

## **National Congress of American Indians**

### **United States Senate Committee on Indian Affairs**

#### **The American Indian Probate Reform Act: Empowering Indian Land Owners**

**Thursday, August 4, 2011**

Good morning, Mr. Chairman and Vice Chairman and Members of the Committee. Thank you for inviting National Congress of American Indians to testify on the American Indian Probate Reform Act. The National Congress of American Indians (NCAI) was established in 1944 and is the largest national tribal government organization.

We greatly appreciate that the Committee is once again considering the issue of Indian land allotments, inheritance and fractionation. Since the 1980's, these difficult and entrenched problems have been the subject of several efforts to improve the law under the Indian Land Consolidation Act. NCAI supported the 2000 and the 2004 amendments because it is absolutely necessary to restrict the growth of fractionated land ownership. There are currently over four million ownership interests in 170,000 tracts of allotted Indian lands. Without strong action, fractionation will continue to grow exponentially, even greater problems will be created in federal land management, it will become even more difficult to put land into productive use, and Indian land will continue to go out of trust status in piecemeal fashion.

However, when NCAI supported the passage of the American Indian Probate Reform Act (AIPRA) in 2004, we also recognized that the issues are complex, involve difficult tradeoffs, and that no bill could come to a perfect resolution. We relied on the assurances of the Committee that the amendments would not be the last word on this topic, but that we could come back with additional amendments to correct and improve the statute as we gain more experience with it. We thank the current leadership of this Committee for your continued efforts in this direction.

We believe that the timing is right for a fresh look at Indian land consolidation. Last year, Congress approved the settlement of the long running *Cobell* litigation over management of Indian trust funds. The newly created \$1.9 billion Indian Land Consolidation Fund is a great achievement to address longstanding intractable problems with fractionated ownership. However, under the current program, there is a concern that the costs of appraisals and other transactions costs could consume a significant portion of the funds. Discussions with Congress are needed to consider ways to make the program more effective and cost efficient. The *Cobell* settlement fund is a once in a lifetime opportunity to address Indian land fractionation, and it must not be wasted. NCAI offers the following brief background and suggestions.

**Fractionation Data and the Dual Goals of Consolidating Lands and Preventing Future Fractionation.**

We have seen limited data about the nature of Indian land fractionation, but what we have seen paints an important picture. Current data should be shared with tribes because it will facilitate discussion about effective and targeted remedies. There is a common misperception that estate planning doesn't work and that nearly all allotted land is fractionated. Neither is true.

- There are roughly 170,000 tracts of individually owned Indian trust land (this figure is complicated by the division between surface and subsurface estates.)
- 39% remain in single ownership. Many owners have engaged in estate planning.
- 28% have 2 to 10 owners – likely within the control of a closely related family.
- 23% have 11 to 50 owners
- 9% have 51 or more owners
- Approximately 800 tracts have more than 200 owners
- 57% of ownership interests reside in 9% of tracts
- 80% of ownership interests reside in 21% of tracts
- Most highly fractionated tracts are in the Dakotas, Montana, Wyoming, Arizona and Ojibwe reservations in Midwest
- The smallest interest is one millionth in an eighty acre tract

These facts about the nature of fractionation lead to a number of important conclusions:

- 1) **Need to Fund Estate Planning.** Fractionation is an ongoing process, and part of the goal is to prevent fractionation on tracts that are still closely held. The numbers make clear that estate planning has been beneficial on many tracts. In 2005, soon after the passage of AIPRA, the Department made an unwise decision to stop the practice of assisting Indians with the preparation and storage of wills. We would urge Congress and the Department to reconsider this decision and restart funding for Indian estate planning.

The entire structure of the probate provisions in AIPRA is predicated on a significant policy decision by Congress to encourage the drafting of wills by Indian landowners. By writing a will, land can be transferred to any person. In contrast, the intestate provisions are far more onerous than those that are normally found in state probate codes. The persons eligible to inherit are sharply limited to only immediate family who meet a restrictive definition of “eligible heir,” and if no such heir exists the land will go to the Indian tribe. If the ownership interest is less than 5% of the total, the new intestate code will limit inheritance to only the oldest child or grandchild, and if no eligible heir exists once again the interest will again go to the tribe.

We are concerned that the decision to stop assisting Indian landowners with will writing violates the intention of Congress in AIPRA to encourage estate planning and landowner control over property rights. We say this because the decision has prevented Indians from writing wills. First, across the country there are only a handful of legal services offices that

provide will writing services to Indian landowners. Second, the private bar has almost no experience or expertise in working with these issues and will not gain it in the future because there is no money in it. Third, most Indian landowners live in extremely rural areas and have extremely low incomes and limited transportation options. As you know, the most heavily allotted and fractionated reservations are also the most remote and impoverished – often with poverty rates greater than 80%. Assistance with will preparation is a service that is desperately needed by Indian people and in many places only the BIA is in any position to provide this service.

