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Before the United States Senate Committee on Indian Affairs

Oversight Hearing

"The American Indian Probate Reform Act: Empowering Indian Land Owners"

August 4, 2011

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and members of the Committee on Indian Affairs. My name is John Berrey, and I am the Chairman of the Business Committee of the Quapaw Tribe of Oklahoma.

Thank you for your invitation to appear before you today and for holding this hearing on what I believe should be one of the top priorities for Congress and for Indian Country.

One of the most important and cost-effective statutes ever adopted by Congress in the area of Indian affairs is the Indian Land Consolidation Act—commonly known as "ILCA." My remarks this afternoon will focus on the application of this act, and on future activities related to Indian land consolidation. As a general matter, I want to offer my strong support for ILCA and for Indian land consolidation, and also to urge the Committee to consider ways to streamline and improve its implementation.

In contrast to most Federal legislation that carries a cost to taxpayers, ILCA actually results in a savings and, at the same time, provides a benefit to Indian tribes and their members. Because Indian trust lands across the country are so highly fractionated, there is still a great need to find ways to perfect the ILCA and develop additional tools to accelerated the consolidation efforts. The practical experience of my tribe, the Quapaw Tribe, demonstrates that Congress must provide adequate oversight and guidelines to ensure that the funds being set aside for Indian land consolidation are actually used for that purpose, and not to further the purposes of the bureaucracy at the Department of the Interior.

The Costly Problem of Indian Land Fractionation

The problem of fractionation of Indian lands has been well known for more than 50 years to those in who work in the area of Federal Indian affairs. Indian land fractionation is the result of the inheritance process whereby Indian lands pass from generation to generation, multiple Indian owners increasingly end up with undivided ownership interests in tracts of land. For example, there are instances in which Quapaw Indian lands have 100 or more undivided owners. There are Quapaw Indian land owners who hold ownership shares in land such as a 1/12th interest in a 1/144 interest, and I could give you many examples of even smaller ownership interests. The Quapaw situation is not unique. In the Quapaw Tribe's land base, there are

thousands of fractional interests.

Indian land fractionation results in two overriding problems—namely, the land becomes economically unusable because of the difficulty in getting consent among all of the joint owners for leasing and other matters. Second, the administration of these interests by the Bureau of Indian Affairs is expensive and administratively burdensome.

In the early 1980s, a group of officials at the Department of the Interior began attempting to address this problem. These individuals included Wayne Nordwall, who is one of the policymakers in this area for whom I have great respect, and who I believe was among the most effective officials ever to serve in the area of Indian affairs. In October 1981, Mr. Nordwall and others met with members of this Committee, the House Interior and Insular Affairs Committee, and tribal organizations, and over the course of several months the ILCA bill was prepared and adopted. A number of issues arose concerning this legislation, however, in particular with a provision that permitted small interests to escheat to tribes ruled unconstitutional by the U.S. Supreme Court in 1997. Ultimately, these and other issues were addressed, and a revised version of the legislation was enacted into law in 2000.[1]

A Simple, Yet Effective, Solution for Individual Indians, Tribes, and Federal Taxpayers

The ILCA implemented what appears on its face to be a simple, and somewhat obvious, solution to the problem of Indian land fractionation: the Act authorizes Indian tribes within whose jurisdiction the land is located to acquire the fractional individual interests in the land at a fair price, and thereby to return the land to the tribe's land base. Re-consolidating the Indian base reduces the administrative burden to tribes and the United States, reduces the burden on the federal taxpayers, and breathes new life into land that was essentially economically dead.. These win-win-win results benefit all concerned: the taxpayers, tribal governments, and the restricted Indian owners.

I believe that ILCA is among the better legislative ideas ever adopted by Congress, at least in the area of Indian affairs. ILCA was designed to be consistent with the goals of the Indian Self-Determination and Education Assistance Act,[2] and the companion Tribal Self-Governance Act,[3] which I and many others in Indian Country include in the category of sound, progressive legislation that respects the sovereignty of Indian nations and improves the material standard of living for Indian people.

I am particularly proud of the fact that the Quapaw Tribe has been among the tribes nationwide that have used ILCA extensively, and we have achieved to some extent the goal of the legislation. The Indian Land Consolidation Program (the "ILCP") reported recently that through April 2008, the Quapaw tribe had acquired 713 fractional interests in Indian land, which

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1 *See* 25 U.S.C. § 2201 et seq.

2 *See* 25 U.S.C. § 450 et seq.

