem with an enormous responsibility to police, protect, enhance, and conserve the land and its trust resources for future generations. Of the 86,000 acres, approximately 40,000 acres are forested , 20,000 acres of lakes, 34 miles of creeks, rivers and streams, 24,000 acres are wetlands (entire northern one-third of the reservation) with only 2,000 acres of tribal land designated for housing and leasehold properties. Development within our area is predominately residential and confined around the lakes and downtown area.

The three pilot reservations are Lac du Flambeau, Lac courte Oreilles, and Bad River. Lac du Flambeau as the two other Bands consist of allotted land having been made in the 1850's, well before the enactment of the General Allotment Act in 1887. Fractionations on these reservations are the most severe examples in the Great Lakes area. Although, Lac du Flambeau has not received a specified amount under the Pilot Project, to date, the Bureau of Indian Affairs have expended $700,000.00 for Lac du Flambeau. In addition to the Pilot Project, the Tribe has worked diligently in its own efforts to reduce the severe problem of fractionation. In fiscal year 1998-1999 the Tribe appropriated $1.5 million under two separate referendums for the purchase of allotted and fee lands. We acquired from 153 heirs representing 1755 undivided interests. In fiscal year 1999-2000 the tribe appropriated another $1 million to acquire and consolidate lands

in order to utilize land for housing, economic development, and natural resource management. The most recent data received from the Chippewa Housing Authority, tribal members on the waiting list for housing is 268 individuals, a majority of which consisting of a two or three household member composition. This indicates the existing severe overcrowded conditions on the reservation. In order for the tribe to address the housing shortages and overcrowded living conditions, more land must be acquired and more land must be consolidated.

The strongest point and most effective part of the Pilot Project is that it has enabled the Tribe to re-establish their land base which had been decimated by the allotment policy. By 1966, approximately 25% (29,101 acres) of the original reservation land base was allowed to become alienated and currently is owned by non-Band Members. Many of the allotments that have left Indian ownership include our most desirable shorelines around the lakes. To date, the Tribe has re-established 1,181.09 allotment acres, this includes the acquisition of two (2) entire allotments within our designated wildlife area. **Exhibit B** identifies allotted land ownership data. Fractionated ownership of Indian lands is a problem that not only threatens the administrative ability of the Bureau of Indian Affairs it makes utilization of the lands very difficult and sometimes impossible for the individual owners including the tribe. **Exhibit C** is a example of an attempt to consolidate several parcels under the pilot project. To make this a viable unit its time to take this consolidation attempt one step further and acquire those fractional interests greater than 2%.

There is only a few residential leases on allotted land in Lac du Flambeau. Allotment land base has some choice lakeshore but is predominately forested backland and undeveloped. To recoup proceeds from these inherited land interests as outlined in the Pilot Project appropriation language maybe far reaching. *For example, the Bureau acquiring into an 80 acre allotment from 12 heirs representing less than 1% undivided interests and the parcel generates (0) zero income. The number of heirs are still to numerous to get the required approval for a lease and any damages received from a right-of-way have been waived or already disbursed. Under the forest management plan the next timber sale or improvement project is not anticipated for another ten (10) years.* If a parcel is not generating income how and when will income be generated? It is not clear nor has the Tribe been consulted on how to address the economics of these acquisitions. Another concern we have is the time period of these title transfers to the tribe. It is not clear whether this process will take days, months or years. Other areas of encountered dilemmas have been in the transition of payments to tribal members, confusion when payments would be received by members, denial of land sales payments, breakdown in communication and consultation, and regression to the old method of processing land sales.

Under PL93-638 the Tribe contracts certain Real Estate functions of the Bureau of Indian Affairs. Tribal Lands Program currently has a staff of three (3) that provides real estate services and routinely prepares and processes trust and fee title conveyances, sales, purchases, exchanges, partitions and gift conveyances. There are four (4) attorneys that contract with the tribe specializing in Contracts, Housing and Indian Land Tenure issues. The knowledge and administrative experience of the Tribal Land Program has positioned the Tribe to administer the

Land Consolidation Pilot Program.

The tribe supports the Land Consolidation Pilot Project and recommends funds be appropriated in fiscal year 2000-2001, to continue the Pilot Project objectives in reducing fractionation of Indian lands. The tribe strongly urges that new allocation language and criteria for the Pilot Project allow tribal governments the authority to administer the program. In addition, acquire interest greater than two percent within a designated time and allow individual land owners acquisitions for consolidation concurrent with the Tribe's Land Management Acquisition Plans. Thereby, creating greater opportunities in land utilization for new housing development, economic development, enhancement and management of the natural resources. The Tribe recently received the new Land Consolidation Act Amendments of 1999 on Bill S.1586 and recommends ample time for review, commentary and consultation.

In conclusion, on behalf of the Tribe, I appreciate the time of the Chairman and Members of the Committee to allow us to express our concerns and recommendation regarding the Land Consolidation Pilot Project.

Miigwetch!

Exhibit A


N
Lakes
Streams (Major)
Streams (Minor)
Ownership Type
A 301
F 197
T 284
Lac du Flambeau Land
Ownership Status
2 Miles

Exhibit B

Lac du Flambeau Allotted Land Ownership Data

	No. of Interests	Percentage	Acreage	Estimated Value
2% or less	14,690	86.0%	3,273	$1,476,321
2% > 5%	1,324	7.7%	2,650	$1,195,310
5% > 10%	543	3.2%	2,150	$969,780
10% > 20%	357	2.1%	3,570	$1,610,286
20% > 50%	162	0.9%	2,008	$905,730
50% > 100%	25	0.1%	775	$349,572
Totals	17,101	100.0%	14,426	$6.5 Mil.

The Lac du Flambeau Tribal Trust Resources consists of moderate density second growth forests with some inland lakeshore frontage and river frontage. Development is predominately residential and confined around the lake areas and downtown area. Much of the area is rural and used for timber products and recreation. The lakeshore frontage ranges from ideal to low, wet, and unbuildable. Few leases are on allotted lands.

Allotment land base has some choice lakeshore frontage but is predominately forested backland and undeveloped. The average land area held by each heir if divided would receive 0.84 acre.

Lac du Flambeau Indian Reservation Ownership

Tribal Land	35%	30,448 ac.
Allotted Land	17%	14,426 ac.
Aleinated (Taxable)	26%	22,221 ac.
Lake/Rivers	22%	19,450 ac.
Total		86,545 ac.

EXHIBIT C

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATE OF W
STATE HIGHWAY
GEOLOGICAL AND NATU

Tribal Land Enterprise
A Sub-chartered Corporation of the
ROSEBUD SIOUX TRIBE
Incorporated Under Act of June 18, 1934, (48 Stat 984)
Telephone 747-2371 or 747-2372

November 2, 1999

Honorable Senator Ben Nighthorse Campbell
Chairman, Senate Committee of Indian Affairs
Room 106 – Dirksen Senate Building
Washington, DC 20510-6450

Dear Senator Nighthorse Campbell:

These written comments supplement my oral testimony before the Senate Committee of Indian Affairs on November 4, 1999. I request leave of the Committee to submit more detailed written comments since I was only invited to present oral testimony a few days ago and have not had sufficient time to develop them.

I am the Executive Director of Tribal Land Enterprise (TLE), a corporate entity of the Rosebud Sioux Tribe created in 1943 pursuant to the Indian Reorganization Act. Tribal Land Enterprise works cooperatively with the Tribal Council of the Rosebud Sioux Tribe and it performs several important functions for the Tribe. Importantly, TLE leases tribal land and uses the proceeds to purchase additional interests in land and to operate the organization.

I want to give an overview of what TLE does because it has a direct bearing on the fractionated heirship problems addressed in S. 1586. I suggest to you that this proposed legislation does not address the myriad of problems with fractionation of heirship land. The solution, for the United States, tribes and allottees, should not be arrived at piecemeal. That approach will lead to other insurmountable problems that can be avoided through close consultation with the tribes. The Rosebud Sioux Tribe and I would be willing to direct our efforts to resolve these complex problems in cooperation with the Committee, individual members of Congress and the Administration. It seems reasonable that those who have suffered and continue to suffer under the legacy of the Allotment Era are particularly well qualified to suggest solutions to problems caused by those misguided policies. I suggest that tribes should be involved throughout this process rather than merely asked to respond to proposed legislation at committee hearings.

