S. HRG. 112–431

THE AMERICAN INDIAN PROBATE REFORM ACT: EMPOWERING INDIAN LAND OWNERS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

AUGUST 4, 2011

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THE AMERICAN INDIAN PROBATE REFORM ACT: EMPOWERING INDIAN LAND OWNERS

THURSDAY, AUGUST 4, 2011

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. I call this hearing on Indian Affairs to order.

Aloha and welcome to the Committee's oversight hearing on the American Indian Probate Reform Act: Empowering Indian Land Owners.

The basis for today's hearing began in 1887 during the assimilation period with the passage of the General Allotment Act. That Act converted communally-owned Tribal lands to individually-owned Indian lands. The basic idea behind the General Allotment Act was to force individual Indians to abandon their traditional lifestyles, cultures, and Tribal relationships, and transform them into farmers and ranchers.

One of the lasting consequences of the General Allotment Act is the problem of land fractionation. As original allottees died, the General Allotment Act required the lands to descend in accordance with State inheritance laws, which often provided an equal share of ownership to each of their heirs. When they passed, their interest in the allotment was further divided among the next generation and so on. Today, an individual plot of allotted land might have up to 1,000 owners and can therefore be put to really no beneficial use.

Fractionation is a real problem in Indian Country. According to the Department of Interior, of the 10 million acres of land held in trust for individual Indians, 70 percent of them are fractionated.

The American Indian Probate Reform Act, and we call it AIPRA for short, was enacted in 2004 to address this issue and was aimed at protecting the integrity of Tribal homelands and restoring their potential for economic development. AIPRA created a uniform Federal Indian Probate Code, instead of the multiple individual State laws that once governed Indian probate activity. The Act also provided the Department of Interior with tools to facilitate the consoli-

dation of land ownership in order to restore the economic viability of Indian lands.

Today we will hear from witnesses about how AIPRA has affected the lives of American Indians and what their experience has been with the Administration and implementation of this Act.

With that, I want to welcome the witnesses. I ask that you limit your oral testimony to five minutes. Your full written testimony will be included in the record. Also, the record for this hearing will remain open for two weeks from today, so we welcome written comments from any interested parties. So thank you very much.

Let me introduce the first panel and welcome you here today. The Honorable John Berrey, Chairman of the Quapaw Tribe of Oklahoma; Mr. David Gipp, Vice President, Great Plains Region of the National Congress of American Indians. Again, welcome to both of you.

Chairman Berrey, will you please proceed with your testimony?

STATEMENT OF HON. JOHN L. BERREY, CHAIRMAN, QUAPAW TRIBE OF OKLAHOMA

Mr. BERREY. Yes, I will. Thank you very much, Mr. Chairman, and hawe from the Quapaw Tribe.

I want to give you a little background about my Tribe. We were the indigenous Tribe to eastern Arkansas, where we lived for as far back as we can remember, and in the 1850s we were removed to Oklahoma. And like many Tribes we have suffered the effects of the land issues that you described in your opening remarks. But we believe that the ILCA and the AIPRA are fantastic tools for our Tribe. We are able to consolidate ownership, we are able to provide better services. We have the largest first responders in our county. We have four fire stations with EMT. And consolidating the land helps us manage our jurisdiction much better than we are when it is highly fractionized.

In the past few years, the Quapaw Tribe has put a lot of attention to land consolidation. We have purchased over nearly 800 interests, which equals over 500 acres. We have a very well managed realty department that works hard and communicates well with the landowners, and we have had great success. A lot of the difficulties we have had were in becoming a self-governance Tribe and taking over and compacting realty. It still has created sort of some animosity from the local BIA agency, which sometimes makes it difficult for us to get these realty transactions completed, but we are working our way through that and we are starting to see some success.

Some of the things that the Quapaw Tribe has done is back four or five years ago we created a land consolidation plan. We spent a lot of resources and energy sort of laying out on paper what our intentions were for consolidation and how we were going to approach it. One thing about the Quapaw Tribe's reservation, it is the home of Tar Creek, the largest Superfund site in the United States, which was the result of some lead and zinc mining back in the late and early 1900s.

So one of our efforts, as we consolidate that land in the Superfund site, it makes us easier to work with our partners at the EPA to make decisions for cleanup that are much more difficult when

you have a lot more stakeholders. So part of our plan with our consolidation is to unitize the property under the Tribe, which helps us in remediation. In the long term, our goal is to create a passive wetlands and to get us out of the Superfund business, because it is a tiresome and we have to spend a lot of time, and we really just want to get back to having a passive wetlands and getting taken off the national priority list for Superfund.

So this land consolidation vehicle through AIPRA has been very good for us. We were able to consolidate land. The Tribe, on a regular basis, we buy land from Tribal members almost daily. Even without the program we continue to buy land from our Tribal members and it is very successful.

We not only have our land consolidation plan, but we have a bonus program. A lot of the problems with land consolidation is you have people with such a small interest that the value is not enough even to incentify them to come in and sell it; it may be just a few dollars. So what we have done is, on a very small interest we will give a $100 bonus or more, depending on the size of the interest, to incentify the Tribal member to come in and sell us their interest, and that has worked very well. We have a lot of Tribal members that have taken advantage of our bonus system, and that comes from our Tribally generated dollars through our economic development vehicles that we have on the reservation.

So with a great realty department, with a land consolidation plan, and with a bonus system to incentify people with very small interests, we have been very effective at consolidating land at Quapaw.

I think it was about five years ago we were fortunate enough to have an earmark for $1 million for land consolidation at Quapaw. One of the things I want to point out and one of the things that I hope you can take home tonight is of the $1 million, the Bureau of Indian Affairs has spent nearly $600,000 of that in administrative costs. So we were only able to take advantage of a little more than $400,000 of that $1 million to buy fractionated interests. We asked a number of times for the Bureau to tell us what they spent it on and we never got any kind of reply.

So our hope is that you might create some sort of tool or some process that keeps the Bureau from using that money for administrative costs that aren't necessary for land consolidation. And in my testimony I have a letter from the Bureau of Indian Affairs that spells out how they spent more than half of the money on administrative costs.

So a big fear of mine is out of this money that is going to come for Indian land consolidation, it will just be used as sort of an appropriation for the Bureau to use it for things other than land consolidation, and that is a big concern for us. We think there are Tribes like our Tribe and other Tribes that have compacted realty that have the wherewithal, they have the expertise and the ability to efficiently do these transactions without spending a lot of money on administrative costs. So that is one of the real big things that I wanted to point out.

The thing about it, land consolidation strengthens Tribes. Our Tribal members believe in it. It makes better use for Tribal members once it is consolidated because the Tribe can use our monies

for maintenance or we open it up for hunting or fishing or economic development, and everything that we do as a Tribe benefits each Tribal member.

So I just hope that there is not a consideration of coming up with a third party to manage the money, which I think would just create more of an administrative burden on the resources. I hope that there is some sort of control that keep the Department of Interior, the Bureau of Indian Affairs from overusing it for administrative costs.

And I hope that you can help create a vehicle to allow Tribes like my Tribe and other Tribes that are successful in their realty department that have a consolidation plan, that have an office, that has a program that has been very effective in the past to be able to use the money directly, and we can streamline or make it more efficient so we can reach our goal of consolidating the land.

I have a lot of testimony here and I am here for your questions. I don't want to take too long because I want you to be able to recess like everyone else, and I appreciate your time today. Thank you very much.

[The prepared statement of Mr. Berrey follows:]

PREPARED STATEMENT OF HON. JOHN L. BERREY, CHAIRMAN, QUAPAW TRIBE OF OKLAHOMA

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 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.

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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.

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 decisionmaking, 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 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.

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[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).

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 consolidationrelated 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]

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 percent 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;

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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 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.

(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.

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.

Attachment

United States Department of the Interior
Bureau of Indian Affairs
INDIAN LAND CONSOLIDATION CENTER
721 West Lakeshore Drive, Ashland, WI 54806

Quapaw Tribe of Oklahoma
Honorable John Berrey, Chairman
Quapaw Tribal Business Committee
P.O. Box 765
Quapaw, OK 74363-0765

July 2, 2007

Dear Chairman Berry:

This is a follow up to my May 11, 2007, letter to you concerning the $1 million special appropriation to support Quapaw land consolidation efforts.

Actual expenditures/recoup

	BIA Admin	CNI Admin	Acquisitions	Total	Recoup
FY 2004	$ 42,825.93	$ 23,827.51	$ 0.00	$ 66,653.44	$ 0.00
FY 2005	$ 72,782.81	$188,554.21	$308,965.52	$570,302.52	$ 14,999.73
FY 2006	$ 29,897.00	$ 75,414.52	$113,327.12	$218,638.64	$ 2,566.27
	$145,505.74	$287,796.24	$422,292.64	$855,594.60	$ 17,566.00
Total projected expenditures/recoup					
FY 2007	$ 26,500.00	$ 79,073.72	$ 60,000.00	$165,573.72	$ 3,915.83
Total projected expenditures/recoup thru the end of FY 2007	$172,005.74	$366,869.96	$ 482,292.64	$1,021,168.34	$21,481.83

The BIA administrative costs were funds supplied to the Miami Agency for initial staff support to the program by beginning reconciliation of ownership records and later for quality assurance review and deed approval. The CNI administrative funds supported up to 2 contract staff members located at Miami Agency to expand reconciliation efforts, research ownership, conduct customer outreach, process applications, establish/maintain program files, and assure ownership changes were officially recorded.

As of July 2, 2007, $21,481.83 of recouped revenue has been placed into the Quapaw/ILCP Acquisition Fund Account. These "recoup" funds are the result of income received from interests purchased by the ILCP. By statute these funds may only be used to purchase additional fractionated trust or restricted interests within the boundaries of Quapaw lands.

The Indian Land Consolidation Office (ILCO) projects all of the $1.0 million will be obligated by the end of this fiscal year and will shutdown purchase activities at the Miami Agency. ILCC will keep the Quapaw Tribal Business Committee informed of the situation as FY 2007 comes to a close.

Sincerely,

Robert R. Jaeger, Director

cc: Director, BIA
Deputy Director, Trust Services
Regional Director, Eastern Oklahoma
Superintendent Miami Agency

The CHAIRMAN. Thank you very much, Mr. Berrey.
Mr. Gipp, would you please proceed with your testimony?

STATEMENT OF DAVID GIPP, VICE PRESIDENT, GREAT PLAINS REGION, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. GIPP. Thank you, Mr. Chairman. It is an honor to be here and to represent the National Congress of American Indians, our President Keel, who could not be here today. I am a member of the Standing Rock Sioux Tribe located in North and South Dakota, and I am also the Alternate Vice President for the National Congress, and I am also President of the United Tribes Technical College in Bismarck, North Dakota, and, as I said, I am a citizen of the Standing Rock Nation in North and South Dakota, and we have many of the paramount issues and problems that are attempting to be resolved through this Act.

We greatly appreciate that the Committee is once again considering the issue of Indian land allotment, inheritance and fractionation. There is, as you know, currently over 4 million ownership interests in 170,000 tracts of allotted Indian lands. Without continued attention, fractionation will continue to grow exponentially, even greater problems will be created in Federal land management, and it will become even more difficult for Indian landowners to put their lands into productive use.