3 *See* 25 U.S.C. § 458aa et seq.

involved a total of 590.75 equivalent acres, with approximately $500,000 paid to our tribal landowners.

ILCA is not solely a federal initiative, and it requires substantial tribal commitment. Some restricted Indian land owners initiate contacts with the tribes to offer to convey fractional interests. But for Indian land consolidation to be successful the tribal realty offices must devote resources to publicizing the program and to locating and working with the fractional interest owners. Tribal realty offices are in the best position to do this, as they usually have better and more current information concerning the contact information for their members than does the BIA.

For Indian land consolidation to be successful, tribes must also make a serious financial commitment to the program. Federal funding for ILCA can be used only for payment of the market price of fractional interests in land, and these numbers, based on appraisals, quite often are inadequate to incentivize the Indian owners to sell their interests. For example, the Quapaw Tribe has acquired fractional interests in Indian land that had appraised values as low as about $25, and we have see mineral interests appraised as low as $1 or less.

A lot of the Indian owners of these tiny interests react to the offers the same as you and I—at some level, the appraised value is simply not worth the time and effort to process the paperwork. For this reason, the ILCP has approved of the use of tribal bonuses, which may be paid above and on top of the market value, to the seller. The Quapaw Tribe has, since the beginning of ILCA, paid approximately $580,000 in bonuses on land purchases. In my view it is entirely appropriate for a tribe to incentive the owners of fractionated interests to participate in the ILCA program, and I think this is one aspect that has made our program successful in the past.

Limitations on funding have slowed the Quapaw Tribe's use of the program beginning about three years ago, and we really have only begun reducing fractionation for those lands within our jurisdiction.

Challenges to Making ILCA Work

While I think the Committee will find broad—if not almost universal—consensus about the merits of Indian land consolidation and ILCA, the Quapaw Tribe has experienced several obstacles that I believe may be instructive to the Committee. As I noted, I believe the Indian Self Determination, Tribal Self-Governance and ILCA are among the better laws ever passed, and one of the common objectives they all share is to enhance tribal capacity and decision-making, with a corresponding reduction in the Federal Indian affairs bureaucracy.

On this score, let me say that I have many friends at the Department of the Interior and at the Bureau of Indian Affairs, and I hesitate to sound overly critical or to apply too broad of a brush with my comments. But, the self determination regimes and ILCA have been met with fairly strong resistance within the Federal bureaucracy, which has a strong interest in perpetuating itself. Based on my own observations, I believe if the Committee does not provide adequate oversight and scrutiny, the funding available for land consolidation may not be effectively and efficiently used.

As a case in point, the BIA fought hard to prevent the Quapaw Tribe from withdrawing its governmental functions pursuant to the Tribal Self-Governance law. Unfortunately, it took expensive litigation for us to be able to achieve what Congress had mandated to be a matter of right for all Indian tribes. The main obstacle to making self-governance more broadly used is that the Federal bureaucracy does not want to relinquish control and funding, which was the purpose of the law. We have observed a similar response to ILCA, and I believe that unless this Committee commits itself to effective land consolidation, the BIA may see the TLCF as a source of new Federal funding for itself, as opposed to accomplishing the goals of Indian land consolidation.

The Quapaw Tribe was fortunate to have received funding for Indian land consolidation a few years ago through the efforts of Senator Jim Inhofe, who recognized the problem for the Oklahoma tribes of fractionation and the benefits to Federal taxpayers of ILCA. As a result, the Quapaw Tribe was able to make a very good start at reducing fractionation within our land base. However, of the $1 million appropriation the Quapaw Tribe was provided for land consolidation, just over half—approximately $540,000—was, as of July 2007, projected to be spent on administrative costs.[4] While I do not have the final numbers, it appears that over half the money was scheduled to be spent on administration, not re-consolidating the tribe's fractionated lands.

Although I have never been provided an explanation for these administrative costs, I doubt that they can be justified. ILCA does not create a new form of Indian land title conveyancing—it simply provides funding to acquire fractional interests. It should not be necessary in most cases that the BIA hire more staff or equip new offices. In fact, ILCA is a program that the realty offices of self-governance tribes such as the Quapaw Tribe should be able to implement, with assistance from the ILCP.