Addressing the problems associated with fractionated heirship land must be much broader than those perceived solutions contained in S. 1586. A range of alternatives should be made available to tribes to deal with the problems to avoid further fractionation by operation of law. One such solution is for Congress to ensure that tribes have the ability and the means to acquire fractionated interests in land during the lifetime of allottees. In addition, Congress should ensure that the tribal land base will be restored by providing a more efficient means for tribes to acquire land that has been lost due to the policies established during the Allotment Era and return them to trust. The following discussion will serve as a reminder to the Committee what the Congress has been done in the past with regard to the

Rosebud Sioux Tribe and how congressionally crafted solutions are being used today. It is suggested that the Committee use the following as a template for addressing problems associated with fractionated heirship lands and dissipation of the tribal land base on a much broader scale.

TRIBAL LAND ENTERPRISE

As noted above the Rosebud Sioux Tribe created Tribal Land Enterprise in 1943, forty years prior to enactment of the original Indian Land Consolidation Act. In doing so the Tribe made a major commitment to preserve and restore and consolidate the tribal land base...even in view of the dire economic circumstances of tribal members. The importance of that decision cannot be overstated and the Committee should recognize the sacrifices by poverty stricken members of the tribe to maintain the tribal homeland.

The operation of TLE involves the transfer, by tribal members, of beneficial title to their trust or restricted interest in land, including fractionated heirship interests, in exchange for TLE Certificates. The value of TLE shares is set annually. Certificate holders may redeem their certificates for cash at any time. The certificate holder may also deposit certificates on TLE assignments of trust land that gives the holder with surface rights to the land. Such assignments can be relinquished to the Tribe in exchange for cash. Class A certificate holders have the right to vote their shares at the annual TLE shareholders meeting.

TLE Certificates may be transferred during the holder's lifetime to family members. Upon the certificate holder's death the certificates to a named beneficiary. If no beneficiary is named, TLE Certificates may pass by devise or by

descent and distribution by probate of the decedent's estate in the Tribal Court. TLE Certificates are considered non-trust probate assets.

Tribal Land Enterprise has, to the extent resources have been available, prevented further fractionation of land and the transfer of thousands of acres of the tribal land base out of trust. Even when creditors foreclose on allotments used as security for defaulted loans, the practice has been for TLE to satisfy the debt and prevent the land from being lost from the tribal land base.

Between November, 1996 and October 1999, Tribal Land Enterprise assisted the Rosebud Sioux Tribe, in 841 transactions, acquire 9,9335.19 acres of trust and restricted land. Four hundred –eighty-nine (58%) of those transactions involved interests in heirship land of 2% or less. Yet, the value of those 2% or less acquisitions was $76,968.21, five percent of $1,674,478.97 in total trust land purchases during that period. Tribal Land Enterprise now purchases between $40,000 and $70,000 in fractionated heirship interests per month.

The point of the above discussion is to point out to the Committee there are alternative ways to deal fairly with owners of fractionated heirship interests while, during their lifetime, effectively addressing the fractionation problem.

ISOLATED TRACTS ACT

Twenty years before enactment of the original Indian Land Consolidation Act, Congress enacted legislation that authorized the Rosebud Sioux Tribe to sell, exchange or mortgage isolated tracts in open areas within its 1889 reservation. Act of December 13, 1963, Pub. L. 88-196, 77 Stat. 349, popularly known as the Isolated Tracts Act. The legislation was designed to stop the disastrous effects of the

Allotment Era and three surplus land acts that followed. The legislation was also for the purpose of preventing further dissipation of the tribal estate, to consolidate tribal interests in approved consolidation areas and for tribal economic development. S. Rep. No. 673, 88th Congress, 1st Session.

The Isolated Tracts Act became law some thirteen years before the United States Supreme Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d. 660 (1997), held that the three above surplus land acts caused diminishment of the 1889 Rosebud Sioux Indian Reservation.[1] Pursuant to Kneip, the reservation was diminished from a five-county area (Todd, Mellette, Tripp, Gregory and Lyman Counties, South Dakota) to the geographic area within Todd County, South Dakota.

Regardless of the outcome in Kneip, the Rosebud Sioux Tribe and its members have retained significant interests in Mellette, Tripp, Gregory and Lyman Counties. The Isolated Tracts Act recognized the Tribe's interests in those areas and ensured that proceeds from the sale or mortgage of isolated tracts in Tripp, Gregory and Lyman County must be used to purchase land in consolidation areas approved by the Secretary. Todd and Mellette Counties have been approved as a consolidation area. The Congress mandated that title to fee land purchased by the Tribe pursuant to the Act must be taken in trust. Todd County, South Dakota v. Aberdeen Area Director, Bureau Of Indian Affairs, 33 IBIA 110 (1999).

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[1] The three surplus land acts are Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, c 260, 26 Stat. 448.

Because Congress astutely provided a mechanism for the Tribe to acquire fractionated interests in consolidation areas, it has done so utilizing the proceeds from isolated tracts. Moreover, Congress has also made it possible to restore to tribal trust ownership land lost due to the policies of the Allotment Era. The Tribe strongly opposes any effort through administrative rulemaking to undercut this remedial tool the Congress has provided to the Tribe. See, Proposed Amendments To Regulations Governing Taking Land Into Trust For Indians (25 C.F.R. Part 151) published at 64 Federal Register 17574-17588, and explanatory comments, April 12, 1999.

When the formation of TLE is taken together with the Isolated Tracts Act, the Rosebud Sioux Tribe has both congressionally authorized mechanism and the means to address problems associated with further fractionation of trust and restricted land and to restore its trust land base. I strongly suggest to the Committee there are viable alternatives to the escheat provisions contained in S 1586. The above discussion is to illustrate that point.

I suggest to the Committee that it is the nature of tribal culture to maintain contact with the tribal homeland, no matter how small the interest. To the allottee with a minimal interest in land the issue is not economics, but maintenance of contact with the reservation homeland, extended family and the tribe. This problem with fractionation of trust and restricted land, while untenable for management by the trustee, was made and perpetuated by the Congress. Again, I suggest that the Committee seek resolution of the myriad of problems associated with heirship lands in partnership with tribes.

SPECIFIC COMMENTS ON THE TEXT OF S. 1586

With regard to Section 2, Findings, I reiterate that the proposed legislation is a piecemeal approach to a much larger problem involving the aftermath of the Allotment Era. Fractionation is but only a symptom. I suggest that a comprehensive approach be undertaken in partnership with tribes to address in a systematic, meaningful way, problems created by the Dawes Act and subsequent surplus land acts.

With regard to probate matters, deference should be given to proposed legislation drafted by the Indian Land Working Group.

With regard to Section 206 (c), authorizing tribal courts to preside over trust assets, consider that tribal courts are very seriously underfunded. Any increase in tribal court caseloads must be accompanied by sufficient base funding for services and facilities to appropriately adjudicate these cases. Moreover, the Committee must also consider that probate cases typically involve lawsuits within lawsuits. It view of a growing line of federal court cases limiting tribal court jurisdiction, the Congress should make it absolutely clear that the tribal courts have both subject matter and personal jurisdiction in all such cases involving both trust and nontrust assets. Similarly, the tribal court's territorial jurisdiction must be sufficiently broad to adjudicate matters involving trust lands whether within former reservations and outside of those areas. There are circumstances where such extraterritorial jurisdiction is necessary to reach estate assets and parties to such proceedings.

I strongly oppose limitation upon estates passing by intestate succession to spouses and heirs of the first or second degree. Section 207 (c) (2). This is overly

heavy handed and ignores culturally significant views of extended family by my tribe and other tribes. Again, there are other approaches to deal with the fractionation problem. This limitation would tend to reflect erosion of tribal culture, tribal laws and tribal values.

