

TESTIMONY
OF
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U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
HEARING ON
S. 550, THE “AMERICAN INDIAN PROBATE REFORM ACT OF 2003”
October 15, 2003

Mr. Chairman, Mr. Vice Chairman and Members of the Committee, I am pleased to be here today to provide the Administration's views on S. 550, a bill to amend the Indian Land Consolidation Act (ILCA) to improve provisions relating to the probate of trust and restricted land. Since a new version of S. 550 was introduced yesterday the Administration did not have time to review the bill but will submit our views after our review is complete. The Department believes that probate reform is important. This bill also appears to be an effort to take the Fractionation of lands, in a marginal way, through the probate reform process. The Department urges the Committee to seriously and meaningfully address land fractionation in Indian Country.

For nearly one hundred years, this problem has grown, and we are now at the point where absent serious corrective action millions of acres of land will be owned in such small ownership interests that no individual owner will derive any meaningful value from that ownership. The ownership of many disparate, uneconomic, small interests benefits no one in Indian Country and creates an administrative burden that drains resources away from other beneficial Indian programs.

While Congress has occasionally taken bold steps, such as attempting to have interests of two percent or less escheat to the tribe, sadly, a consistent theme within the history of legislation attempting to deal with fractionation has been that needed provisions are often deleted or compromised in an effort to reach consensus in Indian Country. In many instances, the hard decisions have been avoided. This conflict avoidance has resulted in an incomplete legislative solution to the problem and fractionation has continued to grow. Given the state of fractionation on many reservations, S. 550 may, in fact, be the last opportunity to meaningfully address this

issue, if it is not too late to do so. Accordingly, Congress should carefully consider what its goals and objectives are and ask whether its efforts will make a meaningful difference in the challenges presented by fractionation in Indian Country.

We must find a way to consolidate Indian land ownership in order to restore full economic viability to Indian assets. Any meaningful effort for land consolidation also should include provisions relating to probate reform. We welcome the opportunity to work closely with the Committee to craft legislation that will better meet the dual goals of probate reform and the consolidation of fractionated land.

Over time, the system of allotments established by the General Allotment Act (GAA) of 1887 has resulted in the fractionation of ownership of Indian land. As original allottees died, their heirs received an equal, undivided interest in the allottee's lands. In successive generations, smaller undivided interests descended to the next generation. Fractionated interests in individual Indian allotted land continue to expand exponentially with each new generation. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly. These four million interests could expand to 11 million interests by the year 2030 unless an aggressive approach to fractionation is taken. There are now single pieces of property with ownership interests that are less than 0.0000001 percent or 1/9 millionth of the whole interest, which has an estimated value of .004 cent.

The Department is involved in the management of 100,000 leases for individual Indians and tribes on trust land that encompasses approximately 56 million acres. Leasing, use permits, sale revenues, and interest of approximately \$226 million per year are collected for approximately 230,000 individual Indian money (IIM) accounts, and about \$530 million per year are collected for approximately 1,400 tribal accounts. In addition, the trust currently manages approximately \$2.8 billion in tribal funds and \$400 million in individual Indian funds.

There are approximately 230,000 open individual Indian money accounts, the majority of which have balances under \$100 and annual throughput of less than \$1,000. Interior maintains over 19,500 accounts with a balance between one cent and one dollar, and no activity for the previous 18 months. Total sum included in these accounts is about \$5,700, for an average balance of .30¢. On average each IIM account costs about \$150 per year to maintain. At that average rate, it costs almost \$3,000,000 to manage these accounts. Nonetheless, the Department has an equal responsibility to manage each account and the real property associated with it, no matter how small and regardless of account balance. Obviously, no one benefits from such expenditures.

Under current regulations, probates need to be completed for every account with trust assets, even those with balances between one cent and one dollar. While the average cost for a probate process exceeds \$3,000, even a streamlined, expedited process (if one was available) costing as little as \$500 would require almost \$10,000,000 to probate the \$5,700 in these accounts.

The Committee should also be mindful of the recent ruling in the *Cobell* case, and its implications for the cost of administering the many small interests now held in trust for individual Indians. On September 25 of this year, Judge Lamberth issued a ruling in the *Cobell* litigation with regard to the breadth of the Secretary's accounting duties for individual Indian

money accounts. The ruling requires an accounting method that involves transaction-by-transaction verification and expands the scope of the historical accounting from the one proposed by the Department.

The Department submitted a plan to the court that would have cost approximately \$335 million. The court decided in essence that Congress intended that historical accounting provides a complete history of all financial transactions in IIM accounts and all individual Indian land ownership transactions since the passage of the GAA in 1887. The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting land ownership records. The Department currently holds more than 600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the majority of these records. The court has ordered that the bulk of the accounting be completed in three years, although it allowed the Department to propose a revised timetable, in light of the scope of duties imposed by the court. The Department's January 2003 plan had a five-year time frame for a much smaller project.