The only explanation I ever received for this expense was that the land records maintained for our tribe by the BIA's Miami Agency were in such disarray that this extraordinarily large expense was necessary to brings titles current. I also have some doubts about that explanation. Since that time, our tribe has finally been permitted to assume the realty function and open a tribal realty office. The land records transferred to us were, in fact, in a mess, and they plainly had not been the subject of a $500,000 clean-up effort. We operate our tribal realty program annually on far less than the amount of administrative costs that the BIA charged to the Federal taxpayers for administering *not the entire Quapaw realty program but only the consolidation of fractional interests in land*.

I believe the experience will be entirely different if ILCA funding and programs in the future are overseen by the ILCP and tribal realty offices. The ILCP has, in my experience, been one of the brighter spots in Indian affairs. My tribe's experience has been that the ILCP is knowledgeable and can answer questions directly. It is helpful, and it can assist a tribe in effecting an ILCA conveyance often in a matter of days. Additionally, tribal realty offices such as the one operated by the Quapaw Tribe, have operated very efficiently and they should be in a

[4] *See* Letter from Robert R. Jaeger, Director, Indian Land Consolidation Center, to John L. Berrey, Chairman, Business Committee, Quapaw Tribe of Oklahoma (July 2, 2007) (attached).

position to prepare all of the necessary paperwork which can then be approved by the ILCP. I think it is simply impossible to justify the need for the BIA's local agencies and regions to add a costly layer of bureaucracy to this process when they bring no value to the land consolidation process.

The Quapaw tribe's experience shows both the benefits of ILCA—the reduction we have achieved in fractionation—and the problems—the tendency of the BIA to use ILCA funding to perpetuate and strengthen its expensive bureaucracy.

Potential Issues with the NEPA Review Being Conducted by the BIA

In addition to my fears about the use of the TLCF to create a new bureaucracy, I have concerns as well that the BIA's implementation of the National Environmental Policy Act ("NEPA")[5] also presents a challenge to successful Indian land consolidation. My comments focus solely on the practical application of NEPA in this area, and are not intended in any way as a debate as to the merits of NEPA.

NEPA, of course, requires consideration of the potential environmental effects of pending major Federal actions. With respect to conveyances of fractional shares of Indian lands, this policy has been difficult for the BIA to implement. Mr. Nordwall, who was involved in the drafting and refining of ILCA at almost every phase between the early 1980s and the adoption of the last set of amendments in 2005, has relayed that the intent of the land consolidation initiative was to make conveyancing as expeditious as possible, and that it was never contemplated that NEPA was apply to these transactions.

In fact, the Secretary of the Interior's role under ILCA was intended to be essentially ministerial, in particular, in ensuring that the required procedures were followed. Only a few sections of ILCA, if any, give the Secretary true discretion in approving or disapproving a transaction, and, in fact, several mandate that the Secretary must approve certain types of conveyances. A categorical exclusion from NEPA review has been approved for certain conveyances of Indian lands. Nevertheless, the determination of whether the categorical exclusion is appropriate in a particular case has caused delay and expense, and, I believe, has expanded the bureaucratic burden of ILCA.

There has been litigation in this area, and I can appreciate that the Secretary and the BIA face uncertainties about how to implement the categorical exclusion for land consolidation-related conveyances. However, I think conveyances of fractional interests in Indian lands under ILCA need to be viewed for what they clearly are: it is the tribe and the individual Indian land owner who make the decision concerning which interests are to be bought and sold—not the Secretary or the BIA. The Secretary's function for most ILCA conveyances remains a ministerial function of approving the conveyances desired by the actual title holders.[6]

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[5] *See* 42 U.S.C. § 4321-47.

[6] For example, 25 U.S.C. § 2204(a) authorizes tribal governments to purchase all of the

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Accordingly, this Committee should clarify that conveyances under ILCA that are non-discretionary decisions with respect to the Secretary and the BIA, are not major Federal actions triggering a NEPA review.

Comments and Suggestions About ILCA Going Forward

Before I conclude, I would like to offer some suggestions that I hope the Committee will consider as it continues its review of the implementation of the ILCA, including the following:

1. In the 111th Congress, Vice Chairman Barrasso proposed a series of amendments to § 110 of the ILCA that, if enacted, will make more tools available for land consolidation, and which I believe have merit. These amendments would:

(a) Amend the definition of a "parcel of highly fractionated Indian land" by reducing the number of owners (1) from "50 or more but less than 100" to "not less than 20, but not more than 49" if no such owner owns more than 10% of the entire undivided ownership in the parcel; and (2) from 100 to 50 co-owners in general;

(b) Eliminate the requirement that payments or bonds be posted before commencing the partitioning process;

(c) Change the standard for determining whether a parcel is valuable enough to qualify for partition by raising the threshold from $1,500 to $5,000;

(d) Authorize the Secretary, at the request of an Indian tribe, to credit revenues derived by an Indian tribe on newly received land to any outstanding lien that may exist on another, tribally-owned parcel; and

(e) Authorize the owners of undivided trust or restricted interests who have been accorded "owner-manager" status by the Secretary, to enter into leases for any purpose authorized by the Long Term Lease Act (25 U.S.C. § 415) for a term not to exceed 25 years, with the option of one renewal for an additional 25 years.