I can see absolutely no basis for treating 2% as the threshold value for treating interests in land differently that other interests. The 2% threshold may represent quite valuable interests in non-renewable resources or renewable resources that are not harvested frequently. Further, this view places a premium on economics, which is not the only consideration from the beneficial owner's viewpoint. It is the moral and cultural view of my tribe that escheat is not appropriate under any circumstance. A member of my tribe must be paid for his interest in land no matter how small the value.

It is my belief that allowing 51% of the heirs to an allotment to control how the land will be used seems entirely improper under certain circumstances. For example, when timber, mineral resources or rights of away are involved, a 2/3 majority would seem appropriate. See, Section 220.

In conclusion, I ask that the Committee roll up its sleeves and work with tribes to find solutions to the many problems caused by the Allotment policies of a past era. These efforts should not be mere consultation, but a diligent, on-going effort in working with the tribes.

Sincerely,

Ben Black Bear, Executive Director

COMMENTS - 8

ATTACHMENT 1

Tribal Land Enterprise

A Sub-chartered Corporation of the
ROSEBUD SIOUX TRIBE

Incorporated Under Act of June 18, 1934, (48 Stat 984)

Telephone 747-2371 or 747-2372

MEMORANDUM

TO : Ben Black Bear Jr., TLE Executive Director

FROM : D'Arcy Bordeaux, TLE Finance Manager

RE : Land Acquisitions

DATE : November 1, 1999

The following information was taken from the Tribal Land Enterprise's past three (3) audits:

- In fiscal year 1996 (October '95 to September '96), we spent $1,107,470 on land
- In fiscal year 1997 (October '96 to September '97), we spent $1,569,531 on land
- In fiscal year 1998 (October '97 to September '98), we spent $1,584,573 on land

In fiscal year 1999, the Tribal Land Enterprise Board of Directors approved of approximately $1,220,995.44 in land acquisitions. Most of them were completed by September 30, 1999. The largest acquisition that is still pending is the one in the amount of $450,465.00. This is part of the $1.2 million stated previously.

ATTACHMENT 2

Tribal Land Enterprise
A Sub-chartered Corporation of the
ROSEBUD SIOUX TRIBE
Incorporated Under Act of June 18, 1934, (48 Stat 984)
Telephone 747-2371 or 747-2372

MEMORANDUM

DATE: November 2, 1999

REPLY TO
ATTN OF: Brenda J. Antoine, Acquisition & Assignment Manager

SUBJECT: Trust Acquisitions to the Tribe/TLE

TO: Ben Black Bear, Jr., Executive Director

Trust Acquisitions from Members/Non-members to the Rosebud Sioux Tribe/TLE for a Three (3) Year Period Beginning November, 1996 through October, 1999:

Members Purchased From:	728
Non-Members Purchased From:	113
Total Members/Non-members:	841

Members/Non-members Selling Less Than 2% Interest in a Tract:	489
Members/Non-members Selling More Than 2% Interest in a Tract:	337
1 Owner/Member Selling 1 Whole Tract:	15
Total Members/Non-members:	841

Acquired Acres From a 2% Interest or Less Sales:	510.34
Acquired Acres From a 2% Interest or More Sales:	7404.91
Acquired Acres from 1 Owner Tract Sales:	2020.44
Total Acres:	9935.69

2% or Less Interest Sales - Purchase Price:	$ 76,968.21
2% or More Interest Sales - Purchase Price:	$1,283,210.76
Whole Tract Sales - Purchase Price:	$ 314,300.00
Total Purchase Price:	$1,674,478.97

Attachments

ATTACHMENT 3

Tribal Land Enterprise
A Sub-chartered Corporation of the
ROSEBUD SIOUX TRIBE
Incorporated Under Act of June 18, 1934, (48 Stat 984)
Telephone 747-2371 or 747-2372

MEMORANDUM

DATE: NOVEMBER 2, 1999

TO: BEN BLACK BEAR, JR., EXECUTIVE DIRECTOR, TLE

FROM: LARRY D. MARSHALL, TLE LEASE MANAGER

SUBJECT: LEASE REPORT

TLE presently has interest in and to approximately 800,000 acres more or less and the TLE Lease Office manages approximately 60% of this acreage. The remaining acreage is managed through the TLE Assignment Department and the Bureau of Indian Affairs.

Approximately 80% of this land base is grazing land, 15% is farmland and 5% is hayland. 30% of this land base is leased by Tribal members and the remaining is leased by non-members.

The use of this land base is managed through the Range Unit Permit System, Farm/Pasutre leases, homesite leases, Business site leases, Irrigation leases, the wildlife Habitat Incentive Program, Conservation Reserve Program, the development of the Pork Production facility, the development of a Boys Ranch and the development of an Elk and Buffalo herd. All the above is accomplished through the cooperation of the Bureau of Indian Affairs, the Farm Agency Service, the Natural Resource Conservation Service, the Indian Health Service, the Tribal Water Resource Office, the Fish and Wildlife Service, the Mni-Wiconi Project and Housing and Urban Development.

Tribal Land Enterprise

A Sub-chartered Corporation of the
ROSEBUD SIOUX TRIBE

Incorporated Under Act of June 18, 1934, (48 Stat 984)

Telephone 747-2371 or 747-2372

November 17, 1999

Honorable Ben Nighthorse Campbell
Chairman, Senate Committee of Indian Affairs
Room 106, Dirksen Senate Building
Washington, DC 20510-6450

RE: SUPPLEMENTAL COMMENTS ON S. 1586, INDIAN LAND CONSOLIDATION ACT AMENDMENTS OF 1999

Dear Senator Nighthorse Campbell:

I offer the following additional Comments on S. 1586 to supplement the written comments submitted to the Committee and my oral testimony on November 4, 1999.

SECTION 2 FINDINGS

These Findings should be supplemented to include congressional recognition of the following impacts as a result of the General Allotment Act, subsequent surplus land acts, and the failed Federal Indian Policy of the Assimilation Era:

Tribes continue to suffer from diminishment of their trust land base through negotiated and advertised sale of allotments at the request of allottees, through foreclosure proceedings where allotments are used as collateral to secure loans and by operation of law through probate proceedings.

Further diminishment of the tribal trust land base compounds the severe economic hardship of tribes and their members, who are some of the poorest people in the United States.

The efforts of tribes and individual tribal members to restore title to former allotments to trust, concomitantly consolidating and expanding the tribal trust land base, have been met with vigorous opposition by state and local governments.

I recommend that Finding 11 be amended to read as follows:

(11) the problem of the fractionation of Indian lands described in this section is the result of an **assimilation** policy of the Federal Government **that is no longer in effect**, that cannot be solved by Indian tribes **alone**, and requires a **comprehensive solution under Federal law enabling tribes to prevent further fractionation, further loss of the tribal trust land base and to more efficiently restore title to interests in former allotted lands to trust.**

SECTION 3 DECLARATION OF POLICY

Add: to prevent further loss of trust allotments made to Indians

Add: to promote restoration of interests in former allotments to trust status under tribal ownership.

SECTION 4 AMENDMENTS TO INDIAN LAND CONSOLIDATION ACT

Subsection a (5): should be "heirs of the fourth degree" in view of the extended family system which is significant to tribal culture.

SECTION 203 OTHER APPLICABLE PROVISIONS

Conditions Applicable To Purchase: (b)(3) It should be specifically noted that other legislation calls for creation of consolidation areas and this provision should not affect those statutes.

SECTION 206 DESCENT AND DISTRIBUTION....

Subsection (c) seems to provide tribal courts with adjudicatory jurisdiction to enter findings of fact and conclusions of law in probate cases involving trust and restricted lands. However, there is no express language delegating such authority to tribal courts. There is also no express delegation of authority to the tribal courts to assert personal jurisdiction over all parties to such probate proceedings whether they reside on or off the reservation.

Subsection (c) (2) seems to authorize tribal courts to sit as magistrate courts or special masters in probate proceedings involving trust and restricted lands, with final authority in the Department of the Interior, Office of Hearings and Appeals. This is an intriguing concept.