Unlike most private trusts, the Federal Government bears the entire cost of administering the Indian trust. As a result, the usual incentives found in the commercial sector for reducing the number of small or inactive accounts do not apply to the Indian trust. Similarly, the United States has not adopted many of the tools that States and local government entities have for ensuring that unclaimed or abandoned property is returned to productive use within the local community.

PERSISTENT PROBLEM

The overwhelming need to address fractionation is not a new issue. In the 1920's the Brookings Institute conducted the first major investigation of the impacts of fractionation. This report, which became known as the Merriam Report, was issued in 1928 and formed the basis for land reform provisions that were included in what would become the Indian Reorganization Act of 1934 (IRA). The original versions of the IRA included two key titles; one dealing with probate and the other with land consolidation. Because of opposition to many of these provisions in Indian Country, most of these provisions were removed and only a few basic land reform and probate measures were included in the final bill. Thus, although the IRA made major reforms in the structure of tribes and stopped the allotment process, it did not meaningfully address fractionation (and the subsequent adverse impacts in the probate process).

Accordingly, in August 1938, the Department convened a meeting in Glacier Park, Montana, in an attempt to formulate a solution to the fractionation problem. Among the observations made in 1938 were that there should be three objectives to any land program: stop the loss of trust land; put the land into productive use by Indians; and reduce unproductive administrative expenses. Another observation made was that any meaningful program must address probate procedures and land consolidation. It was also observed that Indians themselves were aware of the problem and many would be willing to sell their interests.

Similar observations were made in 1977 when the American Indian Policy Review Commission reported to Congress that "although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments" and that "more than 10 million acres of Indian land are burdened by this bizarre pattern of ownership." The Commission

reiterated the need to consolidate and acquire fractionated interests and suggested in this report several recommendations on how to do so. Many of the observations and objectives made in 1938 and 1977 are the same today.

In 1992 the General Accounting Office (GAO) conducted an audit of 12 reservations to determine the severity of fractionation on those reservations. The GAO found that on the 12 reservations upon which it compiled data, there were approximately 80,000 discrete owners but, because of fractionation, there were over a million ownership records associated with those owners. The GAO also found that if the land was physically divided by the fractional interests, many of these interests would represent less than one square foot of ground. In early 2002, the Department attempted to replicate the audit methodology used by the GAO and to update the GAO report data to assess the continued growth of fractionation and found that it grew by over 40 percent between 1992 and 2002.

As an example of continuing fractionation, consider a real tract identified in 1987 in *Hodel v. Irving* (481 U.S. 704 (1987)):

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the BIA at \$17,560 annually.

Today, this tract produces \$2,000 in income annually and is valued at \$22,000. It now has 505 owners but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the 505 owners could agree) for its estimated \$22,000 value, the smallest heir would now be entitled to \$.00001824. The administrative costs of handling this tract in 2003 are estimated by the BIA at \$42,800.

Fractionation continues to become significantly worse and as pointed out above, in some cases the land is so highly fractionated that it can never be made productive because the ownership interests are so small it is nearly impossible to obtain the level of consent necessary to lease the land. In addition, to manage highly fractionated parcels of land, the government spends more money probating estates, maintaining title records, leasing the land, and attempting to manage and distribute tiny amounts of income to individual owners than is received in income from the land. In many cases the costs associated with managing these lands can be significantly more than the value of the underlying asset.

CONGRESSIONAL RESPONSE

Congress recognized 20 years ago the need to take firm action to resolve the problem of small uneconomic interests in Indian land. In 1983 Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA). The Act authorized the

buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than 2 percent. A lawsuit challenging the constitutionality of ILCA was filed shortly after its passage. While the lawsuit was pending Congress addressed concerns with ILCA expressed by Indian tribes and individual Indian owners by passing amendments to ILCA in 1984.

In 1987, the United States Supreme Court held the escheat provision contained in ILCA as unconstitutional because “it effectively abolishes both descent and devise of these property interests.” (See *Hodel v. Irving* (481 U.S. 704, 716 (1987))). However, the Court stated that it may be appropriate to create a system where escheat would occur when the interest holder died intestate but allowed the interest holder to devise his or her interest. The Court did not opine on the constitutionality of the 1984 amendments in the *Hodel* opinion. However in 1997, in *Babbitt v. Youpee* (519 U.S. 234 (1997)), the Court held the 1984 amendments unconstitutional as well.

As a result, Committee staff, the Department, tribal leaders, and representatives of allottees worked together to craft new ILCA legislation. This cooperation led to enactment of the Indian Land Consolidation Act Amendments of 2000. Neither the 1984 amendments nor the 2000 amendments authorized the system discussed by the Court in *Hodel* where an interest holder would be able to devise his interest to an heir of his choice.