When the National Congress supported the passage of the American Indian Probate Reform Act in 2004, we relied on the assurances of the Committee that the amendment would not be the last word on this topic, but that we would come back with additional amendments to correct and improve the statute as we gain more experience with it. We thank your leadership and the Committee for continued efforts in this direction.

We have five basic suggestions, Mr. Chairman. First, our primary recommendation is that estate planning assistance should be supported by Congress and the Department of Interior. In 2005, soon after the passage of AIPRA, the Department of Interior made an unwise decision to stop the practice of assisting Indian landowners with the preparation of wills. We would urge Congress and the Department to reconsider this decision.

Approximately 39 percent of Indian allotments are still in single ownership. Providing assistance with will writing is the best way to prevent these lands from becoming fractionated in the future. The Cobell settlement establishment of a $1.9 billion fund to consolidate fractionated lands is a great achievement, but it will be all for nothing if we do not prevent fractionation from recurring. As an example, the Great Plains Region of the Bureau of Indian Affairs, where I am from, has over 40 percent of the individual interests in trust lands. As BIA officials have stated to me, the greatest need regarding probate is for better estate planning by individuals to assist in preventing further fractionation.

Our second recommendation, we should consider additional tools to address extraordinary fractionation. On a relatively small number of tracts of lands, there are a huge number of owners. Native people are proud of our children, and some of us have had a lot of them. Some tracts of land have more than 1,000 owners and contain interests that are less than one millionth of a share. Why would a landowner sell an interest in land for less than a nickel or a dollar? It isn't worth the time. Right now the statute is limited to only fair market value. The Interior Department needs the abil-

ity to make offers at greater than fair market value for very small interests in order to create an incentive to participate in land consolidation.

Third, we continue to see delays and backlogs on probates and appraisals. At Standing Rock, for example, it is not unfamiliar to see a probate nearly five years after the death of some of our Tribal citizenry. It is a big problem in the Great Plains, as well as in other regions, although there are some conflicting reports on this issue. These delays seem to be related to a lack of communication and organizational structure between the BIA, the Office of Special Trustee, and the probate judges at the Office of Hearing and Appeals.

In addition, the title system continues to create bottlenecks. The National Congress continues to strongly recommend that the Office of Special Trustee be reorganized back into an integrated function within the Bureau of Indian Affairs. We would encourage Congress and the Department to consider ways to streamline those processes.

Our fourth recommendation, there are some tools in the AIPRA that have not yet been implemented. For example, the Act provides clear authority to the Department to enter into agreements with Indian Tribes to perform functions under the land consolidation program. We have strongly encouraged the Department to use the capabilities and experience of Indian Tribes in local land consolidation.

In addition, the 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 have also not seen use of the owner management provisions or the lien wavers. Some of these provisions should be reconsidered in consultation with our Tribes.

Finally, there is a great need for information and data sharing. Effective consideration of the problem of fractionation requires much greater data sharing in fractionated 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.

There are many other issues and improvements that will come forward through the process of consultation with Tribes. The good news is that all of the improvements in the process will save money and help create economic development. This Committee's leadership has taken a very productive approach that we must continue working on the problems, and if we make mistakes we can come back and fix them. We greatly appreciate the work of the Committee and of your leadership, Mr. Chairman. Thank you so much.

[The prepared statement of Mr. Gipp follows:]

PREPARED STATEMENT OF DAVID GIPP, VICE PRESIDENT, GREAT PLAINS REGION, NATIONAL CONGRESS OF AMERICAN INDIANS

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 percent remain in single ownership. Many owners have engaged in estate planning.
- 28 percent have 2 to 10 owners—likely within the control of a closely related family.
- 23 percent have 11 to 50 owners
- 9 percent have 51 or more owners
- Approximately 800 tracts have more than 200 owners
- 57 percent of ownership interests reside in 9 percent of tracts
- 80 percent of ownership interests reside in 21 percent 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 percent 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 percent. 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 percent 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 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 considersation 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 Seccretary 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 timeframe, 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 inhouse 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 timeframe. 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 percent 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 signficant 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 "ownermanaged" 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 selfdetermination 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 know 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.

The CHAIRMAN. Thank you very much, Mr. Gipp.

This oversight hearing, as you know, is to get updated information as to the problems that are out there, and even as some of you

are doing, recommending some changes that would improve the system.

Chairman Berrey, I understand that as Chairman of your Tribe you worked to acquire enough land to build a resort intersecting three States in an effort to bring economic development opportunities to your people. Can you describe that experience and what part land fractionation played in that process?

Mr. BERREY. Yes, sir. We have a beautiful resort. Our driveway is in Missouri, our parking lot is in Kansas, and our casino is in Oklahoma. We are neighbors to Joplin, Missouri, which suffered a very devastating tornado about a month ago.

But when we had decided that we were going to build our facility in that location, we took great advantage of AIPRA to help us with the multiple tracts of land that we wanted to purchase that were fractionated, and we went through the same process that we always do with purchasing Tribal land; we met with the Tribal members, we described to them what we were planning to do. We felt like because it was going to be a resort, our bonus for that property would be fairly substantial, so at the end of the day they didn't feel like we took advantage of them. And we worked with our realty office and the Bureau to use all the tools in AIPRA to consolidate the land. It worked out very well.

There were some problems that we discovered; there were some probates that had never been completed dating back to the 1960s. But we were able to work with the local probate judge and get those completed. In reality, it made things work very well. We didn't have to follow certain NEPA requirements because we were using AIPRA, and I don't think that it affected anything because, in the process of construction, our stormwater implementation plan and all the permitting that we did endangered species and the other things that you need to do before you break ground on a facility on Indian land we had to do pretty much anyway. We just didn't spend a lot of time on an analysis, but at the end of the day all the facts came about in our permitting process, so it has worked to our great advantage.

Our facility has outperformed and continues to outperform. We provide a lot of jobs for our employees. We are the largest employer in the region, we are the largest first responder in the region, and all of that took place because we were able to take advantage of the tools in AIPRA, which gave us the opportunity to make a single owner out of tracts of land that had multiple owners.

The CHAIRMAN. Mr. Berrey, I understand that as Chairman of your Tribe, you think that the Department of Interior has done enough to educate the Tribes and Indian landowners about how the new probate law works. If not, what more can the Department do?

Mr. BERREY. I think that what would make this all work the best would be to sort of recreate the Indian land consolidation program that was in place with the Indian Land Consolidation Office. That helped us very much in terms of making the transactions more timely.

When we worked with our local agency, because we had to litigate to get self-governance and compact the realty function, it created sort of an uncomfortable relationship between us and the realty function of the local agency. But using the old office that was

managed by Mr. Yeager under the Indian Land Consolidation Office, we were able to expedite those processes and we were able to streamline the time line in order to get those fractional interests purchased.

I really think that we don't need a third party to come in and assist anybody. I think we need to allow the Tribes that are very efficient and very well schooled in the process to help other Tribes do the same thing. I think the Department has some great minds. Mr. Darryl LaCounte from Billings is a very smart gentleman who understands the processes and also the things that slow down the process.

And I just think if we make it so that the money is focused and not wasted on administrative costs and the Tribes work with the Bureau, and the Tribes are given sort of a lead in the process, it will work to a great advantage. And it helps Tribes, through economic development, become less reliant on entitlements that for years was the only money that we were able to generate, what we were handed through the different agencies.

Now, through the Indian Land Consolidation Act, we have not only built this beautiful resort that employs thousands of people, we have created senior housing, we have created other economic development opportunities that give jobs and hope to Tribal members that, prior to that, were just getting either no checks or very small checks for maybe some leasing that may have been done on their property.

So ultimately I just think we need to not bring in a bunch of extra third party people to help; we just need to let the Tribes and the Bureau focus on what is ahead of them and not waste the money through administrative costs, and I think it would be very effective, this use of this money that is in the settlement.

The CHAIRMAN. I am repeating my question, trying to reach whether the Department of Interior has done enough, but I think from what you have said it is sufficient.

Mr. BERREY. I think it is sufficient and I think the thing about Tribes is we know all our people. We know where they are at; we know what they do; we know who they are. If you go to the local agency, they are not that closely connected to the people, so if they rely on us more for the communication and delivery of the message, it always works better because our people trust us, most of our people trust the Tribal government more than they do working with the agency, and that is due to all kinds of reasons in the past.

But I think allowing the Tribes to take the lead and to communicate with the people and to take advantage of the vehicle built into AIPRA it is possible to get the maximum benefit out of this money that, in the past, may have not gotten such efficient use of.

The CHAIRMAN. Thank you.

Mr. Gipp, as a board member of NCAI, what are some of the main issues you have heard from your membership regarding implementation of AIPRA? Do the issues vary by region?

Mr. GIPP. I think that the summary of our recommendations reflects a lot of those concerns from all of the major regions of the National Congress, Mr. Chairman, particularly when I talked about things like estate planning and the ability of our Tribal citizenry to be able to do that. My own mother was, if you will, a vic-

tim of that in that she went to the Bureau of Indian Affairs and asked if she could create her own will. She just passed away last year. And, unfortunately, they turned her down.

And we had some other resources, in our case, our family, to be able to help her with those things, but I can think of thousands of individual citizenry out there that don't get that kind of assistance or technical assistance, and that is something that needs to be really concentrated on.

I think, as I mentioned in my testimony, this is a way to reduce the fractionation issue, if we give that kind of direct individual technical assistance, either through our Tribal governments or through the Bureau of Indian Affairs, and assure that that kind of help is available to, in may cases, some of our elders that are out there that need this help and need some explanation of their rights about the land and the resources that they own.

But again, getting back to your overall question, I think the overall five major recommendations that we have made is really a compilation of listening to the concerns of each of the 12 regions that we represent across Tribal America.

The CHAIRMAN. Mr. Gipp, does NCAI believe that the Department has provided Indian landowners with enough education and outreach of AIPRA so they can make good decisions on how to pass along their property?

Mr. GIPP. I think that the American Indian Probate Reform Act does give us the fundamentals of those tools, but we need to make these improvements that I mentioned earlier, Mr. Chairman. I would say that the Interior Department needs to really step up the pace to educate our Tribal citizenry about those rights that I was talking about and about the issue of fractionation.

So we think, and I would concur with Chairman Berrey's recommendation that there should be a higher degree of reliance upon Tribal Nations themselves in implementation AIPRA and giving them the kinds of resources to assist the Department of Interior in that education of our lands and our interests therein.

We have some of those resources. Many of our Tribal governments are quite capable and they can create partnerships with the Department of Interior and the Bureau of Indian Affairs and the Special Trustee that haven't yet been done. We think those can and should be done, and there is some authority that I mentioned in my fourth recommendation. So we would appreciate if you could take a harder look at that. We also have the group that I represent more specifically, the 37 college Tribal colleges and universities across the Nation that can help the Interior Department do more education for Tribal citizenry, because we are right in the communities. We are right there where Tribal America is at.

The CHAIRMAN. These are the questions that I have, but let me just ask either one of you, if you wish, to make any final statement about this oversight hearing and what we are trying to intend to do.