Any such delegation raises rather complex legal questions that should be carefully considered by the Committee. The first question is whether the United States, as trustee, can delegate such authority to its ward (tribe) in affairs concerning its wards (tribal members) and the trust corpus (trust land and proceeds from trust

land). This principle is thought provoking and would appear to be a departure from traditional notions of Indian law trust jurisprudence. The legislative proposal suggests that one ward (the tribe through its court system) would adjudicate cases applying law enacted by the trustee that would, through escheat, take the other ward's share of the corpus. Ultimately any interest of 2% or less would escheat to the ward adjudicating the case. The proposal is even more intriguing in view of the fact that many tribes do not ascribe to the separation of power doctrine.

Even in view of the above issues, recent decisions issued by the United States Supreme Court have severely limited jurisdiction of tribal courts. Based on development of new doctrine that seems to ignore very well established principles of Indian law, it is predictable that the Court will continue rewriting the law. Therefore, there must be a clear delegation of authority by Congress to tribal courts so that they can assert full subject matter and personal jurisdiction over all aspects of probate matters. This delegation must include authority of tribal courts to hear lawsuits within lawsuits with nationwide service of process. The above trust and jurisdictional issues could be avoided if trial court judges could sit as United States Magistrates.

SECTION 207 DESCENT AND DISTRIBUTION; ESCHEAT OF FRACTIONAL INTERESTS

Section 207 appears to be a redraft of former legislation in an attempt to pass constitutional muster under the takings provisions of the Fifth Amendment. Due regard has been given to the holdings and the suggestions of the United States Supreme Court majority and dissent in Hodel v. Irving, 481 U.S. 704 (1987), and Babbitt v. Youpee, 519 U.S. 234 (1997). The issue whether or not the escheat provisions contained in Section 207 amount to a Fifth Amendment taking will surely be brought before the United States Supreme Court for a third time by aggrieved tribal members who have lost less than 2% interest in trust or restricted land through escheat. The Committee should note that even if the current Section 207 does not give rise to a Fifth Amendment taking, other legal theories will likely be raised. Therefore, it is predictable that the proposed legislation will the subject of further protracted litigation.

One must question why so much time, money and effort has been expended trying to resolve the "fractionation problem" by taking small interests in land by escheat from one ward and giving them to another. It would again seem to be economics that is driving this legislation, a principle that does not square with the trustee's' fiduciary duties to the tribal member owning the small interest in land. All that must be done is to pay just compensation for these small interests in land and the narrow problem involving fractionation will be resolved. It would seem that the Committee has not considered alternatives involving payment of just compensation, and how such compensation is paid. It is probable that paying for fractionated interests would be less costly than the administrative expense of managing them.

Congress could appropriate funds for tribes to purchase fractionated interests. Alternatively, a mechanism could be developed where tribes could issue certificates in exchange for transfer of title to tribes. Tribal Land Enterprise used that mechanism and it is effective.

It is clear the United States wants badly to be free of the headaches of managing fractionated heirship land by washing its hands of the fiduciary duties owed to wards. However, problem associated with fractionation were created by the Congress under failed Federal Indian policy in response to "familiar forces" calling for opening of Indian lands for settlement, the "civilization" of Indians and the assimilation of Indians into the larger society. The primary focus of the United States was and continues to be controlled by economics and continued relentless pressure from those "familiar forces" by which non-Indians seek land and jurisdiction.

Rather than approaching the untenable problem of fractionation comprehensively and in cooperation with tribes, Congress has chosen to address the problem piecemeal, utilizing principles that are unthinkable to many tribes. The Fifth Amendment takings issue raised by the escheat provisions of the statute, while constitutional in nature, are deeply rooted in the economics of managing fractionated interests in land. However, to many tribal members owning a miniscule interest in their grandparents' allotment, the issue may be quite different. The tiny fractionated interest may not produce substantial income or be of substantial economic value. However, that small interest may represent a tribal member's connection with his ancestors, his extended family, and the history of hardship, oppression and bloodshed in maintaining the homeland and his culture. From a system grounded in economics, the Committee may totally be missing the point why the escheat principle is objectionable to tribes and tribal members. Similarly, the Committee may not be aware of the remarkable diversity among indigenous people within the United States recognized as Indian tribes and differing perspectives how problems with fractionation should be resolved.

Section 207 (a) imposes significant restrictions on the ability of tribal members, through devise, from passing their fractionated interests in land to specific relatives no matter what reasoning the testator might have for doing so. It is fundamental, particularly within tribal culture, that the term "heirs at law" is far broader than relatives within the first or second degree of kinship. Moreover, this proposed policy would prevent a testator with relatives of the first or second degree from passing his estate to a more distant relative. Under Section 207 (b), wills would be statutorily redrafted regardless of testamentary intent.

As discussed above, there is a major disparity between an administrative system based on economics and one based on tribal custom and tradition. Succinctly stated, the allotment system created by Congress, has now become unthrifty to administer. There will likely be substantial litigation over reforming

wills as proposed. Fact patterns are sure to emerge that illustrate, in the most graphic terms, why a testator desired to pass over a close relative with his bequest.

Section (c) (1), like the Rule in Shelly's Case, will create a trap for the unwary in preparation of wills. The drafter, including persons who prepare their own wills, must adhere to specific statutory requirements to state, in crystal clear terms, their testamentary intent. The presumption of a joint tenancy with right of survivorship runs counter to commonly understood presumptions in draftsmanship and may be in conflict with applicable law in probate cases. In addition, the trustee is imposing this technical requirement in will drafting on wards who are, by definition, incompetent, and who are, for the most part, too poor to hire an attorney. This provision will lead to unfair results and create tremendous difficulties between family members.

Section 207 (c) (2) again imposes a severe restriction on heir determination under tribal law, custom and tradition. It presupposes a fractionation problem in all cases, including instances where none exists. The proposed standard would seem to apply to estates in which the decedent owns full interest in a tract of land. Yet, the escheat provision would apply only of the decedent owns less than 2% interest. Thus, the provision seems to create a legal limbo in instances where the decedent owns more than 2%. In addition, by severely restricting inheritance to relatives of the decedent of first or second degree and surviving spouses, including non-Indian spouses, Congress will ensure a steady flow of trust land from trust to fee status. It is suggested that this subsection be amended to broaden the class of tribal members who may inherit land and restricting non-Indian spouses to a life estate in such lands.

It is patently unreasonable to follow different standards for descent and distribution of land located on and off Indian reservations. The Rosebud Sioux Tribe maintains a significant interest in land now considered part of the "former reservation" by the United States Supreme Court. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). This is particularly unreasonable in view of specific legislation enacted for the benefit of the Rosebud Sioux Tribe recognizing the Tribe's continued interests in the geographic area the Kneip court referred to as former reservation. Act of December 13, 1963, Pub. L. 88-196, 77 Stat. 349. The Congress should treat former reservation areas as if they were on the current reservation for purposes of this legislation. In that regard, the Secretary has proposed amendments to 25 CFR Part 151 that would define reservation as remaining reservation as established by judicial decree. Such lands within the former reservation, if in trust or restricted status, remain Indian country. This legislation should not be used as a backhanded way to diminish the tribal land base in such areas.

Section 207(d): I am completely opposed to the escheat of any interest in land, no matter how small the fractionated interest. There are alternatives to this

heavy-handed provision involving payment of compensation, issuing certificates and allowing continued use of land, granting assignments of such lands and others. The notion of escheat is not in accord with the customs and the traditions of the Tribe which has refused to "take" the fractionated interests of its members without compensation. Moreover, the Congress created this problem and, based on notions of trust, should ensure that tribal members are not deprived of their property interests without compensation.

I urge the Committee to work cooperatively with tribes to address the myriad of problems caused by allotment and surplus land legislation, including but not limited to fractionation. Using a model based on Tribal Land Enterprise, I am prepared to make an alternative proposal that would avoid takings and trust issues discussed above. I will be happy to meet with your staff to discuss alternatives to this legislation.

