

Testimony of D. Fred Matt, Chairman
Confederated Salish and Kootenai Tribes
of the Flathead Nation
on Substitute S. 550
Held on October 15, 2003

Chairman Campbell and honored Members of the Committee on Indian Affairs, my name is Fred Matt, and I am Chairman of the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation. On behalf of my Tribal Council, I am pleased to provide testimony regarding the substitute bill for S.550 entitled "American Indian Probate Reform Act of 2003."

CSKT appreciates the efforts of this Committee and its staff in attempting to correct the fractionation problems of Indian land ownership and to retain the trust status of the property. We support the objectives of the Indian Land Consolidation Act Amendments of 2000 (ILCAA) and recognize that some amendments are necessary to clarify this complex legislation. Further, we encourage this Committee to complete the amendments prior to the Secretary's certification of notices required by the ILCAA triggering the 365-day effective date for the "descent and distribution" Section 207 (25 U.S.C. §2206) of the Act. We are here today to provide the Committee with CSKT's comments on probate reform as it relates to tribal sovereignty and self-governance. I think we all realize there is no quick and easy, or cheap fix to Indian land fractionation.

I. Introduction.

The Flathead Indian Reservation was reserved through the cession of over 22 million acres of tribal homelands to the United States retaining approximately 1.3 million acres for the "exclusive use and benefit" of CSKT as well as other treaty rights. *The Treaty of Hellgate*, Treaty of July 16, 1855, 12 Stat. 975. The CSKT bitterly opposed the allotment policy on the Flathead Reservation and initially avoided the adverse effects of The General Allotment Act of February 8, 1887, 24 Stat. 388. Despite treaty promises, the competition for the land from outside business and political interests forced the passage of the Flathead Allotment Act of April 23, 1904, 33 Stat. 302 (FAA), the legal authority for disposal of lands located within the exterior boundaries of the Flathead Reservation. In 1908, the federal government granted 2,390 allotments of 80 to 160 acre tracts to Indians. Later, additional allotments on the CSKT Flathead Reservation were made pursuant to other congressional acts comprising in all a total of 3,380 original allottees.

Commencing in 1910, the CSKT Flathead Reservation was open to homesteading and approximately 404,000 acres of land were patented to non-Indian settlers, 61,000 acres were granted to the state of Montana, 18,500 acres of land were reserved by the United States for the National Bison Range, and some 1,700 acres of land were also reserved by the United States for other purposes. As a result, the

most valuable asset of CSKT, the land, was sold to non-Indian settlers at below-market value, nearly destroying the tribal economic base. The transfer of land from tribal ownership to private ownership created jurisdictional battles and barriers to tribal self-governance on our own Reservation which we struggle with daily.

In 1934, Congress repudiated the federal policy of allotments with the enactment of the Indian Reorganization Act, 48 Stat. 984, and approximately 35,000 acres of “surplus” lands were restored to CSKT tribal ownership. In addition, CSKT adopted the first constitution pursuant to the IRA which was approved on October 18, 1935. At that time, the land base of the CSKT had diminished to approximately 30 percent tribal ownership. Since the era of the forced sale of tribal assets, the CSKT have expended great efforts and much resources to reacquire lands within the exterior boundaries of the Flathead Reservation. The mission statement of the CSKT acknowledges the great importance of tribal ownership and control over all lands within our reservation boundaries.¹ Currently, the CSKT have restored its land base to nearly 70 percent tribal ownership. Attached at the end of this testimony, please find the land status maps of the CSKT from 1855 to present.

Additional history that helps explain CSKT’s struggle for self-determination and the desire to have a hand in the decisions that affect us. Since 1990, the CSKT have operated the realty program pursuant to Public Law 93-638, The Indian Self-Determination and Education Assistance Act of 1975, as amended. First under a contract then in 1994 the CSKT took the next step and evolved from a contract tribe to a compact Tribe. The CSKT compacted the Land Titles and Records Office in the latter part of 1995. Land Titles and Records Office is governed by federal regulations found at 25 Code of Federal Regulations, Part 150 and maintains land records and title documents for nearly 1 million acres of individual allotted/trust, Tribal trust and Tribal fee lands on the Flathead Reservation.

As a result of our active land stewardship, the CSKT has first-hand experience and knowledge of Indian land issues. CSKT believes that through the combined efforts of land acquisition, probate reform and estate planning education, we will eventually manage land fractionation on the Flathead Reservation. In general, CSKT supports Substitute S. 550 with requests for minor amendments. Namely, 1) clarify the definition of Indian, 2) allow devise freely with Tribal options to purchase prior to trust property attaining fee status, 3) reduce the applicable percentage for 5 or fewer owners from 100 percent consent to 90 percent for leasing purposes, 4) allow Tribes to probate trust estates in Tribal Court, and 5) reserving the right to provide additional comments on other technical amendments upon

¹The CSKT Mission Statement: “Our mission is to adopt traditional principles and values into all facets of tribal operations and service. We will invest in our people in a manner that ensures our ability to become a completely self-sufficient society and economy. We will strive to regain ownership and control over all lands within our reservation boundaries. And we will provide sound environmental stewardship to preserve, perpetuate, protect and enhance natural resources and ecosystems.”
Adopted by Tribal Council May, 1996.

further review.

