

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. 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).

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. In 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 than 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 way 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