Sincerely,

Ben Black Bear, Executive Director

William Kindle, President
Rosebud Sioux Tribe

STATEMENT OF
SHII SHI KEYAH ALLOTTEES ASSOCIATION
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE AND
THE HOUSE RESOURCES COMMITTEE

CONCERNING S. 1315, A BILL TO PERMIT THE LEASING OF OIL AND GAS RIGHTS ON CERTAIN LANDS HELD IN TRUST FOR THE NAVAJO NATION OR ALLOTTED TO A MEMBER OF THE NAVAJO NATION, IN ANY CASE IN WHICH THERE IS CONSENT FROM A SPECIFIED PERCENTAGE INTEREST IN THE PARCEL OF LAND UNDER CONSIDERATION FOR LEASE

NOVEMBER 4, 1999

I. INTRODUCTION

Honorable members of Senate Committee on Indian Affairs and members of the House Resources Committee. My name is Shenan Atcitty. I am an attorney for the Nordhaus Law Firm in Washington D.C. Our firm is general counsel to the Shii Shi Keyah Allottees Association, and I am here to provide testimony on behalf of Ervin Chavez, President of Shii Shi Keyah Allottees Association. Mr. Chavez regrets that he is not able to be here today. I am a member of the Navajo Nation, and am pleased to be here today on behalf of the Navajo allottees.

The Shii Shi Keyah Allottees Association and its Board of Directors support S.1315, "to permit the leasing of oil and gas rights on Navajo Allotted lands," and appreciate Senator Bingaman's efforts to address some of the pressing issues affecting the Navajo allottees.

The Shii Shi Keyah Allottees Association was formed in 1983 and has a membership of 2500-3000 individual Indian account holders and landowners. The land holding of the membership is scattered throughout what is known as the Navajo Checkerboard Areas, in the Four Corners region of New Mexico, Arizona and Utah. The Shii Shi Keyah Allottees Association is the primary organization that represents the interests and issues relating to Navajo allottees.

A group of frustrated Navajo allottees formed the Shii Shi Keyah Allottees Association as a result of the allottees not receiving royalty payments for years at a time, despite the fact that oil and gas wells, located next to their homes, were producing daily. When allottees received sporadic royalty payments, it was just simply a check, with no explanation of where or what lease these royalty payments were being made from.

S. 1315 will address one of the pressing issues facing the Navajo allottees, that is securing oil and gas leasing opportunities for allotted Navajo lands where there is fractionated land ownership.

II. BACKGROUND

Although the Navajo allottees have ownership interests in lands that contain vast mineral wealth, they have not had a meaningful opportunity to realize the benefit from their lands. The plight of the Navajo allottees is the result of failed federal policies that sought to breakdown traditional tribal land holdings and individually allot out parcels of land in an attempt to assimilate the Navajo people into mainstream society. Furthermore, for generations, the United States deliberating prevented the Navajo allottees their property right in the minerals underlying their land.

In the 1860's, the United States Army attacked our people while they were living peacefully on our own lands. After several years of defense of our homeland, our people had no choice but to surrender when our fruit trees, crops, and livestock were destroyed. Then, the Army imposed a forced march on our people, which is known as the "Long Walk" hundreds of miles away to an arid, desolate desert area at Fort Sumner in southern New Mexico, where our people were incarcerated for years.

Following the U.S. Government's forced incarceration of the our people, the Navajo Tribe signed a treaty with the United States in 1868 establishing a permanent homeland, and our people were allowed to return to portions of our traditional homelands. The original reservation was subsequently expanded by executive orders from 1878 to 1907, and during that time grew from three million acres to more than eleven and one-half million acres in Arizona, New Mexico and Utah. These lands were mainly desert lands with scarce water supplies, therefore, the Navajos needed large amount of lands to successfully graze their sheep. Pittsburg & Midway Coal Mining Company v. Yazzie, 909 F.2d 1387, 1390 (10th Cir. 1990) ("Yazzie").

By the early 1900's, Navajos living on public domain lands near the east and south portions of the Reservation were threatened by encroachment by non-Indian settlers who were driving Navajos off their lands and appropriating the Indian water supplies for themselves. Yazzie, at 1390. The Superintendent of the Navajo Agency recommended to the Interior Department that the federal government withdraw lands from the public domain for the purpose of protecting these Navajos and their livelihood of sheep grazing an water supplies. Id. Navajo Tribal Chairman Chee Dodge also requested the Commissioner of Indian Affairs to provide additional lands for the protection of the off-reservation Navajos, explaining that the request was of the utmost importance for the Tribe. Although these Navajos were referred to as "off-reservation" Indians, it was well known that they had lived in the area for generations and had abstained from violence even though non-Indians were driving them from their homes. Id. at 1391.

During this period, the prevailing federal Indian policy was to break up tribal relations and integrate Indians into non-Indian communities in which they lived by allotting them lands in severalty as provided for by the General Allotment Act of 1887. Id. Consistent with the policy, the Interior Department set forth a proposal to the President to set aside land from the public domain for the purpose of protecting the Navajos. Yazzie, at 1391. In late 1907 and early 1908, President Roosevelt issued executive orders "withdrawing for sale and settlement" certain lands

in New Mexico and Arizona and setting them apart as an addition to the Navajo Reservation. See Executive Order No. 709 (1907) and Executive Order No. 744 (1908).

Predictably, the New Mexico territorial government immediately pressured Congress and the Interior Department to restore the lands to public domain. Yazzie, at 1391-1392. In 1911, before the allotment process was complete, President Taft issued Executive Order 1284 declaring all remaining unallotted lands added to the Navajo Reservation in New Mexico to be restored to the public domain. Id. at 1392.

III. CURRENT STATUS OF NAVAJO ALLOTMENTS

The legacy of the allotment policy is a "checkerboard" area of land holdings owned by individual Navajos, the federal government, the state of New Mexico, and private landowners all located in an area occupied almost exclusively by Navajo people from the Civil War to the present time. The nature of the checkerboard land holdings has created a jurisdictional nightmare, as well as obstacles for economic development opportunities. The problems confronting Navajo allottees are indeed severe. Though the New Mexico checkerboard area is known for its vast mineral wealth, for the last 12 years, $7 million in leasing bonuses have been paid to the state and federal governments for leasing while only $27,000 has been paid to Navajo allottees.

Almost immediately following the allotment process in eastern New Mexico, the federal government illegally claimed ownership of the valuable minerals beneath a substantial number of the Navajo allotments. For many years, the federal government leased Navajo allotted mineral rights to various coal, uranium, and oil and gas companies to develop these resources and to pay royalties to the federal government and the state that were properly owed to the Navajo allottees. It was not uncommon for Navajos to be removed off their lands in favor of exploration and production of these minerals. In 1983, after years of injustice, a class action was filed in New Mexico federal court on behalf of these Navajo allottees for ownership to the minerals beneath their allotments. See, e.g., Mescal v. United States, 161 F.R.D. 450 (1995). That case was eventually settled under the court's supervision and required the United States to relinquish its mineral rights to the Navajo allottees on lands not under lease and to share with the allottees the federal portion of royalties received for allotted lands under existing leases.

Even though Navajo allottees are now acknowledged owners of the mineral rights underlying their lands, there are still barriers that prevent Navajo allottees from realizing the economic benefits from their lands. Federal law requires that all persons who have an undivided interest in a particular parcel of allotted land must consent to a lease. Although this has had the unintended effect of defeating fraudulent leasing programs, see McClanhan v. Hodel, No. Civ. 83-161-M, 14 Indian. Law Reporter, 3113 (D.N.M. 1987), appeals dismissed as moot, Nos. 87-116 and 87-1234 (10th Cir. 1988), in many cases, not all of the landowners of an allotment are even known. And the Bureau of Indian Affairs ("BIA") is continuing to neglect its responsibilities to update the heirship information after probates are concluded. There are approximately 4,000 individual allotments covering over 750,000 acres of land with over 40,000 known owners. As many as 650 heirs have an undivided interest in a single 160 acre parcel of land. Many of these owners are unknown or cannot be located. Furthermore, the Navajo

allottees continue to be concerned with the BIA's trust funds and record mismanagement practices as well as the decrease in oil and gas exploration and production over the last few years.