II. Probate Reform.

In August 2001 when some of the CSKT Indian landowners received the BIA brochure entitled "Notice to Indian Land Owners," it generated fear among our membership and initiated a flood of requests for fee patent applications. The Notice identified a change in the federal inheritance laws, of most interest, who may inherit which was different from past practice. Amidst this uproar of change, Senate Bill 1340 was introduced to amend the ILCAA of 2000 and to provide for probate reform. Unfortunately, CSKT could not fully answer our tribal member landowners' questions which compounded their concerns. Currently, the Indian Land Consolidation Act Amendments of 2000 (ILCAA) are having the unintended consequence of Indian landowners requesting fee patents for their trust property to avoid the federal legislation that may prohibit them from devising their land to their heirs. We have several applications for fee patent pending the results of this legislation. For example, one individual has a pending application for approximately 560 acres awaiting some direction. The CSKT Tribal Council recognizes the need to get accurate information to our membership as well as balance and preserve the intended goals of ILCAA. The potential of Indian landowners on our Reservation, who feel forced to prematurely transfer their interest from trust to fee status, poses a threat to our self-governance and Tribal jurisdiction.

The proposed substitute bill S. 550 would enact the "American Indian Probate Reform Act of 2003". The findings should recognize that Indian tribes have inherent power to prescribe rules of inheritance for members. Diminishing any inherent authority raises concerns for Indian tribes given the erosion of tribal sovereignty by recent United States Supreme Court decisions. However, CSKT recognizes that probates of trust land located in different states requires the application of different state laws and encumbers the process. Consequently, a uniform federal probate code may be necessary to assist with facilitating the probates in the absence of a tribal probate code. However, the uniform federal probate code should expressly verify that a tribe may enact laws relating to inheritance that will supercede the provisions of the federal law upon approval of the Secretary. Clearly, this recognizes the unique features of each Tribe and that Tribes are in the best position to determine and resolve the fractionated interests on their reservation.

A. Clarify the Definition of Indian. The ILCAA of 2000 provided a minor amendment to the definition of Indian that has resulted in a more restrictive interpretation. Pursuant to ILCAA, "Indian" means:

Any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of 'Indian' under a provision of Federal law *if the Secretary determines* that using such law's definition of Indian

is consistent with the purposes of this Act.

Under the ILCAA of 2000 definition, an individual may inherit trust land if he or she is an enrolled member or eligible for enrollment in a federally recognized Indian tribe or if he or she is found to meet the definition of Indian under other federal law. Unless the Secretary clarifies which federal laws she will consider consistent with the Act, if an heir is not enrolled, the burden shifts to the heir to prove at the probate proceeding that a specific federal statute contains a broader definition of “Indian” and that definition is consistent with the purposes of ILCAA.² The latter interpretation will delay probate proceedings, leave the determination of who is an Indian to the subjective decision of the administrative law judges or attorney decision makers, who may or may not use the same criteria. Furthermore, the definition is too vague for staff assisting Indian landowners with estate planning services to determine whether an heir may be able to meet the burden of proof at the time of probate.

Historically, the Department has allowed anyone of any degree of Indian blood to inherit as long as they are a lineal descendent. The ILCAA of 2000 sought to limit those devises. Here, Substitute S. 550 proposes a broader definition of “Indian” through a range of categories such as enrolled member or eligible for enrollment, lineal descendant within 3 degrees, a current undivided interest owner in trust, and a California definition including in accordance with the Indian Health Care Improvement Act. CSKT appreciates the pressure of Congress to define who the federal government may owe a trust responsibility and also understands that a limited definition will prevent further fractionation of trust interests. However, merely clarifying the federal law that the Secretary may recognize for the definition of Indian pursuant to the ILCAA such as the Indian Health Care Improvement Act codified at 25 U.S.C. §1603(c) as proposed for the California definition may be the clearest and most consistent solution. Furthermore, following existing federal law may lessen a challenge that the definition does not meet the unique political status.

Most importantly, the legislation should recognize that Tribes retain the inherent right to determine its membership and inheritance of its members. If Congress should amend the definition of Indian to broaden the scope of individuals recognized, the legislation should continue to preserve an Indian tribes’ inherent authority and allow tribes to enact their own limitations on inheritance through the enactment of a tribal probate code.