Most importantly, we are concerned that the decision to end this assistance will increase land fractionation. Approximately 39% of Indian allotments are in single ownership. In our experience only a small percentage of landowners write wills and these tend to be the owners of homesites and other unfractionated parcels. These allotments have not yet tipped over into fractionation, and Interior should be doing everything in its power to ensure that they do not. Providing assistance with will writing is the best way to prevent lands from becoming fractionated in the future.

- 2) **Partition.** Current partitionment practices and statutory provisions are ineffective in Indian country. Every one of the 50 states has a partition-by-sale statute that prevents fractionation. Although AIPRA created a partition-by-sale provision for highly fractionated lands, we have not heard of a single instance where it has been used. It appears that the process is too cumbersome. We recommend that this provision should be considered for revision in consultation with Indian tribes.
- 3) **Extraordinary Fractionation.** There are some extremely fractionated tracts that may need special consideration. A tract of land with ownership interests in the millionths may never be consolidated under the current procedures. First, transactions costs and the time and effort needed to locate and complete transactions will consume the limited funds for land consolidation. Special procedures may be needed for identified highly fractionated tracts. A relatively small number of tracts consolidated would yield enormous benefits in reducing the overall number of ownership interests. Second, some interests have so little monetary value that the landowner has no incentive to sell. Why would a landowner sell an interest in land for a nickel or a quarter? It isn't worth the time to complete the transaction or put a stamp on an envelope. The Department may need an ability to make offers at greater than fair market value for very small interests in order to create an incentive to participate.
- 4) **Need for Data Sharing.** Effective consideration on these issues will require much greater data sharing on the fractionated tracts and unfractionated tracts within all areas of Indian country. In addition, it would be helpful to have better information on the results of Indian probate processes over the last several years. We need a common knowledge base in order to develop effective solutions. We believe that the data will demonstrate the need to prevent

future fractionation, as well as to address existing fractionation. Estate planning and attention to the probate process is essential.

The Land Consolidation program has tried differing strategies for targeting acquisitions – sometimes focusing on particular tracts of land, and sometimes focusing more on acquiring the interests of particular owners. More intensive study of data is needed. The average Indian land owner owns 15 interests in scattered tracts. Focusing on owners may be more effective in reducing transactions costs. In addition, data is needed to track the performance of the program over time. Indian tribes have a strong interest in ensuring that the funds are administered effectively and with transparency.

- 5) **Ensuring Funds are used within 10 Years.** A key feature of the Cobell settlement land consolidation is that the funds must be used within ten years or they return to the U.S. Treasury. Indian tribes have raised concerns that the Interior Department may not have the capacity to implement the program in this timeframe, and that future administrations may not have the same commitment to the program. There is a significant concern that this feature of the settlement could make the land consolidation program an illusory promise. We would encourage the Committee to pay attention to the timeline. At this point the Secretary of Interior has recently begun consultation with tribes, and we are satisfied with the rate of progress.
  
- 6) **Agreements with Tribes to Perform Land Consolidation Functions.** The Indian Land Consolidation Act provides clear authority to the Department to enter agreements with Indian tribes to perform functions under the land consolidation program, although it is not subject to contracting under the Indian Self-Determination and Education Assistance Act. 25 USC 2212(b)(3)(C). NCAI has strongly encouraged the Department to use the capabilities and experience of Indian tribes in local land management. These agreements would expand the reach of the Department, prevent the need for development of a large federal bureaucracy, ensure that the funds could be spent within the ten year time frame, prevent competition with tribal programs, engage the unique legal authorities of tribes, and take advantage of tribes' ability to locate owners and make offers. Many tribes also have programs for low-interest loans to landowners who want to consolidate. Further, many tribes have already contracted with the BIA for realty and title functions and could conduct transactions more efficiently in-house under their existing programs.

At the recent tribal consultation in Billings, Montana, Deputy Secretary David Hayes indicated that the Department is very interested in contracting with tribes to assist with land consolidation functions. This is good news, and we encourage the Committee to continue to oversee this process. Over the last 70 years, Indian tribes have purchased and consolidated far more land than the federal government, and tribes have legal authorities, employees, the ability to leverage funds, and knowledge of relationships within tribal communities that the

federal government does not possess by itself. Tribes' capabilities in local land management should be put to use.