To address some of these problems, the Shii Shi Keyah Allottees Association worked with Senator Bingaman and his staff on crafting a bill to alleviate temporarily many of the concerns of the Navajo allottees. Accordingly, the bill will only affect oil and gas leases, and recognizes the need to foster and protect harmony among Navajo families. Therefore, where an allotment has 10 owners or less, S.1315 would require 100% consent among the owners. To allow a simple majority to make land use decisions over the objections of the other owners could create conflict among the family. Similarly, if there are 11 to 50 landowners, at least 80% of the owners must consent to the lease. If there are more than 50 owners, at least 60% must consent to the lease. The Navajo allottees are adamantly opposed to a scheme that would require only a simple majority of the land ownership to consent to a lease. S.1315 provides a balanced approach to lease approval among Navajo families, including preserving the right to reserve in resource development.

With regard to allotted interests owned by a tribe, S.1315 recognizes the sovereign interests of the Navajo Nation, and provides that the Navajo Nation will not be a party to any lease agreement that is approved in accordance with its provisions. S.1315 preserves the Navajo Nation's ability to challenge the approval process.

The Shii Shi Keyah Allottees Association views S.1315 as a good start to begin addressing some of the critical issues facing Navajo allottees. The Navajo allottees believe that additional federal appropriations are necessary to develop tribal probate codes, implement tribal consolidation plans and work with allottees on estate planning and land consolidation.

Furthermore, the Navajo allottees seek congressional appropriations to implement a demonstration project to allow private financial institutions to administer Navajo allotted lands in a similar fashion to way they administer family trusts for private oil and gas properties. In doing so, Congress would not have to deal with reducing the percentage of ownership necessary for lease approval as the only solution to the fractionation problem. An additional potential benefit would be addressing and resolving the issues surrounding the unconstitutionality of the escheatment provisions of the Indian Land Consolidation Act of 1982, both in its original form and as amended. See Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987). Furthermore, a private financial institution is equipped to handle trust assets and documents in a manner that comports with enforceable fiduciary standards, unlike the existing BIA system.

In conclusion, the Shii Shi Keyah Allottees Association is pleased to support Senator Bingaman and S.1315. While the Navajo allottees will continue to work on long term solutions to the fractionation problem, S.1315 is a positive step for Navajo allotment owners to obtain economic returns and benefits for their property, as well as meaningful input in the disposition of their land.

Testimony of Michael Her Many Horses

On Behalf of the Oglala Sioux Tribe

Before the U.S. Senate Committee on Indian Affairs

Hearing on Indian Land Consolidation

November 16, 1999

Chairman Nighthorse Campbell and members of the Senate Committee on Indian Affairs, my name is Michael Her Many Horses. I serve as Tribal Council representative for the Oglala Sioux Tribe. I am the Chairman of the Tribal Council's Finance Committee, which is responsible for for passing revenue Tribal laws to further consolidate our land base. This has proven difficult, indeed.

I represent the Wounded Knee District on the Oglala Sioux Tribal Council. Our Reservation, and my community, have witnesses some of the most dramatic events in American history. These events relate to the government's efforts to reduce our land base, and our culture, which historically was viewed as an impediment to the settlement of the American west.

The Treaty of Fort Laramie of 1851 had established as Sioux Country the entire upper great plains region. (11 Stat. 749). Article 5 of the 1851 Treaty delineated as Sioux Country a vast region bordered by the Platte River on the south, Big Horn Mountains on the west, Yellowstone River on the northwest, and Missouri River to the north and east.

For the Oglala, the Powder River country in present-day eastern Wyoming, which was very productive buffalo hunting ground, and the Black Hills of present-day South

Dakota, were perhaps the most important areas. The hunting grounds were settled in the summer, with buffalo runs during the late summer which provided the subsistence and economic base of the nation. The Black Hills was the spiritual center for the Sioux.

But gold was discovered in the northern Rocky Mountains in 1864. This led to the construction of the Bozeman Trail, right through the Powder River valley hunting grounds. The U.S. Cavalry entered the Powder River valley in the spring of 1865, under the pretext of looking for Indians who took part in raids against the road and railroad builders.

A garrison was established at Fort Reno, in violation of the 1851 Treaty. Red Cloud organized raids, with Crazy Horse. On December 21, 1866, forces under Red Cloud and Crazy Horse overwhelmed the U.S. forces, in the Battle of the Hundred Slain. (Fetterman's Battle). It was the first time an American military outfit was completely decimated, since the Revolutionary War nearly 100 years earlier.

The United States negotiated what it could not take by force. A new Treaty was entered.

The Treaty of Fort Laramie of April 29, 1868, resulted in the establishment of the Great Sioux Reservation. (15 Stat. 635). The Reservation includes all of present-day South Dakota west of the Missouri River. The Missouri's east bank is the Great Sioux Reservation's eastern boundary. The Sioux negotiators specifically ensured that the Missouri River was included as part of the Reservation. The hunting grounds of the Powder River valley were recognized as unceded Indian land, with hunting rights for the Sioux.

The government got its road, but the Lakota Nation retained a vast Reservation from the Black Hills to the Missouri River. We retained our hunting rights on the Powder River hunting grounds.

Nevertheless, the United States violated the 1868 Fort Laramie Treaty soon after its ratification. The discovery of gold in the Black Hills led to further incursions by the cavalry, treaty violations, and war, which culminated in the defeat of Custer at Little Big Horn. Reinforcements by the United States led to the scattering of the bands, and ultimately Red Cloud settled at Pine Ridge Agency. Crazy Horse was assassinated in 1877. The Oglala Sioux band and the Great Sioux Nation were the last native people in North America to submit to the Reservation lifestyle, and to the authority of the United States.

Later, Congress carved apart the Great Sioux Reservation, to obtain the Black Hills and much of the plains for homesteading, through a series of Homestead Acts in the late 1800's. The Act of February 28, 1877 deleted the valuable Black Hills from the Reservation, so it could be opened to gold mining. (19 Stat. 254). Congress carved out six smaller Reservations from the Great Sioux Reservation, in the Act of March 2, 1889. (25 Stat. 888).

The land base of the Great Sioux Nation was diminished from 80 million acres in 1868 to 5.3 million acres by 1910.

The 1889 Act established the Pine Ridge Indian Reservation, our home today. The Pine Ridge Reservation is comprised of 2.8 million acres in what is now southwestern South Dakota. The Reservation is comprised of agricultural and grazing land, and Badlands. Approximately 1.8 million acres remain in trust, but 800,000 acres are allotments owned by individual families.

Our families are unable to make a living off of the land, because the title is held in small, undivided fractions. Of the 800,000 acres of allotted land, 600,000 acres are included in tracts that have 200 landowners, or more.

This means that 200 members of an extended family each own 1/200th of an undivided interest in the tract of land. No single member of the family can utilize the tract, without receiving the majority consent of the other landowners. This seriously impedes the development of our land by Tribal members.

Consequently, nearly all of our land is leased, generally to non-Indian agricultural operators. The lessees receive the profits of ranching and farming operations on our land, while the landowners receive modest lease revenues, which then get divided to 200 or more family members who own a small, fractionated interest in the land. By the time each family receives its lease income, the payments amount to very little.

For these reasons, our land provides virtually no economic benefits to our families. We are located in a very rural area, with little commerce and few private sector jobs. Extreme poverty has resulted on the Pine Ridge Indian Reservation.

The unemployment rates are extreme. The Oglala Sioux Tribe estimates unemployment and underemployment to be 85 percent on our Reservation. The median family income on the Pine Ridge Indian Reservation is $10,870, one-third the national average. (1990 U.S. Census). Per capita income on the Reservation is $3,417, less than one fourth of the national average. (1990 U.S. Census).

Over fifty percent of the families on the Pine Ridge Reservation live below the poverty level. (1990 U.S. Census). The national average of families in poverty is ten percent. (1990 U.S. Census).