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interests in a parcel if the tribe owns at least 50 percent of the tract. Under this provision, the Secretary does not have the discretion to deny initiating the tribal purchase process. Similarly, under § 2205(c)(1) a tribe can acquire an interest devised to a non-Indian seller simply by tendering the fair market value of the interest to the Secretary; there is no action for the Secretary to take other than to receive and disburse the funds. Section 2206(k)(9) allows consolidation agreements entered into among heirs and devisees to a decedent's estate. Again, there is nothing in this provision that allows the Secretary to condition or deny recording the terms of the agreement. Further, under § 2216(c) the Secretary is required—without discretion—to take into trust an interest in land held by a by a tribe or an individual Indian, if a portion of the tract was held in trust on November 7, 2000. Other sections of the statute, in contracts, clearly identify the Secretary's discretion in effecting a conveyance. ILCA, then, identifies the discretionary and non-discretionary functions of the Secretary. Unfortunately, all of the provisions of ILCA have been interpreted to present major Federal actions, contrary to the plain language of the statute.

2. Primary Administration of the ILCA Program. As I have explained, I believe it is necessary for Congress to make certain that there are adequate controls on the disbursement of funds for Indian land consolidation, and also to ensure that enormous sums are not used by the Federal government for unnecessary administration. I believe this could be accomplished, in part, by giving the ILCP the primary responsibility for administering the ILCA program. The ILCA program does not require multiple layers of bureaucracy—including duplicative administration by BIA agencies and regional offices—particularly where tribal realty offices exist and are in a position to review the land records, prepare the conveyances, and present the documentation to the ILCP for final approval.

3. Enhanced Role of Tribal Realty Offices. Where tribes participating in ILCA are self-governance tribes with realty offices, such offices should be responsible for preparing the conveyances, reviewing the purchase agreements, and presenting the documentation to the ILCP. Tribal realty offices are leanly staffed, efficiently operated, and professionally managed. These tribal offices are capable, and they should be permitted, to more fully implement ILCA. The result will be that administrative costs will be lower and more efficiency will be achieved than if the BIA has a significant role.

4. Control of Administration Costs. To ensure that ILCA is administered in a cost-effective manner, I believe that the ILCP should be given a mandate to control costs, as well the tools for ensuring that this mandate is respected by all agencies, including the tribal realty offices participating in the program and the BIA.

5. Appropriate Application of NEPA. I believe the Secretary of the Interior should be directed to review the current policies with respect to the application of the categorical exclusion under NEPA to land conveyances, and to ensure that they reflect a reasonable application of NEPA. Further, I suggest that the ILCP should be given responsibility for approving categorical exclusions for all ILCA conveyances. I believe this office has demonstrated that it knows how to process ILCA conveyances quickly and efficiently, and it should be in a position to uniformly and fairly implement policy in this area.

6. ILCP-Tribal Working Group. I would also suggest that the ILCP be encouraged to establish an informal working group consisting of participation by representatives of tribes actively using ILCA, so that the ILCP is aware of issues and problems encountered by tribal realty offices, and is in a position to help address such matters. Such a working group should be informal, and should not require any costly administration.

In conclusion, it is awe-inspiring to realize that there are over three million ownership interests in over 130,000 tracts of fractionated Indian land. Nonetheless, there are valuable lessons to be learned from the Quapaw experience and the experiences of tribes across the country. Refinements to the ILCA, the development of new consolidation tools, and enhancing the role of Indian tribes in the process are three ways this Committee can advance the cause of Indian land consolidation.

Earlier this week, Congress approved and the President signed legislation that will fundamentally restructure what the United States government does and how it will pay for these activities. Especially in these tight budget times, it is more important than ever that our scarce

resources are spent wisely, and in the service of real and lasting Indian land consolidation.

Thank you for your strong support of Indian communities, and for your consideration of my comments. At this time, I would be happy to answer any questions you might have.