Mr. BERREY. Well, I think my final statement would be that I think besides the self-governance law, the ILCA and AIPRA are the best things since sliced bread in Indian Country; it is truly a vehicle to allow Tribes to grow and manage their lands and provide better services for their Tribes. And I think if you can just keep the

Interior Department from wasting it on admin costs and we use it for buying land, we are all going to win.

The CHAIRMAN. Mr. Gipp?

Mr. GIPP. I would concur. I think that, again, the direction of the Committee on this matter is the right one, and gathering this information is very critical for improvement of the existing law. Many of my Tribes that I represent just in my region are all treaty Tribes, and they wish and hope that the United States Government will live up to its earlier obligations but also, since we are now in the 21st century, help us assure that we retain the land and the resources that we have in a positive, productive way that we envisioned, in some cases, centuries ago that would be helpful to our well-being and to our productivity and continued contribution to America.

The CHAIRMAN. Well, I want to thank both of you for your testimony and your comments here; it will certainly be helpful to us in this. Thank you very much for coming.

Mr. GIPP. Thank you, Mr. Chairman. We appreciate the opportunity.

The CHAIRMAN. Thank you.

I would like to invite the second panel to the witness table.

Serving in our second panel is Mr. Douglas Nash, Director of the Institute for Indian Estate Planning and Probate at the Seattle University School of Law; Majel Russell on behalf of the Coalition of Large Tribes; and Sharon Redthunder, Acting Director of the Indian Land Working Group.

Welcome to all of you on this panel. Mr. Nash, would you please proceed with your testimony?

STATEMENT OF DOUGLAS NASH, DIRECTOR, CENTER FOR INDIAN LAW AND POLICY, INSTITUTE FOR INDIAN ESTATE PLANNING AND PROBATE, SEATTLE UNIVERSITY SCHOOL OF LAW

Mr. NASH. I will. Thank you, Mr. Chairman. And thank you for holding this hearing on a topic that is important to all of us here and throughout Indian Country.

As mentioned, I am the Director of the Institute for Indian Estate Planning and Probate at Seattle University's School of Law. Since 2005, we have worked to establish projects that provide estate planning services to Indian landowners throughout Indian Country and also to provide information and training to those landowners, to Tribal officials, to attorneys, Federal BIA and OST personnel, as well as other interested organizations.

I think, Mr. Chairman, what you will hear and have heard today is a number of individuals agreeing on a number of things about the Probate Reform Act. I think it is agreed that fractionation is a serious problem. It is one that renders interests in real property economically unusable. Those small interests, many times, have family, cultural, or historical value to individuals, but as they are they have no practical utility.

It is also uniformly agreed, I believe, Mr. Chairman, that there is a very high cost associated with these fractionated interests, costs for the administration of them through the Bureau of Indian Affairs and OST, as well as the related probate costs. There is a

continued growth in those interests and, consequently, a continued growth in the costs associated with them. It would be helpful, in our view, if there were some updated statistical information about the number of interests, where they are located and the costs to administer them.

It is uniformly agreed, I believe, that AIPRA, as drafted, would resolve the issue of fractionation over time, given the opportunity to work and given opportunity for the several mechanisms that are built into AIPRA to function. However, to date, those different mechanisms have not been totally implemented. It would be interesting, for example, Mr. Chairman, to see the difference in the number of fractionated interests from June 20th, 2006, when AIPRA took effect, to the present. I believe the number would have increased over that period of time.

I believe it is agreed, and AIPRA emphasizes, estate planning is a critical component of the mechanisms to reduce fractionation. I believe our projects have shown that that can be done and is the case. The pilot project that we originally undertook for the Bureau of Indian Affairs in 2005 and 2006 reduced, according to a BIA audit, the number of wills—reduced or avoided fractionation, excuse me, by 83.5 percent.

Generally, we have established that 87 percent of the wills done under our projects reduce or avoid fractionation. Our current summer project that we have underway that has just recently concluded, the preliminary statistics indicate that 92 percent of the wills done this summer under our project reduce or avoid fractionation. So it is an important component that has been left unused, if you will, through AIPRA and without Federal funding.

There is a major question about how to provide that service to Indian Country. We have used a number of different models in our projects and we have turned our attention to try to figure out a way to provide a service that can reach across Indian Country, and we believe we have done that with the new model that is described in our written testimony that utilizes Institute staff and couples them with Indian landowners throughout Indian Country utilizing video conferencing technology. I believe it is an efficient, cost-effective way to provide those services and is far less expensive than having individual professional staff onsite.

We believe that the delivery of effective and professional estate planning services to Indian Country will have a profound effect. It will avoid or reduce further fractionation of Trust interests and significantly in these times of economic issues and crisis, the money spent to provide those services will result in savings that will exceed the costs and result in savings that will be permanent in terms of the administration and the probate of those Trust interests. And, of course, AIPRA contains already an authorization for appropriations for estate planning assistance to Indian landowners.

It is clear that one of the empowerments that Indian landowners need is the empowerment and the authority and the capacity to determine for themselves where their Trust interests should go and to have the opportunity to do that through estate planning that addresses those Trust interests.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Nash follows:]

PREPARED STATEMENT OF DOUGLAS NASH, DIRECTOR, CENTER FOR INDIAN LAW AND POLICY, INSTITUTE FOR INDIAN ESTATE PLANNING AND PROBATE, SEATTLE UNIVERSITY SCHOOL OF LAW

The fractionated ownership of Indian allotments created by the General Allotment Act of 1887 (GAA) has been estimated to cost the Department of the Interior approximately $432 million annually to manage.[1] These costs will continue to increase each year if decisive action is not taken to appropriate the funds authorized in the American Indian Probate Reform Act (AIPRA)[2] and to fully implement other components of the Act such as the pilot project for management of family trust assets (25 USC 2206(l)), the fractional interest buyback program (25 USC 2212) and the owner managed trust option (2220).

Over time, the system of allotments established by the GAA and subsequent intestate inheritance by multiple generations of descendents has resulted in the fractionated ownership of Indian lands. As original allottees died, their heirs received equal, undivided interests in the allottees' lands, and so it went for generations. As of 2005, there were four million owner interests in the 140,000 tracts of individually owned trust lands, a situation the magnitude of which makes management of trust assets extremely difficult and costly.[3] These four million interests will expand to eleven million interests by 2030 unless major changes are made to address the problem.[4]

The Department of the Interior is responsible for maintaining title records of all trust land interests and managing income derived from the leases of trust land interests. Income must be allocated among all of the owners of undivided interests in each allotment. In some instances, the common denominator required to make this calculation extends 26 digits.[5] Income is maintained in federal Individual Indian Money (IIM) accounts for the individual owners, regardless of the size of their interest. In 1987, for example, one allotment had 439 owners with the smallest heir receiving $.01 every 177 years and receiving $.000418 of the $8,000.00 appraised value if that heir's interest were sold.[6] Ross Swimmer testified that the BIA's administrative costs for this parcel were estimated at $17,560 annually.[7] One can only imagine what those figures are today after 24 more years of fractionation.

Those are, admittedly, some of the extreme examples that exist. Nevertheless, it is not uncommon for allotments to have hundreds of owners of undivided interests. In order to fully assess the depth and breadth of the problem, it would be helpful to have current figures that show:

- The number of trust interests that currently exist;
- The range and average size of those interests;
- The rate at which these interests increase each year;
- The average number of interests per allotment; and
- The cost to administer each interest.
- Where the most fractionated allotments are located.
- Where the least fractionated allotments are located.

The probate of these fractionated trust assets is also an expensive function of the Department of the Interior. It was estimated that in 2008 an average probate cost approximately $7,800, and approximately 3,500 Indian owners of trust assets die each year.[8]

Current and accurate figures on the cost of administering and probating trust interests can be compared to the cost of providing estate planning services to Indian land owners. It will be seen that estate planning is an effective way to avoid or re-

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[1] Majel Russell, *Historical Background to Fractionated Ownership of Indian Trust Lands,* InterTribal Monitoring Association Presentation PowerPoint, Northwest Regional Meeting, November 21, 2008.

[2] 25 U.S.C. § 2206(f).

[3] Department of the Interior, Office of the Special Trustee for American Indians, Budget Justification FY 2005.

[4] Testimony of David J. Hayes, Deputy Secretary of the Interior, before the Committee on Natural Resources, United States House of Representatives Hearing on the Proposed Settlement of *Cobell v. Salazar,* March 10, 2010.

[5] Testimony of Ross O. Swimmer, Special Trustee for American Indians, United States Department of the Interior, before the Committee on Resources, United States House of Representatives Hearing on S. 1721, The American Indian Probate Reform Act of 2004. June 23, 2004.

[6] *Id.* Swimmer citing *Hodel v. Irving,* 481 U.S. 704 (1987).

[7] *Id.*

[8] *Id.*

duce fractionation and that it is a cost-effective means of reducing the high and growing costs incurred by continued fractionation.

The American Indian Probate Reform Act

To address fractionation, Congress amended the Indian Land Consolidation Act with the passage of AIPRA in 2004.[9] The Act did not take effect until June 20, 2006. AIPRA is an innovative piece of legislation which, if fully implemented, would greatly reduce fractionation and the costs and complications associated with it. It would not be a quick fix. Fractionation began with the General allotment act and has continued unabated over the past 124 years.

The Act encourages Indian land owners to have wills done with a carrot and stick approach. Without a will, AIPRA will define who inherits trust interests and how. With a will, an Indian land owner can pretty much designate who will receive those interests the primary limitation being whether a beneficiary will receive those interests in trust or not. Properly done, wills and estate planning and reduce and avoid fractionation and, in some cases, avoid probate. Under AIPRA, intestate interests that constitute less than 5 percent of the total allotment pass to one person—the oldest eligible heir. 25 USC 2206(a)(2)(D)(iii). When an interest greater than 5 percent of the total allotment is part of an intestate estate, AIPRA fractionates that interest by giving it equally to surviving children who are eligible heirs and if none, then grandchildren and so on to other family members. These results can be avoided by the decedent having a will.

The drafters of AIPRA recognized that estate planning was a critical part of the solution and provided authorization for appropriations for estate planning to further reduce or stop fractionation.[10] Without that funding, the allotted land base will continue to fractionate over generations, creating millions of new interests that will require substantial management and add equally substantial costs to the Bureau of Indian Affairs budget. A comparison of the number of trust interests that existed as of June 20, 2006, the date AIPRA became effective, and the present, would likely show that fractionation continued at a steady pace because estate planning services have not been widely available due to lack of funding support.

The Institute for Indian Estate Planning and Probate

The Institute for Indian Estate Planning and Probate (Institute) is part of the Center for Indian Law and Policy at Seattle University School of Law (*www.indianwills.org*). The Institute was established in August, 2005, and, insofar as we know, is the only national, non-profit organization developing projects which deliver estate planning legal services to trust land owners and Tribes nationally. With the mission of assisting Indian people, the Institute develops projects that provide free estate planning services to trust land owners; provides training to Tribal members, governmental officials and the legal community on the provisions of AIPRA, estate planning and the probate process; and serves as a clearing house that provides information via our website and published materials. The Institute has been uniquely successful in achieving those goals.