B. Amend the “Special Rule” of inheritance by devise subject to a Tribal purchase option. The CSKT does not oppose the rules of construction provided in Substitute S. 550 to broaden the special rule of inheritance to allow an Indian landowner to explicitly devise his or her

²For example, the BIA has suggested the use of the Development of Tribal Mineral Resources Act codified at 23 U.S.C. § 2101: Definitions: (1) “Indian” means any individual Indian or Alaska Native who owns land or interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

property to a non-Indian “in fee.” Again, the United States Supreme Court has already recognized that “a decedent’s right to pass on property to one’s heirs is itself a valuable right.” Hodel v. Irving, 107 S. Ct. 2076 (1986). Babbitt v. Youpee, 117 S. Ct. 727 (1997). As a result, CSKT have 72 Youpee estates in various stages of the probate process representing an ownership change to 174 individuals. The CSKT supports amendments that will lessen the risk of the United States Supreme Court finding ILCAA unconstitutional again. Therefore, the CSKT does not object to the amendment allowing an Indian landowner to devise his or her trust land to a non-Indian heir “in fee.” However, CSKT offers its support for broadening the special rule with the understanding that any devise through a probate proceeding to a non-Indian will be subject to the tribal purchase option now provided for in 25 U.S.C. § 2205(c).

C. Provide a Definition for “Family Farm.” Substitute S. 550 provides an exemption of the Tribes’ purchase option of lands devised to a non-Indian if the land is a “family farm.” Currently, the legislation does not provide a definition of family farm. Since this exemption prohibits or delays a tribal purchase option, it is critical that the legislation define a “family farm” and recognize the potential enforcement issues arising from such exemption. For example, if the land status has transferred to “fee status” owned by a non-Indian, a tribe may not even receive notice of its purchase option upon a sale to a non-family member. The legislation should clarify enforcement of the restriction on the deed such as adjudication in Tribal Court. Otherwise, Tribes may be forced to waive sovereign immunity to enforce its right to purchase in state court since a family member may be an Indian or non-Indian or more likely left with no enforcement remedy.

D. Provide a Grandfather Clause for Existing Wills. In 1994, the CSKT realty office sponsored an “Estate Planning” effort. As a result, we have approximately 300 Wills on file for trust landowners. Now, the proposed amendments to the ILCAA have the potential of creating an enormous administrative burden on our staff to prepare Wills and to provide technical estate planning assistance. As a P.L. 93-638 Compact program responsible for providing Will drafting assistance, CSKT recommends that some consideration be given to Indian landowners who already have a Will and some flexibility provided to the judge to interpret the devise in a manner that best reflects the knowledge that the landowner probably had at the time of preparing his or her Will.

E. Development of a Land Title and Records [LTRO] System to Track Life Estates and Fee Interests held by Non-Indians and Allocate Funding for Notification Provisions. Again, CSKT compacted the federal function of operating the title plant for recording, maintaining, and certifying of title documents, and the issuance of title status reports. The intestate section of ILCAA requires recording of life estates and possibly fee interests. Our present system has the ability to track a life estate by including it on the Title Status Report (TSR). However, in a case where the life estate holder is a non-tribal member and the owner dies, it becomes difficult to track, as non-members are not probated in the same manner as Tribal members. Also, when an interest is fee patented, there is no way to keep track of a life estate. Similarly, CSKT supports the concept of joint tenancies right of

survivorship as an estate planning tool, however, the ability to track such interests requires additional discussions.

In addition, Section 207 provides for a notification to landowners of their interests in trust property and this is a good concept. However, CSKT recommends further review of the ability of Land Titles and Records to achieve this goal in a cost effective manner and allocate the necessary funding to effectively accomplish notice.

F. Encourage Broad Secretarial Authority to Approve Tribal Probate Codes. The CSKT requests that Substitute S. 550 encourage the Secretary to approve a Tribal Probate Code that a Tribal government has enacted to determine inheritance and land consolidation efforts of the Tribe. The proposed Uniform Federal Probate Code should only be applicable if Tribes do not have governing Tribal law. The Indian tribes are in the best position to identify and eventually resolve fractionated interests on their reservation. Nonetheless, Substitute S. 550 purposes federal restrictions on the approval of a Tribal Probate Code that merits further review and discussion. In general, the barriers to enacting Tribal Probate Codes should be recognized and alleviated through the Secretarial approval process required in ILCAA and proposed amendments.

G. Recognize Tribal Court Authority to Probate Trust Estates. Section 207 of the ILCAA provides for the use of Tribal Court findings of fact and conclusions of law by regulations of the Secretary. To facilitate probate of estates of its members, CSKT requests recognition of Tribes' authority to probate trust estates in Tribal Court. For example, the proposed amendments should recognize that the Secretary may grant Tribal Court authority upon certain conditions defined by regulation or pursuant to the 638 compact process. This may alleviate a choice of law question, expedite probate of member estates and reduce the number of forums required to probate the estate of a tribal member. For example, generally state law applies to probate trust estates if no applicable tribal law applies. With the enactment of a Uniform Federal Probate Code for inheritance of trust property, Tribes such as CSKT, will be faced with determining which law applies to non trust property. With the enactment of a Tribal Probate Code, tribal law should apply to the entire estate and authorizing Tribal Court adjudication will expedite the process. This is an area worthy of further exploration and discussion.