- 7) **Increasing Efficiency and Appraisals.** Under the current program, there is a concern that the costs of appraisals and other transactions costs could consume a significant portion of the funds. We would encourage Congress and the Committee to consider ways to streamline the land purchasing process under the program. In particular, tribal leaders are concerned about the costs and delays of appraisals, the lack of capacity for conducting appraisals, and the bottlenecks and delays in recording title transactions.
- 8) **Liens and Waivers.** The current ILCA program requires that the Department acquires a lien against the acquired property until the costs of acquisition have been recovered. 25 USC 2213(b). The benefit of this feature is that the acquisition funds are leveraged to fund future acquisitions on the same reservation – in effect doubling the value of the funds spent on acquisition. However, Indian tribes have concerns that for many tracts the costs of tracking the liens on property will outweigh any benefits and will increase transactions and accounting costs. The Department has not yet implemented an effective system for waiving the lien for lands that will not produce income in a reasonable time frame. This aspect of the system should be reconsidered.
- 9) **Locating Owners and Buying Last Interests.** The Land Consolidation program has been effective in convincing a high percentage of owners to respond favorably to purchase offers. However, there have been difficulties in completing consolidation on tracts. Often a small number of owners do not respond, cannot be located, or refuse to sell – and the result is a tract that remains subject to fractionation and the difficulties of multiple ownership. Under the Indian Land Consolidation Act, Indian tribes have the authority to direct the sale of land if the tribe owns more than 50% of the interests. 25 USC 2204(a)(2). However, the Department has been unwilling to exercise this authority on behalf of tribes when the interests involved are fee interests. This provision may need clarification.
- 10) **Delays and Backlogs in Probates.** In some regions of the country we continue to hear about significant delays in the probate process. These delays seem to be related to a lack of communications and clear organizational structure between the BIA, the Office of Special Trustee, and the probate judges at the Office of Hearing & Appeals. In addition, the TAAMS title system appears to continue to create bottlenecks. NCAI continues to strongly recommend that the Office of Special Trustee be reorganized back into an integrated function within the BIA, and that an analysis of the effectiveness of TAAMS be performed.
- 11) **Purchase at Probate.** AIPRA provided new authority for Indian tribes, the Department, and certain landowners to purchase interests in Indian land during the probate process. This feature is balanced by a provision that allows the heirs to avoid a forced purchase if they enter into a consolidation plan. Anecdotally we understand that this feature of AIPRA has

been working as intended in some cases. When an Indian tribe has attempted to purchase a property, it has resulted in the family adopting a consolidation plan and keeping their property.

This is for the good, but we believe that greater exercise of this authority by the Interior Department is also needed. The Department should consider using *Cobell* settlement funds to target certain acquisitions at the time of probate when extensive fractionation threatens. First, Indian tribes tend to focus on larger tracts, and may not pursue fractionated interests. Second, because the statute is working as intended and the exercise of the purchase option tends to trigger a family consolidation plan, Indian tribes may eventually lose interest. The Interior Department may be able to achieve a great deal of consolidation at the probate by attempting to exercise its option, even if it is rarely used to actually purchase the property.

- 12) Owner Managed Interests** - AIPRA contains a provision for "Owner-Managed Interests." Under this provision, if all the owners of a trust property agree to put the land in "owner-managed" status, the owners may enter into certain surface leases without Secretarial approval. The Secretary is not responsible for the collection or accounting of lease revenues while the land is in "owner-managed" status, but the land remains in trust, free from property taxes, and within the jurisdiction of the tribal government. This provision supports self-determination and should reduce bureaucracy on routine transactions. We have not yet heard anything about the use of this provision. We suspect that its existence may not be widely known among Indian landowners. We are interested in learning more from the Department of Interior on this subject.
- 13) Notice to Tribes on Land Going Out of Trust.** One of the more important provisions of AIPRA is the tribal purchase option, which allows Indian tribes the option to purchase any property that is intended to be taken out of trust. In order to exercise this option, though, the tribe must receive notice of the transaction. We have heard anecdotally that some tribes are receiving notice too late to make effective use of this authority. We are interested in learning more from the Department of Interior on this subject.
- 14) Low Interest Loans for Indian Farmers and Ranchers.** There are many active Indian farmers and ranchers in Indian country who would be willing to purchase fractionated lands if they could receive assistance from the Department of Agriculture with loans. A provision was included in the last Farm Bill, but it contained some technical problems that have prevented its implementation by the USDA. We would encourage the Committee to work with the USDA and the Indian agricultural producers to address this issue.
- 15) Other Technical Amendments.** We are aware of a number of other technical issues that have arisen during the process of implementing the statute and process probates, and would be interested to learn from the Department of Interior about their experiences in implementing the statute.

## **CONCLUSION**

Thank you for the opportunity of appearing before you today. Land fractionation in Indian country is a particularly difficult problem because of the inherent contradictions and competing goals. This Committee's leadership has taken a very productive and realistic approach that we must continue working on the problem, and if we make mistakes we can come back and fix them. I greatly appreciate the Committee's willingness to work with us in this manner. I have no doubt that we will be back to work with you again in the coming years on technical amendments to the law. We greatly appreciate the work of the Committee on Indian Affairs, and would like to thank you especially for your attention to this most important issue.