In total, our projects have provided community education to over 24,000 Indian landowners, served over 4,200 clients, executed over 2,100 wills and 1,700 other estate planning documents and successfully reduced fractionation in approximately 87 percent of the estate plans. While significant, and we are proud of these results, they do not even scratch the surface of the need in Indian Country.

The Institute has had projects in Washington, Oregon, Idaho, Montana, South Dakota, Minnesota and New Mexico. These projects utilize personnel who are specially trained on AIPRA, Indian land history, and in counseling Indian clients on ways to reduce fractionation of their lands during their life time and with an estate plan. The free estate planning services include wills, durable powers of attorney, health care directives, assistance with gift deeds, and land sales to Tribes. Our project models vary depending upon need and available funds. We have developed a number of successful project models using law student interns and paralegals; private and legal services attorneys. We have established pro bono projects, and at Seattle University School of Law, we created the first Indian Trust and Estates clinical course in the nation.

Early in our existence, private foundation funding was received to develop estate planning projects. The economic crisis caused those sources of funding for these projects to disappear. The only Institute projects now in operation are those funded by Tribes. Tribes are expending scarce resources for these services even though

[9] 25 U.S.C.§§ 2201–2201.
[10] 25 U.S.C.§ 2206(f)(4)

Tribes are consistent in asserting that these services are part of the federal trust obligation.

The estate planning services provided to Indian landowners under Institute projects include a will as the cornerstone of an estate plan. Clients are counseled on the options they have in devising their trust property in a way that will avoid further fractionation. These include leaving one interest per heir, leaving property to children as joint tenants with the right of survivorship, and leaving trust interests to one child and non-trust or personal property to another. They are also counseled on options that avoid the probate process altogether such as giving a gift deed and reserving a life estate for themselves or selling their interest and having the proceeds in their estate. Most Indian landowners are interested to learn of these options and frequently utilize them.

Estate planning for Indian land owners is not a simple process. In many instances, individuals own property that is subject to Tribal, federal and state probate laws. The wills done must be valid in all of those jurisdictions when required. Institute project personnel are specifically trained in that regard. In some instances, documents such as health care directives must be done in accordance with state law when there are no on-reservation health care facilities available that can deal with serious and terminal health issues. Finally, the identification of individual trust interests adds an important dimension to estate planning. It often requires coordination with BIA realty and land title record offices.

In addition to developing projects that deliver estate planning services the Institute provides training and information on AIPRA and Indian estate planning to Indian land owners, Tribal officials, attorneys and federal personnel and also reviews and assists Tribes with Tribal probate code development consistent with AIPRA provisions.

Current Institute Projects

From its beginning, the Institute has operated a summer estate planning intern program. Originally funded by a foundation grant, this project is now totally funded by the Tribes it serves. Second and third year law students, and sometimes law graduates, receive a week of intensive training on Indian land history, AIPRA, Indian will drafting, estate planning options, professional responsibility and the federal probate process at the School of Law. They then move to the reservation they will be serving to live and work full-time over the summer months. A full range of estate planning services is provided at no cost to Tribal members. Each intern is supervised by an attorney licensed in the state where they are working. This year eight Tribes in Montana, Oregon, Wisconsin and Washington had interns on their reservations. Preliminary statistics for this summer's program indicate that 92 percent of the wills done reduced or avoided further fractionation. This program is available to all Tribes and it is expected to expand next year.

The Institute also provides year around estate planning services to one Tribe's housing authority clients who are elderly or disabled.

This fall, the Institute will engage in a very unique estate planning project, providing estate planning services to the members of the Bristol Bay Native Association (BBNA). BBNA provides a wide range of services to its members who reside in 32 villages spread over an area the size of Iowa. With one exception, there are no roads leading to them and no roads leading to Dillingham, Alaska, which is where BBNA is headquartered. BBNA provided base funding for two years and is providing in-kind services as well along with Alaska Legal Services. Originally designed for a law extern, the services will be provided for the first four months by a recently graduated attorney under a fellowship. Beyond the logistical challenges this project poses, it provides a very special set of circumstances in that the allotments there are very recent so that there are many first generation owners. Over a period of time, this provides us with the opportunity to determine if the availability of estate planning services will avoid the problem of fractionation so rampant in the lower 48 states.

A New Project Model to Provide Estate Planning Services to Indian Country

As noted, the services provided through Institute projects, while substantial, are far from meeting the needs that exist in Indian Country. Even the Tribes receiving services under the summer intern program have needs that extend beyond the summer months. This led the Institute to consider how to effectively get estate planning services to Indian Country at a reasonable cost. The result is a model that utilizes teleconferencing technology to allow professional staff at the Institute to interact with Indian land owner clients at any Tribal location. Surprising little is required—a room where confidentiality can be maintained, a computer with teleconference ca-

pability and a specially trained Tribal staff person to operate the computer and help manage documents. An individual would need to do no more than enter the room, sit down and begin talking with the Institute staff person whose face appears on the screen. Information would be gathered, releases provided so that records of trust interests could be obtained, draft documents prepared and then reviewed in a second teleconference with the client after which the documents would be finalized and executed. The cost would be assessed on a per document basis. It is expected that this model will be in place on a reservation in the very near term. It too is available to all Tribes.

Providing estate planning services to Indian land owners nationwide could be very complicated and costly. This model provides the most effective and cost efficient means of achieving that goal and fulfilling the Federal Government's trust obligation to individual Indian land owners.

Federal Funding of Indian Estate Planning Services

In 2005, the Institute was the recipient of a one year, $500,000 Bureau of Indian Affairs Pilot Project contract to determine if estate planning services were needed in Indian Country and, if so, whether they would reduce or avoid fractionation. The project was developed to provide services on reservations in South Dakota and select reservations in Washington. The results clearly indicate that estate planning is a highly effective tool in reducing and eliminating fractionation.[11] In a short nine month contract cycle, the pilot project served more than 1,100 clients, and at the end of the contract, 586 individuals remained on a waitlist. A subsequent audit by the BIA concluded our estate planning project reduced fractionation of Indian lands; prevented the creation of 4,640 new interests; removed 679 interests from the probate process entirely; and that 83.5 percent of the wills executed reduced fractionation.[12]

Despite demonstrating that estate planning services were needed and that they were highly effective in reducing or avoiding further fractionation, requests for an extension of time to serve land owners on waitlists and for additional funding were denied. Since that time, there has been no further federal funding for the delivery of estate planning services to Indian Country despite repeated requests.

In addition to periodic and repeated communications with the BIA about funding for Indian estate planning, I appeared before the U.S. House of Representative' Committee on Appropriations, Subcommittee on Interior, Environmental and Related Agencies in 2009 and 2010 to request assistance in providing full funding to implement AIPRA. The Conference Report on H.R. 2996, the Department of the Interior and Related Agencies Appropriation Act for 2010, directed the BIA to utilize funds that were included in the Office of Indian Programs account and the Indian Land Consolidation account for estate planning assistance as provided for under Section 207(f) of the Indian Land Consolidation Act (25 U.S.C. 2206(f)). This section of AIPRA authorizes the Secretary to enter into contracts with non-profit entities to provide estate planning and probate services to owners of fractionated interests in allotments. Over several months, we attempted to work with the Department to determine how the available funds would be used to carry out the implementation of AIPRA, but had no success. To our knowledge, the BIA did not initiate any effort to enter into contracts with non-profit entities to provide estate planning and probate services in 2010.

We noted that the Department's budget request for 2011 reports that the [BIA] "is actively engaged in implementing" AIPRA, including the provision of probate services.[13] The request for 2011 was for more than $13 million and includes 159 FTE. Virtually all of the funds and FTE appear to be directed at coordination with the Office of Hearings and Appeals in probate proceedings. In addition, the 2011 budget request includes $1 million for 5 new FTE to implement AIPRA and the Indian Land Consolidation Act. The BIA proposed to use these funds and FTE to provide:

> "educational information regarding the authorized provisions within AIPRA, information on lifetime transfers such as consolidation agreements through gifts, exchanges and family trusts, through probates and forced sales. It will also include information to Tribes on monetization and in writing probate codes. This will be accomplished by creation and dissemination of brochures (in English and Native languages), partnering with Tribal colleges and Tribal organizations,

[11] Supplemental Audit Report under Task Order SEA–0004443 under AIPRA FY 2006 AIPRA Implementation Project, Phase II, Estate Planning Services Auditor, September 15, 2007.

[12] *Id.*

[13] Budget Request for the Bureau of Indian Affairs for 2011 at IA–RES–7.

conducting community meetings and via public news sources such as local newspapers, radio and the Internet." [14]

The BIA also planned to use the funds and FTEs to:

"pursue partnerships with Indian organizations, various Indian land clinics, private attorneys, and legal aid groups to *further research cost effective actions regarding estate planning*. The initial push is to help more landowners complete estate planning and will drafting." [15]

That initial push did not materialize. The Department's proposed budget plans will not meet the needs of Indian Country nor will it reduce fractionation or probates and, consequently, will not reduce administrative costs. The 2011 BIA budget request does not provide any detail on what level of funding may be directed toward estate planning and will drafting. Insofar as we know, there were no funds directed toward those activities. With all due respect, we do not believe that there is a need for research regarding estate planning and will drafting. It has been seven years since AIPRA's enactment and there is an acute and urgent need for action to fully implement its provisions. Through our various projects, we already know the most cost effective means of providing estate planning services to Indian clients. We know that face-to-face consultations are necessary with clients for effective estate planning. We know that with informed counsel, clients will often choose plans that avoid fractionation and even probate. We know that Indian people often need wills that are valid under Tribal and state as well as federal law, and we provide that service. We agree that education is important. That is why our programs have reached over 24,000 Indian land owners in the last five years and our website is designed to provide information specifically to Indian land owners, Tribal leaders and attorneys.

Thus, even when directed by the House Subcommittee, the Bureau of Indian Affairs has not moved one step closer to providing estate planning services to Indian land owners.

Conclusion

For each interest that estate planning reconsolidates or removes from the probate process entirely through gift deed or Tribal sale, the government will save money. Costs will continue to increase with the exponential growth of fractionation. The Department has had six years to implement AIPRA, but has made little progress in reducing fractionation and has failed to seek the necessary funds to implement the estate planning services which have proven to be so effective in reducing fractionation. We think that it is imperative that the Committee insist that the Department fully implement AIPRA, including efforts to ensure that funding is available to Tribes to assist their citizens who own interests in allotments to obtain the necessary estate planning services in order to reduce fractionation. Six years ago the Committee and Congress identified the problem and developed an effective solution. It is time for the Department and the Congress to take the next step and provide the necessary resources. The status quo will simply mean more fractionation and greater federal expenditures year after year for the indefinite future.

The CHAIRMAN. Thank you very much, Mr. Nash.

Ms. Russell, would you please proceed with your statement?