These conditions are particularly difficult for children and the elderly. Seventy percent of the children on the Pine Ridge Indian Reservation live in poverty. (1990 U.S. Census). Nearly 60 percent of the elderly live below the poverty level, although only 2 percent of the elderly are subject to these conditions, nationwide. (1990 U.S. Census).

The Oglala Sioux Tribe suffers the highest infant mortality rates in the nation. (1990 U.S. Census). The life expectancy on our Reservation is the lowest in the nation. (1990 U.S. Census). Residents on the Pine Ridge Indian Reservation have the lowest chance of any American to reach the age of sixty. (1990 U.S. Census). The life expectancy amongst males living on these Reservation is 47 years, as compared to the national average of 72 years. (1990 U.S. Census). An Indian living on the Reservation has a 15 percent chance of suffering an accidental death, as opposed to a 2 percent chance for Americans generally. (1990 U.S. Census).

The Pine Ridge Indian Reservation remains the poorest place in the United States. (1990 U.S. Census). This results, in large part, from our inability to utilize our land on account of the fractionated ownership of our trust allotments.

We estimate that it will cost $65 million to purchase the fractionated interests on our Reservation to those tracts of land that are rendered economically unproductive, on account of the fractionated title. This is an extremely

serious matter. In light of the economic conditions we are suffering, described above, our very survival may depend on solving the land crisis.

On the Pine Ridge Indian Reservation, we stand prepared to do our part. We remain willing to use available Tribal land lease revenues to purchase fractionated interests in land. However, our lease revenues are encumbered by the U.S. Department of Agriculture.

Under the Indian Tribal Land Acquisition Program, USDA loaned $19.6 million to the Oglala Sioux Tribe in the 1970's. Several Notes were entered in the 1970's, and pursuant to these Notes the Tribe pays $870,000 annually to USDA. These payments divert meager Tribal revenues to the United States, for repayment of loans provided to the Tribe to re-purchase land that was taken by the United States. Although the loans have helped in our land consolidation efforts, the repayment terms are siphoning off badly-needed Tribal resources.

The USDA has provided billions of dollars in debt relief to non-Indian farmers. Debt relief has generally been unavailable for Indian Tribes under the ITLAP program, although Tribes such as the Oglalas are among the poorest people in the United States.

The Oglala Sioux Tribe has been desperately seeking debt relief from USDA. After dragging its feet on this issue for years, on November 2, 1999 USDA published a Proposed rule in the Federal Register for debt relief for Indian Tribes under the ITLAP program. (64 Fed. Reg. 59131).

The promulgation of a regulation, if determined necessary by USDA to provide debt relief to the Oglalas, is

very important. In light of the economic conditions described above, it is unconscionable for the Department of Agriculture to continue collecting nearly $1 million from the Oglala Sioux Tribe, each year.

However, the Proposed rule is seriously flawed. It contains criteria for debt relief that are overly specific and stringent. It is unlikely that any Indian Tribe could meet these criteria. To be sure, non-Indian borrowers need not meet criteria as detailed or stringent as these. Additionally, a waiver of Tribal sovereign immunity is proposed as a condition of relief.

The history of our Nation, as it relates to our land, is summarized above. My ancestors gave their lives to protect our way of life and our sovereignty. Now, the Department of Agriculture is proposing to require that we waive these rights, to merely be eligible for relief that is routinely afforded to non-Indians. Their Proposed Rule must be revised substantially, with realistic criteria for debt relief and with no unconscionable provisions for waiving Tribal sovereign immunity. Otherwise, the regulatory mechanism for debt relief under the Indian Land Acquisition Program shall be meaningless.

On behalf of the Oglala Sioux Tribe, I thank you for the opportunity to testify before the Senate Committee on Indian Affairs.

THE ALL TO OFTEN FORGOTTEN PART OF INDIAN PROBATE

In the morass of complexity and technicalities involved in Indian probate, there is a tendency to overlook a simple fact: that a member of someone's family has passed away. It is easy to forget that fact when probates take so long and the focus becomes the preparation of the probate file and the processing of that entity called the "estate."

While the participants may not be all that torn up about "Aunt Mabel's" passing at eighty years of age after having lived a full life, when it is the heir's mother or father or, worse yet, when it is the heirs' child, probate can be a painful and traumatic event.

It is one thing to submit a family history or a copy of a death certificate upon the death of a family member, it is quite another to have to appear to discuss the passing of an immediate family member or someone by whom the heir was raised.

Heirs are hungry for information. They want to know about the land: where it is located, what is its character, how much land is there, is it useful for any purpose, when was it allotted, who are the co-owners and how did strangers to the family acquire interests in the land?

Probate is two things, basically: it is the winding up of the decedent's affairs and the transfer of the decedent's assets to his or her rightful heirs. That is the functional part of probate. The emotional part of probate is that it is the process by which the legal existence of a human being is concluded that someone holds near and dear.

Sure there are old or probates involving huge numbers of parties in which the emotion has long-since passed, if there ever were any, given the remoteness of the relationship of the heir or heirs to the decedent. The fact that there are such probates should not, however, detract from the fact that within the first three or so years of an immediate family member's death, the pain is very real and emotions are just below the surface or the further fact, depending upon whose figures are used, that 85% to 90% of all inheritance occurs among relations within the first and second degree. This means: children, grandchildren, parents and siblings with spouse added as a lawful dependent.

All persons involved in probate for the Department of Interior have no doubt seen families engaged in battles that are nothing more than a fight over assets. Greed is not an unknown commodity in Indian probate. However, most probate personnel would also agree that a primary focus of most individuals who participate as heirs is that of "connection" either to the decedent or to the interests in allotted lands as a continuing symbol of the heir's status as an Indian.

Lucky is the heir who receives significant income from his or her interests. The fact of ownership of interests in allotted lands as a subjective or emotional nexus with the heir's heritage, whether familial or cultural, has all too often been ignored by executive and legislative branch policy-makers and functionaries.

Because it is easy when one operates purely at a policy-level to forget that laws apply to human beings who process things in a personal way, laws such as the "two percent rule" will never

fly. There will always be a heir who will refuse to accept loss of his or her nexus with the deceased loved one's property, no matter how small the interest, or who will draw a line in the sand about the loss of what he or she views as a vestige of Indian heritage.

No matter how smugly policy wonks may rationalize why individuals with small interests should agree to give them up for the greater good or may construct arguments which permit them to bob and weave around legal due process requirements and notions of fundamental fairness in order to take small interests without compensation, the plain fact remains that the all such efforts will be challenged. Moreover, the longer the time between the enactment of the provision and a final decision on the merits--all of which thus far have been in the heirs' favor--the more it costs the government in hidden costs such as wasted implementation, labor and clean up costs. All of this adds needless complication to an already bad fractionation problem.

At times, it seems that government operates in a parallel universe in relation to the lives of ordinary people--more so where Indians are concerned. To most Indians land, including allotted land, means homeland and heritage, not real estate. Chief Joseph's father admonished him to " never sell the bones of his father." Indians adhere to that principle. In all but a very few areas, the primary method of allotted land transfer is by inheritance. In many areas, sales of allotted lands to non-family members are unheard of. Seen in this light, the importance of Indian probate proceedings should not be underestimated or minimized.

If policy-makers and others forget that there are real people on the other end of what they do and that the real people they are dealing with are Red people with Red attitudes about land, they are doomed to repeat the mistakes of the past. It is these very mistakes with all their nuances and complications that allotted landowners, tribes and the United States are living with today.

Judge Sally Willett
Cherokee

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November 18, 1999

Hon. Ben Nighthorse Campbell
United States Senate
Committee on Indian Affairs
838 Hart Office Building
Washington, DC 20510

Re: S. 1586 and S. 1315

Dear Senator Campbell:

I would like to submit the following comments for the record of the joint hearings you and Chairman Miller convened November 4, 1999 on S. 1586 and S. 1315. I commend you for your efforts in seeking solutions to the difficult problem of fractionated ownership of Indian lands. This is an issue affecting almost 20% of all Indian land, posing a significant barrier to economic development and cultural survival for Indian people. But although a solution is desperately needed, it should be a solution that recognizes both tribal and individual interests.