The 2000 amendments attempted to address the fractionation problem through inheritance restrictions which, when effective, would make certain heirs and devisees ineligible to inherit in trust status, and require that certain interests be held by the heirs and devisees as joint tenants, with rights of survivorship. The legislation also contained provisions for the consolidation of fractional interests. Tribes and individual allotment owners can now consolidate their interests via purchase or exchange, with fewer restrictions. The legislation also attempted to enhance opportunities for economic development by negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. Finally, the amendments extended the Secretary’s authority to acquire fractional interests through the Indian land acquisition pilot program, with the establishment of an Acquisition Fund, and the authorization of annual appropriations to help fund the acquisitions. While many of these new authorities were immediately effective, the inheritance restrictions were not. Under ILCA, the Secretary is required to certify that she has provided certain notices about the probate provisions of the 2000 amendments before most of these provisions become effective. Congress requested that the Secretary not certify because additional amendments were needed.

Some of the land related provisions are currently in effect. For example, the ILCA pilot project has acquired a total of 58,297 interests. However, during this period the number of fractionated interest grew even larger. Moreover, completion of the first phase in the Midwest Region, Great Lakes Agency, is expected by December 2003, signifying that majority ownership has been achieved on the first three reservations. In addition, as mentioned above, the 2000 amendments have begun enhancing opportunities for economic development by providing for negotiated agreement, standardizing, and in some cases relaxing the owner consent requirements. This has streamlined the leasing process for land owners to enter into business and mineral leases. While many of the land related provisions have proven to be successful, many other provisions, especially the probate provision, have proven to be complicated and difficult to implement.

DEPARTMENTAL CONCERNS AND SOLUTIONS

The Department of the Interior was hopeful that the 2000 amendments would solve the fractionation problem. During congressional hearings on the amendments, the then Assistant Secretary Kevin Gover testified that the amendments would both eliminate or consolidate the number of existing fractional interests and prevent or substantially slow future fractionation. He also stated that several technical amendments needed to be made to the legislation.

Unfortunately, the 2000 amendments have not solved the issue, in part due to ambiguities in the statute and in part due to the possibility that full implementation could result in the loss of trust status for a significant part of the Indian land base. The 2000 amendments have proven to be complicated and difficult to implement. In addition, certain provisions were left to be dealt with in an anticipated package of amendments. For instance, the 2000 amendments do not contain a federal code of intestate succession; state laws of wills do not apply in testate cases and the federal law of wills leaves many gaps; and certain lands in California and Alaska were exempted from the probate provisions. At the same time, fractionation continues to be a pervasive problem in Indian Country. Therefore, prior to passing legislation Congress should thoroughly consider the above issues as well as authority to dispose of unclaimed property; authority to partition to permit individuals as well as tribes to consolidate land holdings; expedited, less cumbersome probate for small estates; and authority to purchase highly fractionated interests without consent during probate.

As stated above, two important areas need to be addressed in any future amendments: unclaimed property and the partition of land.

Under state law, a state may sell or auction off certain personal property that has not been claimed by an owner within a certain amount of time, usually within 5 years. This is not the case with inactive IIM accounts or real property interests. Often times the whereabouts of account owners are unknown to the Department because account holders do not respond to our requests for address information and our repeated attempts to locate them have been unsuccessful. This may be because the small amount in their account does not make such effort worthwhile. However, the Department must account for every interest regardless of size and we do not have the authority to stop administering accounts where whereabouts of the owner are unknown. We must have the authority to close these small accounts and restore economic value to the assets if the owner does not claim their interest within a certain amount of time. If the owner does not come forward, the revenue generated from the interest should be held in a general holding account against which claims could be made in the future if the owner's whereabouts become known or the interest could be used to further the fractionation program.

Partition authority is also important to the Department. The existing partition statute authorizes sales to tribes that have obtained majority ownership or consent, but that authority has seldom been used to date. A partition in kind authority is needed to give owners the ability to obtain a discrete parcel of land where feasible. Equally important, however, is the ability to trigger the sale of fractionated land which cannot be feasibly partitioned. The existing sales authority should

be simplified, extended to individual Indian landowners, and possibly broadened to reduce the consent requirement where highly fractionated land is involved. We would like to work with the Committee to come up with an appropriate process to conduct these sales, and also to make the pilot program more applicable. Unless the Department has the authority to deal with de minimus holdings, more and more lands will simply become unmanageable.

The Department has been heavily engaged on working toward a constructive solution to these issues. Over the last six months the Department has worked with congressional staff, the Indian Land Working Group, and the National Congress of American Indians on developing ideas and legislative language to constructively address probate reform and land consolidation. We have made significant progress, however, much remains to be done.

CONCLUSION

Thank you, Mr. Chairman, Mr. Vice Chairman and Members, for taking the lead on these important issues for Indian people and trust reform. Too often key provisions needed to address this issue have been struck out of legislation in an attempt to accommodate opposition. Tough decisions are going to have to be made in order to solve this issue so that we can have a workable program that addresses fractionation in a meaningful way. This concludes my statement. I will be happy to answer any questions you may have.