STATEMENT OF MAJEL RUSSELL, ESQ., ATTORNEY AT LAW, ELK RIVER LAW OFFICE, P.L.L.P., BILLINGS, MONTANA; ON BEHALF OF COLT (COALITION OF LARGE TRIBES)

Ms. RUSSELL. Good afternoon, Chairman Akaka. My name is Majel Russell and I am an enrolled member of the Crow Tribe of Indians in Montana. I am also an individual Indian trust landowner and I own land in two different statuses, one as a competent Crow Indian, meaning that I make my own decisions on that land, and also I have land that is managed by the Bureau of Indian Affairs. I also own land on two different reservations, the Pine Ridge Indian Reservation as well as the Crow Indian Reservation. So I speak today from a perspective of a landowner as well as the legal

[14] Id. at IA–ILC–3 and 4.
[15] Id. at 4. (Emphasis Added).

counsel for the Coalition of Large Tribes, and I thank you very much for holding this hearing. I think these are critical issues and I am glad that we are focusing attention today on this matter.

The Coalition of Large Tribes was established in early April and it is currently comprised of 11 large land-based Tribes. These are all Tribes with lands at least, reservations of at least over 100,000 acres, and those Tribes include the Mandan, Hidatsa and Arikara Nations, the Oglala Sioux Tribe, Crow Tribe, Navajo, Sisseton Wahpeton Sioux Tribe, Blackfeet Tribe of Montana, Rosebud Sioux Tribe, and the Cheyenne River Sioux Tribe. And our organization is chaired by Chairman Tex Hall and co-chaired by Cedric Black Eagle of the Crow Tribe.

A component of the COLT mission has been to identify statutory, regulatory, fiscal, and policy barriers to Tribal energy development, and to make recommendations to eliminate or lessen impacts. So consistent with those concerns, COLT has also identified provisions in AIPRA that could be improved to better comply with the congressional intent of AIPRA and actually to reduce fractionation and enhance beneficial use of trust lands. Further, I think that there are specific provisions in AIPRA that truly could empower Indian landowners and make Indian landowners active landowners, and today I want to talk about a various number of the provisions in AIPRA that I believe can be strengthened.

First of all, as everybody has mentioned, valuation is a huge issue, and AIPRA started in the right direction with 25 U.S.C. 2216, which attempted to relax some of the rigid appraisal requirements by allowing an estimate of value instead of a fair market value, and we think that provision should go even further to mandate some standards to the Department, because even though the estimate value is there in the law, the Department has not developed any regulations to come up with alternative methods of valuating lands. So there is leeway to do so, but we have not had the cooperative effort from the Department to come up with standards on how to do that, so I think that would be key. If there is a mandate that we could include in 2216 that would require that, that would be helpful.

There are also provisions in 2216 that allow a landowner to waive a valuation, and that may be important in certain cases. If I am going to sell an interest of mine to my brother or another one of my family members, I should be able to waive a valuation or appraisal. The only time you can do that right now under the law is if the interest is 5 percent or less and if you are going to sell it for nominal value. So if we could expand that provision, we should allow Indian landowners to actually negotiate sales and do exchanges as competent Indian people and have the freedom to do that that other landowners have in America.

Another key issue that I want to talk about is 2216(c). This is undivided fee interest. There was a very strong measure adopted by Congress that any undivided fee interest in a trust tract should go automatically into trust upon request by the Tribe or landowner. It has been 11 years since that provision has been adopted by Congress and we still cannot get the Department to determine that that is a mandatory acquisition that, upon request, should go into trust and there should be a consolidation of the tract.

I have been working very hard with Tribes to exercise that provision and have had no luck getting interest into trust under that provision for the larger land-based Tribes. I know some Tribes have used it, but for the Tribes I have worked with, the large land-based Tribes, we haven't been able to use that. So if we could get a clarification that 2216(c) is a mandatory acquisition authority, that would be very, very helpful.

I also think that purchase at probate is an incredible tool. Purchase at probate could resolve lots and lots of problems. However, we are hindered at purchase at probate by valuation issues. We cannot get appraisals in time for the probate judge to close out the probate matter. You know, the judges are under a time frame and they have to close out their probates within a certain period of time, and we can't get appraisals done to actually make use of that. So I think that is important. We need to expand on the purchase at probate provisions.

And then I want to talk real quickly. I participated, my law office participated as a subcontractor in a very small pilot project to test another tool in AIPRA, which is the consolidation agreements at probate, and this was a project that allowed us to go in as attorneys, meet with families and basically help them mediate an exchange of the interest to prevent fractionation, and this project was extremely successful at reducing the creation of new undivided interests. We did 27 consolidation agreements for a family and there were 300 and 200 and 46 interests that would have been created had we not done the project, and, instead, only 937 new interests were created. So there was a huge savings of the undivided interests that would have been created had we not done the consolidation agreements.

The problem with consolidation agreements is that there is no outreach by the Bureau to provide that service to families. It is a service that needs to be done by professionals. You need to educate the landowners on this process, assist with the mediation, do the title work, do a lot of the technical work that needs to be done, and there isn't an outreach process that can help, and it is an incredibly invaluable tool that I believe we need to mandate. And I guess in that sense where I think we could do a statutory revision is that we could require in every Indian probate an attempt to mediate at the front end.

If you were able to sit down with families and mediate, they are not that unreasonable. Indian people understand that fractionating the land further is not good; it renders them powerless; it renders them completely inactive landowners. So if you give them that chance, they are going to take that chance. Our experience was that families were able to sit down and negotiate and keep the interest whole. So if we could mediate at the front end, it would save us money in the long run because every single probate from like 2006 is 7800 a probate. So we would save the cost of the hearing, we would reduce costs, and also for management.

So I know I am running out of time here, but those are some key things that I have thought about, and I expound on these issues a lot more in my written testimony. So thank you.

[The prepared statement of Ms. Russell follows:]

PREPARED STATEMENT OF MAJEL M. RUSSELL, ESQ., GENERAL COUNSEL, COALITION OF LARGE TRIBES (COLT)

Introduction and Background

Good afternoon Chairman Akaka, Vice Chairman Barrasso, and members of the U.S. Senate Committee on Indian Affairs. My name is Majel M. Russell. I am an enrolled member of the Crow Tribe in Montana, an individual Indian trust landowner and practice federal Indian law out of Montana. I currently serve as legal counsel for the Coalition of Large Tribes (COLT). I would like to thank you for holding this hearing and for the opportunity to testify today on behalf of COLT.

COLT was formally established in early April 2011, and is comprised of 11 large land based Tribes, including the Mandan, Hidatsa and Arikara Nations, the Oglala Sioux Tribe, the Crow Tribe, the Navajo Nation, the Sisseton Wahpeton Sioux Tribe, the Blackfeet Tribe of Montana, the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe. COLT is co-chaired by Chairmen Tex Hall of the MHA Nation and Cedric Black Eagle of the Crow Tribe.

COLT was organized to provide a unified advocacy base for Tribes that govern large trust landbases and that strive to insure the most beneficial use of those lands for Tribes and individual Indian landowners. A component of COLT's mission has been to identify statutory, regulatory, fiscal and policy barriers to Tribal energy development and to make recommendations to eliminate or lessen their impacts. Additionally, COLT has galvanized efforts to restore and protect Tribal landbases.

Consistent with the above concerns, COLT has identified provisions in the American Indian Probate Reform Act of 2004 that could be improved to better comply with the Congressional intent of AIPRA to reduce fractionation and enhance beneficial use of Indian trust lands. Thus, I will be discussing several important topics in this regard: (1) amending the valuation or appraisal process of trust lands for lifetime sales between Indian Tribes and individual Indians, including mineral interests and improvements on trust lands; (2) clarification of existing authority for the acquisition of undivided fee interests into trust; (3) improving opportunities for Tribes and individuals to purchase lands at probate; (4) mandating adequate notice, education and assistance for Tribes and individuals of their rights to participate in consolidation agreements at probate; (5) mandating enhanced estate planning efforts for individual Indian landowners; and (6) review of the life estate and single heir rule provisons.

The American Indian Probate Reform Act of 2004

The American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. §§2201–2221, amended the Indian Land Consolidation Act (ILCA) with the principal purpose of addressing "the ever-worsening administrative and economic problems associated with the phenomenon of fractionated ownership of Indian lands." Sen. Rpt. 108–264 (May 13, 2004). Thus, ILCA was amended to create a federal probate code and to improve mechanisms by which Indian Tribes and individuals owners of trust or restricted land can consolidate fractionated parcels of land.

Valuation of Trust Lands

One of the provisions in the American Indian Probate Reform Act of 2004 that was carried over from the 2000 Amendments to the ILCA is Section 2216—sales, gifts and exchanges between Indians and Indian Tribes. Under this Section, Tribes can purchase fractionated interests that are greater than 5 percent of the total tract for *less than fair market value* so long as the Indian owner is provided an "*estimate of value*." The purpose of this section is to encourage consolidation of land ownership through transactions involving individual Indians and between Indians and Indian Tribes exercising jurisdiction over the land. Several aspects of Section 2216(b) deserve attention with respect to Tribal purchase of these fractionated interests.

First, while AIPRA provides Tribes authority to purchase fractionated interests from individual Indian landowners, no accompanying regulations have been promulgated to implement this section. Current regulations, adopted pre-AIPRA provide that "except as otherwise provided by the Secretary," an appraisal is required before approving a sale (or exchange or other transfer). 25 C.F.R. §152.24. As stated earlier, under AIPRA, Section 2216(b) requires only an estimate of value. While there is case law that says the "estimate of value" requirement overrides the more stringent regulation in the C.F.R. requiring an appraisal, the regulations have not been revised to remove this discrepancy between the regulations and the law, resulting in confusion for Tribes, landowners and the Bureau of Indian Affairs (BIA). (See *Bernard v. Acting Great Plains Reg. Dir.*, 46 IBIA 28, 41–42, citing *Miller v. Rocky Mtn. Reg. Dir.*, 25 IBIA 187, 191 (1994) holding that the statute controls when there is a discrepancy between a BIA regulation and a later-enacted statute).

While it may be clear that something less than an appraisal is required for conveyances under Section 2216 (b), Tribes do not have guidance as to what will meet the definition of an "estimate of value" given the lack of statutory guidance addressing this issue.

An additional issue under 2216(b) is the valuation of fractionated mineral interests, even if something less than an appraisal is required. Valuation of mineral interests is especially problematic for a parcel that has no production history. Obtaining a pre-sale estimate of value for these interests would be extremely cumbersome, if not impossible. While it is true that an individual Indian can waive the estimate of value requirement where the ownership interest is less than 5 percent of the parcel, individual Indians do not have the option to waive the estimate of value requirement for sales of interests representing greater than 5 percent.

Additionally, while a waiver for the estimate of value is available for interests representing less than 5 percent, this exception is only available where the grantor is conveying to a spouse, brother, sister, lineal ancestor, lineal descendant, collateral heir, co-owner or Tribe. Thus, this exception does not include Indians and non-member Indians who are not co-owners. Limiting the waiver exception to interests representing less than 5 percent and to the category of individuals described above frustrates Tribes' and individual Indians' ability to quickly and easily enter into exchanges and sales that would accomplish consolidation.

Section 2216 could be amended to provide Tribes with authority to enact their own regulations governing valuation requirements of transactions that come under 2216(b). Such a provision would be similar to Section 2205 of AIPRA, providing Tribes with authority to enact their own probate codes, subject to Secretarial approval. This delegated authority could include threshold requirements, such as the five year prohibition on the Secretary to approve a transaction that would put the land into fee status (§ 2216(b)(2)) as well as certain valuation standards. Tribes should have the option of contracting for pre-sale and post-sale valuation of tracts without the current burdensome step of federal approval, similar to the regulations implementing Section 2205 of AIPRA, which allow Tribes to contract for preparation of probate packages.