H. Family and Private Trust Pilot. Section 207 provides an amendment to develop a Family and Private Trust Pilot Program. This concept requires more information to respond. It is unclear how you create a trust relationship within another trust obligation. In addition, federal law allows only tribes and individual Indians to hold property in trust. Those laws may require an amendment for a family trust. However, CSKT has found a general interest among our membership in this concept.

I. Unclaimed and Abandoned Property. Another amendment to Section 207, provides a

process for the unclaimed and abandoned property. This section also requires further information and clarification. In general, we recognize there should be some exception for minors, non compos, etc., as well as additional due process prior to abandoning IIM monies. In general, CSKT supports amendments to allow individuals and Tribes an opportunity to purchase undivided interests of co-owners whose whereabouts are unknown or after notice is published. A process should be developed to provide for adjudicated in Tribal Court to protect the due process interests of individuals. Similarly, the abandonment provisions should also have strict guidance. However, CSKT would suggest that the voluntary abandonment process should follow the gift deed provisions as a better process. The efforts to find missing persons is a good process and probably the most cost effective. Again, this is an area that requires funding to be successful.

III. Land Acquisition

Section 213 limits CSKT from participating in the pilot programs for acquisition of fractional interests. In general, the funding for the pilot land acquisition projects provided for in the ILCAA are not available for compact Tribal programs. However, due to our aggressive land acquisition, CSKT are in a position to counteract the fractionated interest on our reservation with additional funding. The CSKT identified 200 tracts of land in which the CSKT owns more than 50 percent interest. The total amount needed to acquire the remaining interests in these tracts is just under \$6.5 million with less than 15 percent going towards appraisals and administrative costs. In May, 2003, we submitted this proposal for funding to the Department for review.

By acquiring these interests, the CSKT would eliminate over 3000 Individual Indian Monies (IIM) accounts that have minimal value. In fact, several of the listed specific interests have only a two percent ownership interest. For example, one tract has 14 owners with a combined total interest of only 0.62 percent on an 80-acre tract, while another track has 43 owners with a combined total interest of only two percent on 79.6 acres. Both of these particular tracts of land have active agricultural leases in place requiring administrative overhead to manage, record, and distribute small amounts of money to 57 individual owners. Therefore, consolidation of these ownerships is a prudent alternative that would eliminate the on-going costs to perform managerial duties, while eliminating the IIM accounts. Therefore, the CSKT requests that this Committee consider recommending an allocation for funding specifically for P.L. 93-638 Compact Tribes.

IV. Non-Probate Amendments.

A. Clarify the Leasing Authority of Tribes or Indian Landowners with Majority Ownership and applicability of ILCAA to approval of Rights-of-Way. Based on the number of owners in a tract of land, the ILCAA provides an applicable percentage of owner's consent required for approval of an lease. However, if there are five or fewer owners of undivided interest, a lease requires consent of all the landowners (regardless of the amount of undivided interest owned) prior to

approval. 25 U.S.C. § 2218. Substitute S. 550 amends ILCAA to clarify the process and grant authority to the Secretary to approve leases with 90 percent consent. In addition, this is an opportunity for the Committee to recognize that generally federal law and regulations require consent of the Tribe with ownership interest in a tract of land prior to approval of a right-of-way across such land. 25 Code of Federal Regulations, Part 169. Therefore, CSKT recommends that “rights-of-way” be stricken from the heading in section 2218.

B. Tribal Notification of Trust to Fee Status with Option to Purchase. In Section 217, CSKT supports the amendment and clarification of paragraph (f) providing the Tribes an opportunity to purchase prior to the Secretary terminating trust status. This provision is also required in Section 207 of ILCAA for probate of estates. In addition, this amendment again requires a definition of a “family farm.”

C. Partition. Section 205 of Substitute S. 550 in general recognizes the sovereignty of Tribes for partitioning highly fractionated interests. CSKT supports the partition section providing for Tribal consent. The definition of highly fractionated requires further development and we request additional opportunity to respond. CSKT would also recommend that tribal newspapers are recognized as newspapers of general circulation. Again, notification and due process are key to the process. Further, CSKT supports the limitation of potential buyers pursuant to current regulations that require Tribal consent for nonmember acquisitions. 25 CFR §151.8.

Next we should review the issues surrounding dry or passive trust land status as well as when a fee patent is issued on an undivided interest in the land. By operation of law, a non-Indian inheriting trust property cannot hold such interest in trust. However, even if reacquired by a Tribe or Indian the land does not revert back to trust status but rather requires the fee to trust allocation. Still, it would be helpful to identify a forum such as federal or tribal court to resolve some of these issues.