I have studied the fractionation issue for the past five years. In the past, I have provided legal assistance and representation to individual Navajo allotment owners and organizations of allotment owners from Navajo and other reservations. I have worked with the Indian Landowners Working Group in their efforts to develop solutions to this problem. I write now in my capacity as a scholar, interested in finding a solution that will restore use and control of allotted lands to tribes and their people.

1. Congress should not adopt any solution until tribes and allotment owners have ample opportunity to consider and comment on the proposal.

Since the General Allotment Act of 1887, Congress has imposed myriad changes in the laws governing individual Indian land, often over the objections of tribes and landowners. Even when there have been few objections, it has more often been because notice was slim and the period for discussion and negotiation inadequate. The Indian Land Consolidation Act of 1983 is a prime example, passed as an amendment to an unrelated bill originally drafted for a single reservation after only one day of hearings.

S. 1586 will drastically change the law governing leasing and inheritance of allotted lands. I strongly urge you and Rep. Miller to hold field hearings so that allotment owners and tribes can fully consider these important changes.

2. The best solution will promote consolidation in tribes *and* individual owners and their families.

Many owners of small, highly fractionated allotments care little about their ownership interests and would have no objection if the tribe took title to their descendants' share. Many others, however, care deeply about their land and see their interests as closely tied to their families, cultures, ways of life, and religions. Given the opportunity and necessary assistance these owners would take steps to consolidate their families' interests for future generations. Unfortunately, the present system of title transfers is so complicated and the Bureau of Indian Affairs so overburdened that even simple estate planning is practicably impossible.

At present, it is nearly impossible for families to consolidate allotment ownership themselves. Partitions, gift deeds, exchanges, lease councils, and trusts are all tools that could be used to help families consolidate ownership of their land, but the Bureau is presently unable and seemingly unwilling to provide the assistance and oversight required by statute, regulation, and the trust responsibility. Any solution should provide assistance to allotment owners and their families so they can regain use and control of their land.

3. Consolidating allotment ownership in tribes will not, by itself, solve the problem.

Since at least 1983, the Bureau of Indian Affairs has pursued tribal consolidation as the solution to the fractionation problem. With the passage of time and generations, the solution proposed in S. 1586 will eventually consolidate land ownership in the tribes. While such consolidation will reduce the Bureau's workload in maintaining records on fractionated titles, it will not restore the land to productive use. Each tribe will still have to develop a system for assigning consolidated land and respecting allotment owners' previous claims. The most productive solution would work with tribes to address this problem from the beginning.

4. "Escheat" of fractional interests will be perceived in Indian Country as unjust and unwise.

Although frustrating to all concerned, small co-ownership interests in highly fractionated allotments are not without value, both economic and non-economic. A less than 2% interest in a standard 160-acre allotment corresponds to 3.2 acres of land. The owner of such an interest may earn substantial income if it is producing mineral resources or is near an urban area. He or she is entitled to use the land, to physically partition his or her share, and to obtain a homesite lease from the other co-owners. Indeed, the United States Supreme Court has twice recognized the property rights of owners of small interests in highly fractionated allotments (*see Hodel v. Irving and Babbitt v. Youpee*).

A revived Section 207, as proposed in S. 1586, would be particularly damaging (and unpopular) among Navajo allotment owners in northwestern New Mexico, southern Utah,

and northeastern Arizona. In addition to widespread cultural taboos among elderly, more traditional, landowners against writing wills, the Bureau is particularly ill equipped in these areas to provide estate-planning services. Indeed, as late as 1996, the Bureau was routinely denying landowners the information they needed to even make a logical will.

The Bureau is likely to argue that by allowing landowners to devise their small, fractionated interests, the revised Section 207 will fit within dicta announced by the Supreme Court in *Hodel v. Irving* and *Babbitt v. Youpee*. But unless escheat is accompanied by a substantial increase in estate planning services for allotment owners, Section 207 will, in practice, deprive Indian landowners of their property without compensation and without due process of law.

It is significant that the strategy of "escheat" has not received widespread support from Indian governments who stand to receive ownership of the escheated interests.

5. Drastic changes in the rules governing mineral and commercial leases of allotted lands should be pursued cautiously.

Current law requires agreement of all locatable and competent co-owners in order to lease allotment lands for mineral resource and commercial development. S. 1586 would add Section 220 to the Indian Land Consolidation Act to allow the leasing of allotted lands with the agreement of a simple majority of the ownership, making much easier to extract minerals from allotted lands.

S.1315, introduced by Senator Bingaman and addressing only Navajo allotments, was developed in consultation with the affected landowners, balances landowners' right to prohibit development with the need to facilitate leasing. By establishing a sliding scale, linking the percentage of agreement required with the number of co-owners, S. 1315 balances landowners' right to control the use of their property with their interest in leasing their land for development. Many allotment owners are uncomfortable with the wholesale taking of the right to determine if, when, and how development will occur, particularly when the allotment is not highly fractionated, but is owned by a small number of family members.

Moreover, unlike S. 1315, S. 1586 would include all resources – e.g. coal strip-mines and *in situ* uranium mines. This is particularly threatening to resident co-owners for whom coal or uranium development could mean relocating. By way of example, Navajo allotment owners have been on both sides of past and present efforts to develop coal and uranium resources in northwestern New Mexico. This bill would decide the issue on the side of those pushing resource development and would do so without any input from the people affected. At the very least, the bill should be amended to require tribes to opt for this provision before being subject to it.

As a legal matter, the measure as proposed raises a serious problem as an unconstitutional taking of property. In *Babbitt v. Youpee*, the Supreme Court recognized the property

rights of owners of small fractional allotment interests to devise those interests. The proposed bill would take away landowners' executive rights to control the terms of development of their land. This interest is long established and a clearly protected property right in the field of oil and gas law. S. 1586 would change long-settled property rules and would be doing so without notice to the affected landowners, exposing it to challenge under the 5th Amendment to the Constitution.

6. Landowners need – *and are entitled to* – information about their allotment ownership.

The key to consolidating allotment ownership, both through *inter vivos* transfers and estate planning, is in providing landowners with adequate information about their allotted land and its ownership. The Bureau continues to use the Privacy Act, in my opinion illegally, to keep allotment ownership records hidden from everyone but potential lessees. There is no technological reason why every allotment owner should not be able to go into a chapterhouse or their local tribal office and access a computerized Geographical Information System providing a list of allotments, their ownership, leases and rights of way and land location. Such information is absolutely essential if landowners are to use and manage their land effectively. Any solution should include provisions for providing adequate information to landowners.

7. Congress created the fractionation problem. It is only just that Congress appropriate the necessary resources to resolve it.

It has become a commonplace that solutions to the fractionation problem must come without significant appropriations. Tribes have too many more immediately pressing needs and Congress in not inclined to support "extra" funding in Indian Country. Indeed, it has taken a major class-action lawsuit to obtain any significant funding for reforming the management of the proceeds earned from allotted lands. Effectively addressing the underlying problem of fractionated title will require a similar commitment. Since Congress created the problem, it is only fair that Congress appropriate funds to solve it.

Before Congress passed the Dawes General Allotment Act, Indian tribes did not have any problem passing land use rights from one generation to the next. Unfortunately, the Dawes Act and subsequent amendments established a system that lacked any rational inheritance scheme. Because the law imposed both state intestacy laws and trust restrictions on alienation and partition, allotment landowners have been trapped in highly fractionated co-ownership. Unfortunately, ameliorating this condition decades later will require spending money for tribes and individual landowners to consolidate fractionated interests and for the provision of assistance necessary to develop tribal probate codes, implement tribal consolidation plans, and work with landowners on estate planning and land consolidation. A decision not to devote resources to solving this problem is a decision to continue the destruction wrought by congressional acts passed over a century ago.

In conclusion, I again commend you and your colleagues for taking up this extremely complicated and difficult issue. The recovery of these increasingly useless lands, is critical to the health and survival of Indian tribes and Indian people. I urge you to take into account the interests of both in designing a solution.