The intent of Section 2216 was to relax the requirements of inter vivos conveyances of trust real property to promote consolidation. Eliminating the requirement for a formal appraisal in lieu of 'an estimate of value' is a step in the right direction. However, amending Section 2216 to allow individual Indians to waive the estimate of value should be extended to all fractionated interests, rather than limiting this exception to highly fractionated, or less than 5 percent, interests. The option to waive the estimate of value should also be extended to transactions wherein the grantee is a member or non-member Indian, regardless of whether he or she is related to the grantor. Allowing Tribes to determine how best to effectuate conveyances with their members would acknowledge Tribal self-determination and allow Tribes to develop procedures based on a Tribe's unique landbase, history, resources, and member ownership in order to effectively address fractionation. Frankly, allowing Indian landowners the ability of private fee landowners to negotiate sales and exchanges would recognize land owner rights and facilitate active land ownership.

Acquisition of Undivided Fee Interests into Trust Status

25 U.S.C. § 2216 (c) mandates that upon a request from an individual Indian or Tribe to take an undivided fee interest into trust that the Secretary shall do so 'forthwith'. The clear intent of this provision is to consolidate a tract of land that is comprised of undivided trust and fee interests into sole management as a trust tract. The provision was adopted into law in 2000, over 11 years ago. However, no regulations have been promulgated to provide guidance to the Department, and as a result, the Department has not yet determined that requests to acquire undivided fee interests are mandatory acquisitions. A simple revision to 2216 (c) that clarifies that a Tribal or individual Indian landowner's request for the United States to acquire an undivided fee interest is a mandatory acquisition would insure that the original intent of Congress is effectuated. Without a statutory clarification, the Department has reviewed undivided fee interest acquisition requests in accordance with its discretionary acquisition authority under the IRA which undermines this valuable consolidation provision.

Purchase at probate-25 U.S.C. § 2206(o)

The AIPRA purchase at probate provision at 25 U.S.C. § 2206(o) is another valuable land consolidation tool. Like life time conveyances under Section 2216, purchase at probate allows individual Indians and Tribes the opportunity to consolidate fractionated interests in trust or restricted land at probate; however, the appraisal process also hinders this option. Additionally, a concern exists that Tribes and indi-

vidual Indians do not receive adequate notice of their rights to purchase at probate under this section.

This provision allows "eligible purchasers," meaning Tribes, devisees and eligible heirs to purchase trust or restricted interests in a decedent's estate for no less than fair market value, subject to certain consent requirements. An heir or devisee qualifies as an eligible purchaser if the individual is taking an interest in the same parcel of land in the probate proceeding (See 43 C.F.R. § 30.161). The regulations implementing Section 2206(o) require an eligible purchaser to provide written notice to the Office of Hearings and Appeals (OHA), the federal agency responsible for adjudicating Indian probates, of his or her desire to purchase an interest.

Upon receiving notice from an eligible purchaser, the OHA requests an appraisal, in accordance with the Uniform Standards for Professional Appraisal (USPAP) to establish "appraised market value" of the interest. Upon receiving the appraisal, OHA sends notice of the sale to all eligible purchasers, the BIA, all of the heirs, devisees and the Indian Tribe with jurisdiction over the land. Although an appraised market value can be based "on a valuation method developed by the Secretary under 2214 of the AIPRA," OHA will often not approve a purchase without the USPAP appraisal. OHA will then approve a purchase at probate if an eligible purchaser submits a bid in an amount greater than or equal to the "market value" of the interest. Obviously, with delay in obtaining USPAP appraisals, this purchase option is undermined especially when OHA has strict deadlines to close probates.

To improve the purchase at probate, Section 2206(o) should be revised to mandate notice to landowners, and to relax the requirements for purchases. First, either the BIA or the OHA should be mandated to provide the Tribe, heirs and devisees with meaningful notice of their right to purchase under this Section. Providing landowners with notice early on in the probate proceedings is critical since a written request to purchase interests at probate must be accomplished prior to a final decision being rendered. One option is to have the BIA agency that is responsible for preparing the decedent's probate file include a notice and explanation of rights under Section 2206(o) as part of the probate file. This probate file is sent to the OHA upon completion. Accordingly, OHA could include the notice and explanation of rights to Tribes, heirs and devisees at the time interested parties are served with notice of a probate hearing (See 43 C.F.R. § 30.114).

In addition to putting landowners on notice of their rights to purchase at probate, Section 2206(o) should be amended to include a waiver for obtaining an "appraised market value" and for purchasing interests at less than fair market value to achieve consistency with Section 2216. Further, allowing an "estimate of value" would avoid the time consuming and expensive USPAP appraisals for mineral interests that are included in parcels of land with no production history. Presently, mineral appraisals are often not completed for purchases at probate; and unless they comply with USPAP standards, purchase requests are being denied or prolonged. Our experience is that some confusion exists as to which federal agency is responsible for requesting and obtaining a mineral interest appraisal.

Further, clarification of the Tribal consent requirement for purchases at probate is long overdue. Where the decedent leaves no spouse and children, the less than 5 percent tracts go to the Tribe. Tribes therefore need to provide consent for a sibling to purchase interests that would otherwise go to the Tribe; however, Tribes have not been actively responding to these requests. First of all, it is not clear who is responsible for contacting the Tribes, and second, there is no guidance to obtain consent. An option to consider would be for OHA to send notice to the Tribe of an heir's request to purchase. If the Tribe fails to raise an objection within a certain time period, the probate judge could then approve the sale. This notice could also provide the Tribes with an explanation of its right to renounce its inherited interests and the timeframes to do so.

Consolidation Agreements at Probate-25 U.S.C. § 2206(j)(9)

Like purchase at probate and lifetime conveyances, consolidation agreements at probate provide additional authority for Tribes and individual Indians to reduce fractionated ownership of Indian trust and restricted land. Section 2206(j)(9) of the AIPRA allows heirs and devisees to consolidate interests in any tract of land in the decedent's inventory, and also allows heirs and devisees to gift or exchange their own land as part of the final consolidation agreement. Currently, there are no regulations implementing this section.

In 2009 and 2010, Elk River Law Office in conjunction with the Bureau of Indian Affairs and Inter Tribal Monitoring Association conducted an estate planning pilot project, which in part, included assisting families with consolidation agreements at probate. Recognizing that fractionated ownership of land reduced the ability of Tribes and individual Indians to effectively manage the land, one goal of the project

was to determine whether consolidation agreements at probate were a viable tool for reducing fractionation.

The Pilot Project statistics clearly indicate that consolidation agreements at probate could play a key role in reducing and even reversing fractionated ownership of Indian land. Consider the following statistics to determine how successful these agreements were in reducing fractionation. Absent the 27 consolidation agreements that were executed, 3,246 undivided interests would have been created; that is, 3,246 undivided interests would have been created by operation of AIPRA's intestacy rules and as a result of will devises. However, only 937 new interests were created from 27 consolidation agreements. This means that a total of 2,309 new undivided interests were *avoided* as a result of 27 consolidation agreements. (See Supplemental Report Estate Planning Pilot Project: Consolidation Agreements at Probate for Individual Indian Trust landowners in an effort to Reduce Fractionated Land Ownership in Indian Country, July 2010).

While the role of consolidation agreements in reducing fractionation is clear based on project statistics, it is equally clear that additional outreach and resources would assist and increase landowner participation in consolidation agreements. There are no provisions within Section 2206(j)(9) that require the BIA or the OHA to provide notice to Tribes, heirs and devisees of their right to participate in consolidation agreements at probate. Our experience in the Pilot Project showed an overwhelming willingness on the part of families to participate in a mediation for the purpose of entering into a consolidation agreement. However, had they not been advised of how a consolidation agreement could benefit them as landowners, it is unlikely they would have considered or even been aware of this option.

Thus, an amendment to 2006(j)(9) that requires notice to Tribes and individual Indians of their right to participate in consolidation agreements would enhance the use of this valuable consolidation tool. In addition, Section 2206(o) could be amended to include a provision allowing families to participate in attorney-assisted mediations. Given the high percentage of families in the pilot project who were successful in entering into consolidation agreements, noticing families of their rights early on and providing mediation services would eliminate a large portion the Department expenditures on probates, expedite OHA's ability to close estates in a timely manner, and reduce litigation—all while preventing and reducing fractionation.

Permanent Improvements

While a notice and explanation of rights to landowners is the key to increasing participation in consolidation agreements, further clarification of the process to identify and value permanent improvements on trust lands would reduce current confusion. In order to approve a consolidation agreement, a judge has to find that the participants were advised of "all material facts." One concern when assisting families who know very little about the trust property is whether a family can truly be advised of "all material facts" when it is unknown whether the tracts include permanent improvements, and if so, the value of those improvements.

Current regulations provide that a probate file (prepared by the BIA agency that serves the Tribe where the decedent was an enrolled member) must include a certified inventory of trust land including "accurate and adequate descriptions of all land and appurtenances." 25 C.F.R. § 15.202. However, local agencies have often not complied with this provision. Nonetheless, for an heir to truly be advised of all material facts, the value of permanent improvements is critical. Not only could permanent improvements affect a family's deliberations in the simplest of consolidation agreements, access to this information could become even more critical in cases where families are opting to partition. Understanding what improvements are on the land may also affect a Tribe's, devisee's or heir's decision to object to or alternatively initiate the purchase of fractionated interests at probate. In either case, to truly be advised of "all material facts," a Congressional mandate to the BIA to include appurtenances in the BIA probate file is necessary.

As part of the 2008 technical amendments, Section 2206 of the AIPRA was amended to provide that "a devise of trust or restricted interest in a parcel of land shall be presumed to include the interest of the testator in any permanent improvements attached to the land." Further, this section applies to covered permanent improvements "even though that covered permanent improvement is not held in trust," and without altering the trust status of the improvement (See 25 U.S.C. § 2206(H)(1)(B)–(C)). Based on this provision, a permanent improvement appears to run with the land. However, this appears to be inconsistent with the OHA's jurisdiction, which is limited to probating trust or restricted land and trust personalty, and not real or personal property (other than land). (See 43 C.F.R. § 30.102). Thus, a statutory clarification of the role of permanent improvements not only in a consolidation agreement, but in any probate proceeding, is necessary. Allowing the OHA

to probate covered permanent improvements would streamline and possibly eliminate the need for two probates-one in the OHA and one in the Tribal court for the covered improvements.

Estate Planning

Will drafting plays an equally important role in consolidating Indian lands. However, landowners are without the technical assistance needed to draft wills that not only comply with the AIPRA's testamentary rules, but prevent fractionation. In my experience, wills drafted by individual Indians or untrained attorneys are often set aside for failing to comply with AIPRA requirements. Current AIPRA provisions to provide estate planning funding, if available, to non-profits for estate planning should be revised to mandate funding to create a professional will drafting service within the BIA. Such a service should include providing Tribes, heirs and devisees with maps indicating the location of the decedent's interests, landowner income reports, indicating leases and revenue streams, land inventories, and other documents that should be considered when consolidating and making estate planning decisions. The argument that will drafting is a costly undertaking for the Department can be countered with the argument that wills can reduce fractionation, thereby reducing management costs.