V. Allocation of Funding for P. L. 93-638 Tribes for Compact Realty Programs.

The complexity of the ILCAA and estate planning services will require training of staff, notice to Indian landowners, development of a Tribal Code and upgrading the system for Land Title and Records. In addition, the funding for the pilot land acquisition projects provided in the ILCAA are not available for compact Tribal programs. The CSKT should not be penalized for pursuing self-governance through compacting federal functions. Therefore, the CSKT requests that this Committee consider recommending an allocation for funding specifically for P.L. 93-638 Compact Tribes for the following functions:

1. Training
2. Estate Planning Services
3. Development of Tribal Probate Codes
4. LTRO Upgrade and Development of a Tracking System

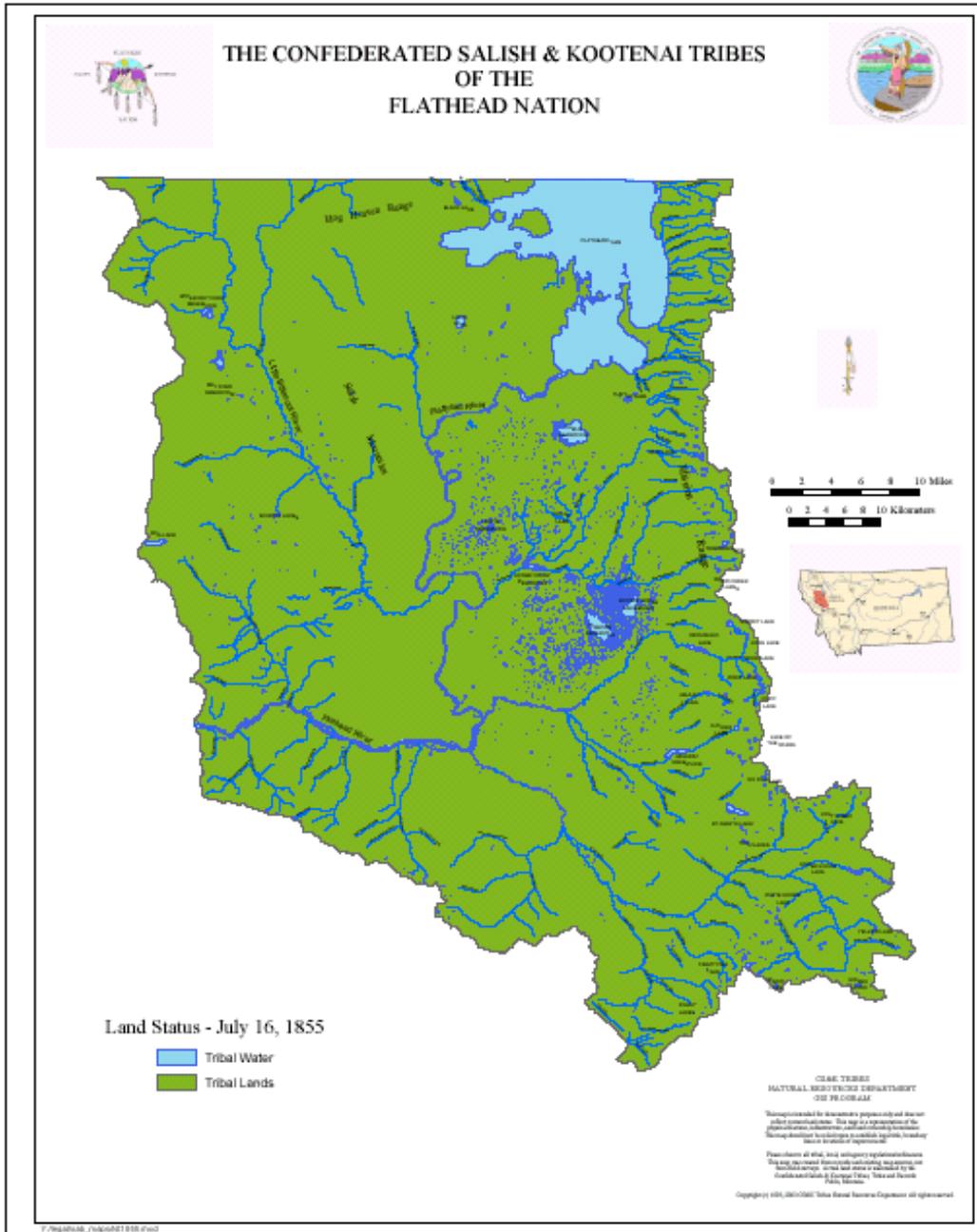
5. Land Acquisition Funding for Compact Tribes to Acquire Fractional Interests.

VI. Summary.

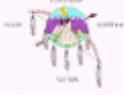
Again, CSKT appreciates the opportunity to participate in the amendment of this very important legislation. CSKT understands the complex nature of Indian land issues and recognize that there is no easy solution or legislative answer. Still, there are many positive aspects in the ILCAA and the proposed amendments in the Substitute S. 550. This testimony touches upon some of the issues CSKT has experienced over the years, as well as the recent concerns raised since the passage of the Indian Land Consolidation Act Amendments of 2000 by our membership. We look forward to working on the technical issues surrounding Substitute S. 550 and hope to provide additional comments as requested.