In 2006, the BIA discontinued drafting and storage of wills for individual Indians. However, the BIA remains tasked with attempting to locate wills to include in the probate packages to be forwarded to OHA for decision. Requiring that the BIA resume storage of Indian wills would insure the wills are accessible for inclusion in probate packages and reduce costs of the current efforts to locate wills.

Another component of estate planning relates to the Tribal Probate Codes authorized by 25 USC 2205 that allows Tribes to develop rules of descent and distribution of Indian trust lands. Without an approved Tribal Probate Code, the AIPRA "federal probate code" is applied to probate Indian trust lands. Since implementation of AIPRA, only one probate code has been approved by the Department of Interior despite the numerous probate codes submitted by Tribes for review and approval. Although the Department provided Federal Register guidance of acceptable Tribal probate code provisions, no explanation of the limits of Tribal discretion are included. Further an outreach effort to education Tribes and provide technical assistance would result in a greater number of approved Tribal probate codes.

Life Estates Without Regard to Waste

Clearly, participation in consolidation agreements provides a significant cost savings to the Department, while reducing fractionated ownership of Indian lands. However, it is uncertain what role, if any, life estates without regard to waste play in reducing management costs for the Department, given that the consent of the life tenant and the remaindermen are required on agricultural leases. It is also unclear what consent requirements apply to life tenants and remaindermen on mineral leases.

Under the AIPRA's non-testamentary provisions, the decedent's surviving spouse receives a life estate without regard to waste in the interests of the decedent representing 5 percent or more of the tract. (25 U.S.C. § 2206(a)(2)(A). A life estate provides the life tenant with beneficial use of the land for his or her lifetime, or until the life estate is terminated. This property right, allowing the life tenant to live on, use and take income, including bonuses and royalties, from the land is to the exclusion of any other persons having a present or future property interest in the same allotment. Despite this exclusive beneficial use, regulations governing agricultural leases require the consent of not only the life tenant, but also the remaindermen.

In addition, a 2010 IBIA case clarified that the consent of both the life tenant and remaindermen are also required for Crow competent agricultural leases of 5 years or more (See *Enemy Hunter v. Acting Rocky Mountain Reg. Dir.*, BIA, 51 IBIA 322 (June 29, 2010). However, it is not clear under the regulations governing mineral leases whether the life tenant must obtain the consent of the remaindermen in order to execute a mineral lease. While it is our understanding that agencies are requesting the consent of all property holders prior to approving mineral leases, a clarification of the consent requirements for life tenants requesting approval of mineral leases is necessary.

Single Heir Rule

The single heir rule in AIPRA has garnered a significant amount of attention and criticism throughout Indian Country. However, the feedback from Indian families who participated in the Pilot Project provides an interesting perspective.

Section 2206(a)(2)(D) of the AIPRA governs the disposition of the decedent's interests representing less than 5 percent where the decedent did not leave a will. This section provides that the decedent's oldest surviving child receive all of the interests

representing less than 5 percent. The exception is where the surviving spouse was residing on the parcel of land and receives a life estate. In that case, the oldest surviving child receives a remainder interest. 25 U.S.C. § 2206(a)(2)(D)(iii)(I). If the decedent left no surviving children, then these interests pass to the decedent's oldest surviving grandchild; and if none, to the oldest surviving great grandchild. Where the decedent had no children during his or her lifetime, then the small fractional interests pass to the Indian Tribe with jurisdiction over the land.

There is no doubt that the single heir rule has had a tremendous impact on reducing fractionation for those interests less than 5 percent of a tract as those interests have been prevented from further fractionating. Additionally, it appears that Indian landowners have not overwhelmingly challenged the single heir rule as was perhaps anticipated. Most of the families who participated in the Pilot Project did not raise significant objections to the single heir rule after being provided an explanation of the rule's intent. This is not surprising given that the very reason families agreed to participate in mediation for consolidation purposes was consistent with the intent of the single heir rule-to prevent fractionation and consolidate Indian land. In fact, families were committed to attempting to keep interests in a decedent's estate whole or from undergoing further fractionation.

Most often, if the single heir rule was an issue in mediation, it involved estates that included significant mineral interests located in the Bakkan formation, such as on the Blackfeet Reservation in Montana, or on the Fort Berthold Reservation in North Dakota, where oil production was already occurring. However, these objections were often addressed by executing consolidation agreements, whereby the less than 5 percent interests were shared among family members, with each heir receiving a single interest. Thus, the families found a solution to overcome any perceived unfairness with respect to the single heir rule, while still preventing fractionation.

In closing, AIPRA, and the preceding amendments to the Indian Land Consolidation Act provide important tools to reduce and prevent fractionation of Indian lands for Tribes and individual Indian landowners. However, many of these tools have been under-utilized due to a lack of accompanying regulations, lack of education, notice and technical assistance. Mandating resources to assist Tribes and individual Indians in the utilization of existing AIPRA tools would result in long-term cost savings by reducing the daunting management responsibility for fractionated lands. Additionally, the revisions and clarifications discussed above would enhance the effectiveness of the existing provisions and enhance the intent of Congress.

Thank you and please contact me with any questions.

The CHAIRMAN. Thank you very, very much, Ms. Russell.

Ms. Redthunder, would you please proceed with your testimony?

STATEMENT OF SHARON REDTHUNDER, ACTING DIRECTOR, INDIAN LAND WORKING GROUP

Ms. REDTHUNDER. Thank you, Chairman, for asking Indian Land Working Group to make a presentation. I represent the Indian Land Working Group, a nonprofit organization that has been in existence for 21 years working with the grassroots Indian allottees trying to resolve and preserve Indian lands.

We have been working with AIPRA since its enactment and find that it is a very complex law that needs a lot of training to individual Indians to understand what can be done under AIPRA. We have annual workshops, symposiums that are around the Country inviting all of the people that own land, which would be Tribal people, individual Indians, professionals; and we have workshops that address the American Indian Probate Reform Act in trying to make some clarification out of its potential. It has a lot of potential, but there is a lot of work that needs to be done to make it effective on the fractionated lands. As you will see, from 2004 to current, it has not made a large impact on fractionation, and we feel that there needs to be a lot of training so an Indian landowner can go in.

We have five recommendations, and one is to access the data. The Indian landowner needs to be able to walk into an office and

get all of the data that is available, or not available, to make a decision on their fractionated interest. You go into the office and you find out that you need maps, you need the title status report, and one of the things that you definitely need is updated ownership. TAMS is not updated nationally. You go into different regions and their ownership is not updated. So you need to have updated to make your decisions.

There needs to be a lot of counseling to be done to the individual landowner. The counseling is not happening. You can go into your local Bureau of Indian Affairs Office and you deal with the probate clerk, who may be a GS–5, GS–6, 7, and they need to be trained to work with the individual landowner so the individual landowner will fully understand what the law allows them to do. Right now the counseling is not happening.

When you also go into a probate, the administrative law judge or the decision maker is not counseling the individual landowner on what they can do, what their interests at the probate hearing. During the probate hearing, you have the ability to partition, consolidate; however, I have been informed by some landowners that they go into their probate and no one counsels them on their ability to do these transactions during probate.

So what you need to do is you need to have access to the data to make these decisions, you need to have up-to-date information, you need to have maps. You should also have GIS so you can focus, know what you own and focus what is on the property; is it leased, is there income. There is a lot of things you need to take into consideration on your interest and what the capability of reducing that.

You need appraisals and you need timely appraisals. Appraisals are backlogged and they are not up to date. You need to have information updated.

You need to have up-to-date probates. Probates are backlogged. You don't have up-to-date probates. You need to have notices prior to the probate that you can consolidate your 5 percent or less interest that you can buy. This is not being done.

I myself have tried to buy a less than 5 percent interest of a fractionated interest and I was not informed until after the person had a deceased decision came out, and that was not timely. I filed that I wanted to purchase and I was told that, first, I was told that, yes, I could do it, then later I was told, no, you can't do it because you should have spoke up before the decision was issued. So that needs to be handled. You need to address your probates, your timeliness on when the processes, when you are doing the process.

Also to address fractionation, you need to implement wills. You need to be out counseling your individuals, your senior centers, telling people that they need to do their wills and the consequences. There is a lot of law out there, but people are not being made aware of the consequences if they don't do these things, the consequences of what happens when you don't make a will, and they are just not being informed. The grassroots people out there, our Tribal members, our individual landowners are not being made aware of the consequences of AIPRA, of the 5 percent single heir rule, where it will only go to the oldest child.

Also, the terminology within AIPRA, you need to define different aspects of AIPRA. It is hard to understand it. I have over 40 years experience in real estate and I have studied this and we have attorneys that have studied this and it is very complex and very complex to understand. So, therefore, there needs to be a lot of education at the grassroots level.

Thank you.

[The prepared statement of Ms. Redthunder follows:]

PREPARED STATEMENT OF SHARON REDTHUNDER, ACTING DIRECTOR, INDIAN LAND WORKING GROUP

Good afternoon, Chairman Akaka and distinguished members of the Committee: My name is Sharon Redthunder and I am Acting Director of the Indian Land Working Group. On behalf of ILWG, thank you for the opportunity to participate in this hearing. ILWG was formed in 1991 to assist Tribes and individual Indians with land-ownership and related issues. In 2004, ILWG worked closely with Congress when AIPRA was enacted. For the past six years, ILWG has devoted major portions of our annual conferences to issues related to the implementation of AIPRA. It has been our experience that individual Indian allottees, those at the grassroots level, turn to ILWG for assistance when probate processes or tasks become confusing and complicated. Also, BIA often has as many questions for us as landowners do. We support the Committee's initiative to seek clarity and consistency to AIPRA procedures.

ILWG's support to allottees has produced an overwhelming amount of anecdotal evidence that shows AIPRA is being implemented with many diverse procedures. To this end, ILWG has compiled recommendations for the BIA that we believe will facilitate consistent procedures for probates of Indian land under AIPRA. The major tasks associated with AIPRA fall into five categories: (1) access to data to include land records, prior probates, rights of way and leasing records to facilitate will writing and ensure proper decisionmaking occurs, (2) appraisals, (3) timely notice of pending probates, (4) will writing, and (5) consequences of vague terminology. Moreover, specific issues exist such as permanent improvements, Tribal code development, and use of Geographic Information Systems (GIS) to provide analysis at the grassroots level.

Tasks and Recommendations

1. Access to data is not streamlined. If a family member needs final orders from the courts or questions the accuracy of a grandmother's distribution from a deceased grandfather's holdings that contain producing wells and a right of way, it has become the burden of the grandchildren to gather all lease numbers, assignment of leases, right of way location and all final probate orders. Grandchildren may or may not have graduated from high school and are unfamiliar with probate documents or they may have Phd's from Harvard but still must gather, review, and analyze data that is difficult to access from multiple locations.

If landowner consent is needed to negotiate a right of way, the allottee or potential heir must know all information about past agreements and current information related to the property. When a landowner asks concrete questions about where to access certain documents, the Federal respondent almost always replies "I don't know but I will get back to you or I'll have someone else get that information for you." Another block of precious time goes by. By not obtaining proper timely information or key documents the process is stalled and puts the landowner in a compromised position.