Submitted By:

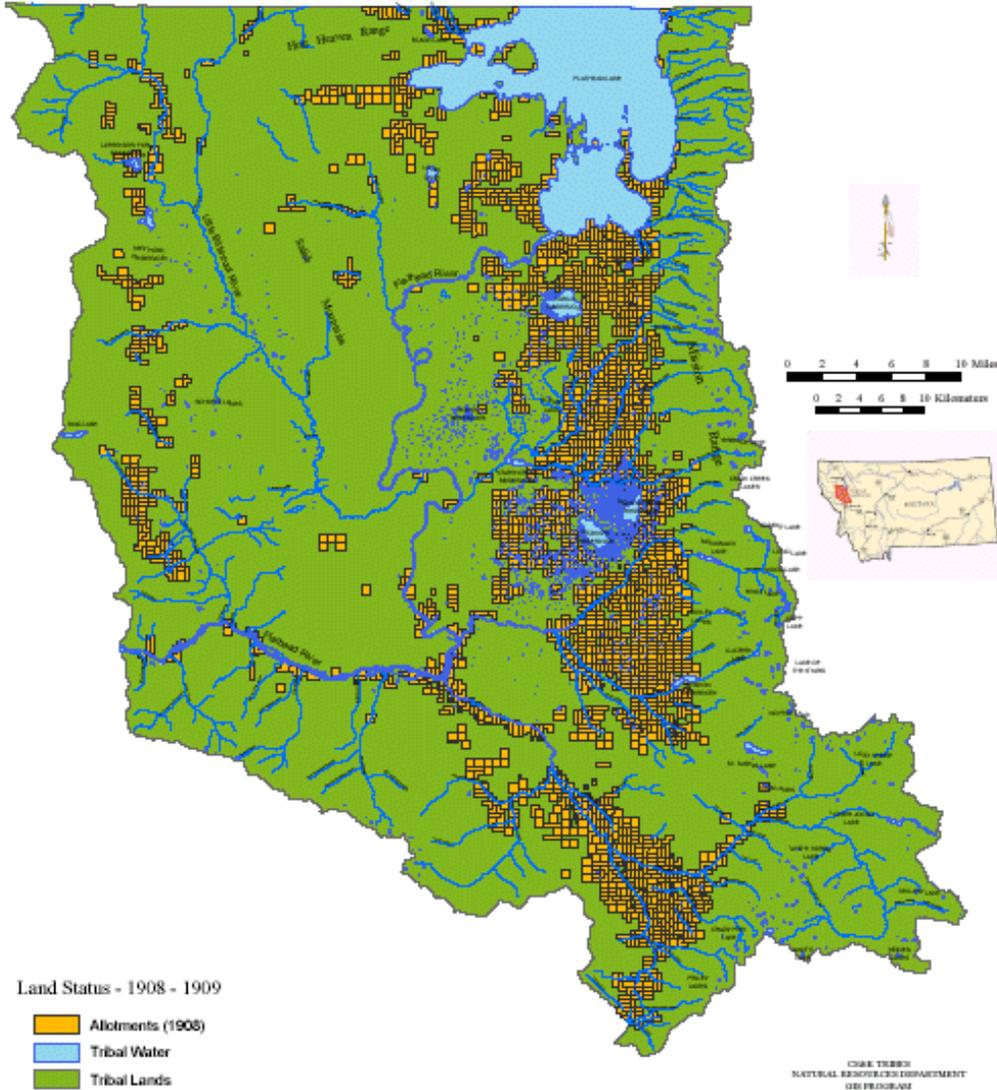
D. Fred Matt
Chairman, Tribal Council

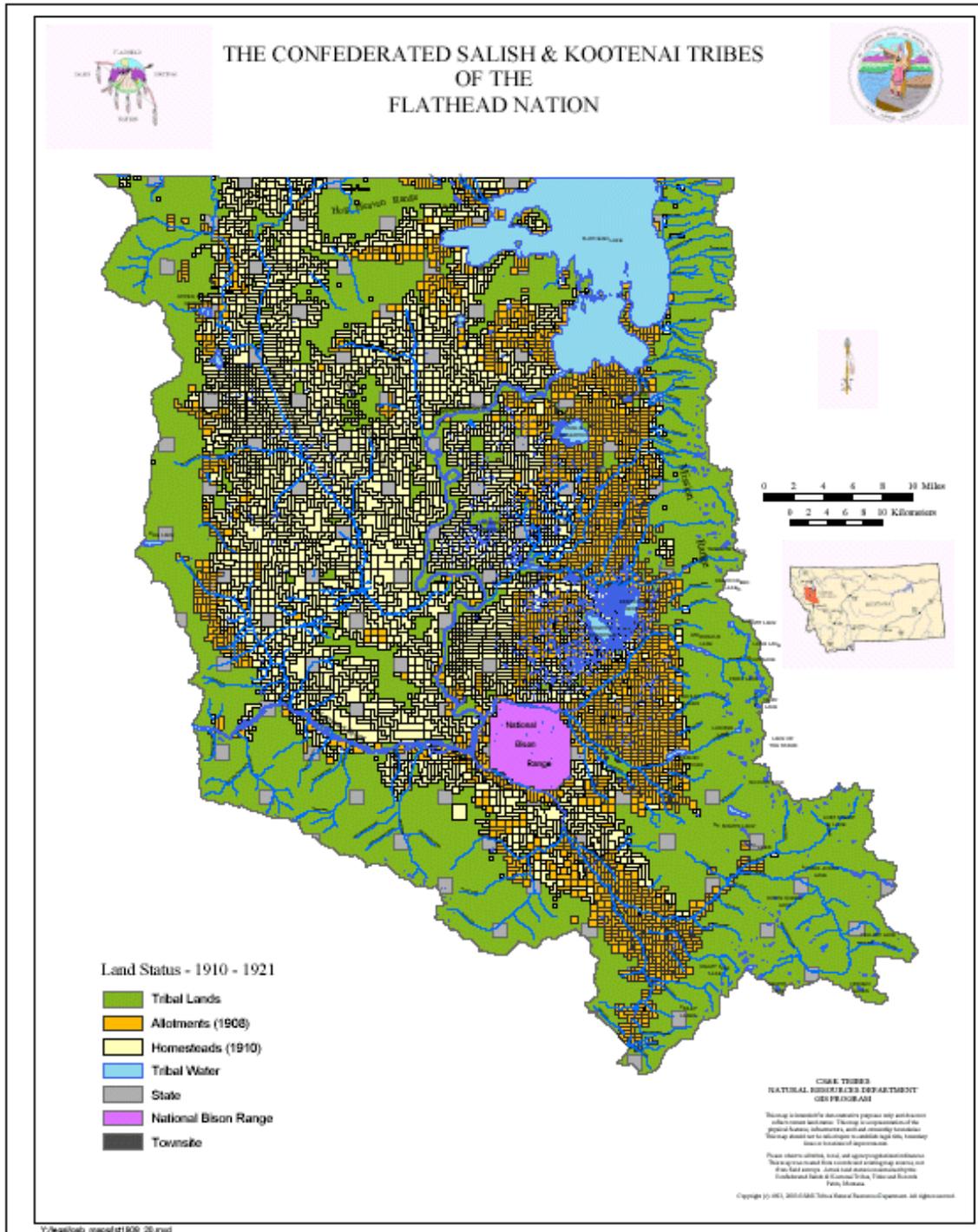


CSKT Land Status - July 16, 1855

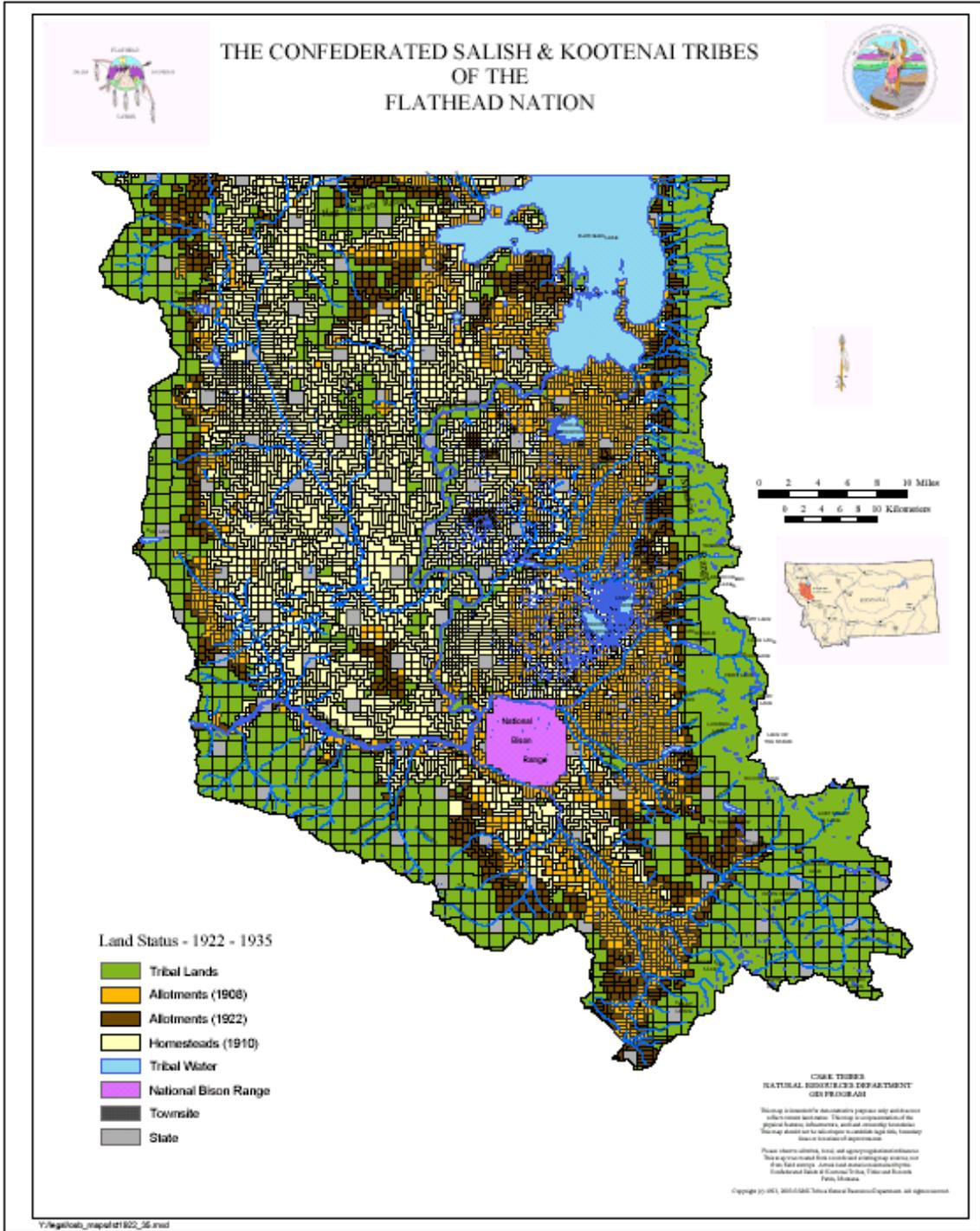


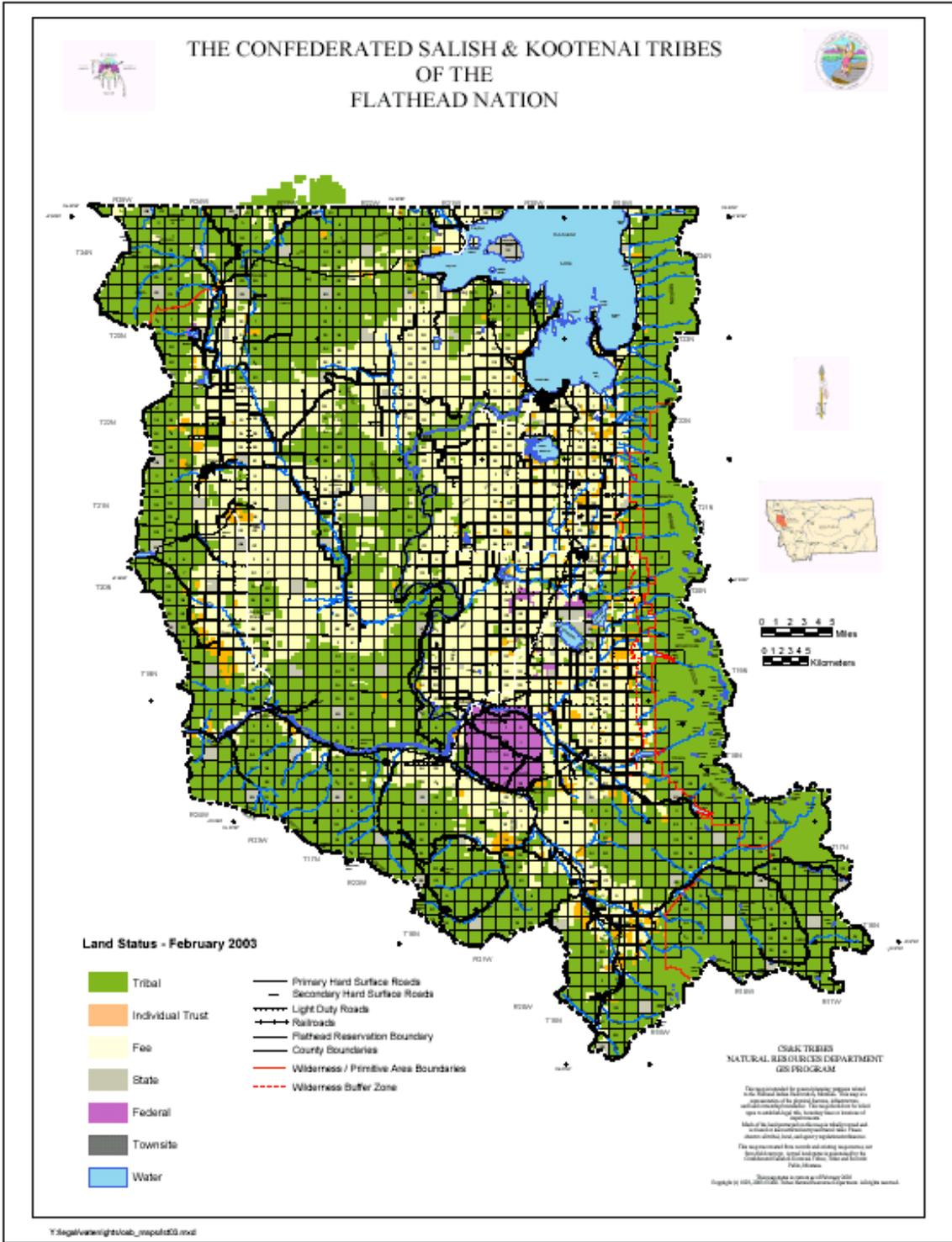
THE CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION





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