A stalled process certainly impedes Consolidation Agreements authorized under AIPRA. Consolidation Agreements benefit landowners with interests in a fractionated parcel. Interests included in a Consolidation Agreement are not subject to purchase under 25 USC § 2206(p). So if a family has not consolidated ownership in the allotment or drafted specific wills, they are not likely to be able to purchase at probate because of a lack of family funds. A Tribe does have the ability to purchase and, if a Tribe does not purchase the entire allotment, a stranger to title is created which makes it more difficult for landowners to consolidate.

A Consolidation Agreement must be negotiated with correct ownership information and presented in final to the Hearing Officer during the pendency of the probate so the documents must be timely retrieved. ILWG does not have knowledge of an actual Consolidation Program in effect and knows only of a few agreements that have been completed.

Another tool authorized by AIPRA is the Owner Managed Interests (OMI) which amends the Indian Land Consolidation Act. OMI's may enter into leases and manage the lease but must have all the necessary backup documents so the proper collections and accounting among the owners is also correct. OMI's also can be a danger. AIPRA requires 100 percent agreement to enter the OMI and 100 percent to terminate the OMI. The problem is that upon the death of one the original owners the successors to decedents interests must track down the all of the other parties to the OMI for probate purposes to effect changes to the document. There may be no bookkeeping records at the federal or Tribal level and tracking the records among the parties is nearly impossible. It could go on exponentially as other original signers to the OMI become deceased. ILWG advises a sunset provision be inserted into OMI's as they are first drafted.

A 1988 Audit by Arthur Anderson identified 5 leases tested and each of the 5 files did not contain properly completed lease modifications. Attendees at our conferences more than two decades later bitterly complain of the same experience. If they do not have an opportunity to review backup documents in preparation for a probate, the errors can continue on as Arthur Anderson's audit shows for decades..

Recommendation: Hire or staff an IN–TAKE SPECIALIST at each agency that only prepares documents and meets with allottees. DEVELOP A CHECKLIST. The package should have Title Status Reports (TSR), all leases, maps, allotment numbers, enrollment numbers for ancestors and final probate orders. Have a STRICT DUE DATE. The in-take specialist must explain each document to the putative heir.

In addition and separately, the Bureau of Indian Affairs (BIA) should have a very active Consolidation Program of assisting individual landowners with consolidation of their fractionated interests in an undivided parcel pursuant to 25 USC § 2206(e). Require the Program to have all TSR's, leases, maps, allotment numbers, enrollment numbers for ancestors and final probate orders readily available.

2. Appraisals. During ILWG conferences for the past six years, allottees have complained about AIPRA appraisals. Most allottees have cited the lack of training of appraisers, minimal knowledge of fair market values, and the extremely slow response time for completing an appraisal. The usual length of time to respond to a request is over a year. If a Tribe can purchase at probate, a value needs to be negotiated with the potential heirs. If heirs want to consolidate they need to do so with a fair value that is agreed to. At one time BIA or OST tried to track appraisals to be completed within one year! Some appraisal requests never made it into the system to be tracked leaving such requests to be held for more than a year before even entering the system.

The main problem concerning the implementation of AIPRA is that BIA personnel have no training or background in the technical issues. AIPRA conducts paper training without teaching the impacts of what the recipients learn. The professional experience in realty or probate fundamentals is under graded at GS grade level. An appraiser certified for agricultural property should not be appraising fractionated interests with a low-ball value using a technique that is not appropriate for Indian Country. ILWG believes there has to be a better system.

Recommendation: Hire or contract as many USPAP qualified appraisers as is needed to meet a strict time-line. Do not allow more than two or three weeks (30 days at most) to complete appraisals. Provide training to appraisers.

3. Timely notice of Pending Probates. It has become routine that co-owners in a highly fractioned allotment are not notified until after the probate hearing and a final order has been issued. It goes without saying that Family Trusts, OMI, and Consolidation Agreements are all tools that should increase the use of wills and substantially reduce the quantity and complexity of probating Indian estates. Notice of a pending probate can trigger the formation of such agreements, but without notice, the likelihood of achieving family plans enforcible under AIPRA is less likely.

Recommendation: Require a probate attorney to present to a probate judge or decision maker a certified list signed by ALL co-owners that they have received notice of the hearing or ask for a continuance of the hearing until all co-owners are notified.

4. Will Writing. ILWG has conducted more than six symposia, numerous roundtable discussions, and various workshops. In addition to these events, ILWG relies on professional expertise and experience covering more than thirty years and concludes that the anecdotal evidence in those forums show *99 percent of trust or restricted allotments are still probated without a will.* Yet the most harmful and unwanted effects of AIPRA will apply to Indian landowners and their descendents through an intestate probate if no will is created. For example, after a divorce, a young second spouse will retain a life estate and all revenue from the trust allotment "without regard to waste". She may outlive the children from the first marriage and in an intestate probate, with no will, the children are excluded from all

revenue derived from the land. The father may well have desired the opposite result but without a will, AIPRA excludes the biological children. Without a will, the "oldest heir" rule excludes other siblings and grandchildren.

When it comes to will writing, terms need to be understood such as *joint tenancy with right of survivorship.* Writing a will and not knowing the result of a term prescribed creates family turmoil. If there are five brothers who hold a trust allotment under this term, all children of the deceased siblings are excluded except for the last surviving brother and only his children inherit. Few Indians understand this, 99 percent do not write wills and the Federal law, AIPRA, may well go against their cultural beliefs and family ties.

Indians need a vault to hold their wills. To deposit the will, a log or register must be used. The BIA need not be held liable if individuals do not follow the procedure to check in a will for safekeeping but Indians need a safe place to store their document.

Recommendation: The Bureau of Indian Affairs should immediately conduct training and outreach to all landowners, NOT TRIBES, either through internal staff or contractual qualified trainers. In general, Tribes do not conduct workshops or give assistance to grassroots, landowners with interests in trust or restricted property derived from an allotment.

BIA needs to provide storage for wills.

5. Terminology. Probate has its own unique language. Terms such as *tenancy in common, joint tenancy with right of survivorship, permanent improvements, purchase at probate, pretermitted children, etc.* need to be defined for grassroots landowners of trust or restricted property if they are to be expected to write a will utilizing provisions under AIPRA. In 2005, the will situation became so confusing, a staff attorney in the Department of the Interior, Office of the Solicitor, Portland, Oregon prepared a document to highlight AIPRA's provisions. There were definitions and commitments made for the Secretary of the Interior to give notice to heirs and track down missing heirs.

Recommendation: Department of the Interior, Office of the Solicitor should develop and publish a handbook with definitions and mail to every landowner of trust or restricted property, including the Five Civilized Tribes and Osage who may be owners of property on other reservations.

Conclusion

There are three issues with which ILWG has serious concerns. The amendment by Public Law 110–453 on permanent improvements on trust or restricted land must be clarified or removed. Geographic Information Systems (GIS) must be installed at all agencies for immediate use. Tribal Probate Code development must be funded so specialists can be hired.

ILWG has a great deal of pride in making the above recommendations. Our Board Members, staff, consultants and volunteers have either been personally involved in the issues or have conducted the proceedings or acquisition relying on the law. We have a fee-to-trust and acquisitions professional on staff, an expert on oil and gas leasing, an IIM expert, a retired probate judge, and the "first ladies" of timber and agriculture. ILWG's experience totals nearly 200 years of technical, personal, and professional experience. ILWG is unique in terms of depth of knowledge and understanding of Indian land issues.

We support the Committee's attention to the technical implementation of AIPRA. We appreciate the opportunity to testify, Mr. Chairman. I will be happy to answer any questions the Committee may have.

Attachment

AIPRA Tasks

1. Access To Data Not Streamlined	2. Appraisals	3. Timely Notice of Pending Probates	4. Will Writing	5. Terminology
a. The probate burden is solely on the Indian to gather pertinent probate data.	a. Appraisals are not timely.	a. Co-owners in a highly fractioned allotment are not notified until after the probate hearing and a final court order has been issued.	a. ILWG forums show that 99% of trust or restricted allotments are still probated without a will.	a. Probate has its own unique language. Terms need to be explicitly defined for Indian allottees.
b. Assembling, reviewing, and analyzing documents is beyond the capabilities of the layman as well as the educated professional.	b. There is a shortage of trained professional appraisers.	b. Timely notice of a pending probate can trigger the formation of Family Trusts, QMTs, and Consolidation Agreements for the individual Indian and family members.	b. The most harmful and unwanted effects of AIPRA apply to Indian landowners and their descendents through an intestate probate.	
c. Consolidation Agreements and Owner Managed Interests (OMI) under the Consolidation Program are practically nonexistent because of a lack of timely information.	c. Appraisers have minimal knowledge of current fair market values.		c. Terms of art when it comes to will writing need to be understood such as *joint tenancy with right of survivorship*.	
			d. Will writing and the Federal law, AIPRA, may well go against Indian cultural beliefs and family ties.	
			e. Storage vaults for approved Wills need to be funded by the BIA.	
Recommendation: Appoint, hire or staff an INTAKE SPECIALIST at each agency that only prepares documents and meets with allottees.	Recommendation: Hire or contract as many USPAP qualified appraisers as is needed to meet a strict timeline. Do not allow more than two or three weeks (30 days at most) to complete appraisals.	Recommendation: Require a probate attorney to present a certified list signed by ALL co-owners that they have received notice of the hearing or ask for a continuance of the hearing until all co-owners are notified.	Recommendation: Bureau of Indian Affairs should immediately conduct training and outreach to all landowners, NOT TRIBES, either through internal staff or contracted out to qualified training.	Recommendation: Department of the Interior, Office of the Solicitor should develop and publish a handbook with definitions and mail to every landowner of trust or restricted property, including the Five Civilized Tribes and Osage who may be owners of property on other reservations.

The CHAIRMAN. Thank you very much, Ms. Redthunder.

Professor Nash, as Director of the Institute for Indian Estate Planning and Probate at the Seattle University School of Law, you devote your time to the study of Indian probate issues. In your opinion, does AIPRA need to be amended, or is it achieving its intended purpose?

Mr. NASH. Mr. Chairman, we have in fact spent a lot of time looking at AIPRA from the time it became effective, was passed

and became effective, and worked with it over the years. It is, as Ms. Redthunder said, a very complicated, complex piece of legislation.

I do know that there was an awful lot of thought and work that went into its development and I think it shows that it is a very innovative piece of legislation. Being that complex, it has sometimes some unintended consequences or sometimes things have been left out. It has been amended three times since it was passed. I think the technical amendments have covered a lot of ground and corrected some things that needed to be corrected.

There are additional corrections, I think, that could be made, and many have studied these and there is quite a list I think that could be developed and submitted. One of them that I ponder, and I don't want to secondguess the many minds that went into developing this Act, but one thing I think that should be considered is the portion of AIPRA that actually works counter to its intended purpose. It was designed to prevent fractionation; yet, when there is an intestate interest that is greater than 5 percent of the total allotment size, AIPRA fractionates that by dividing it equally amongst the decedent's heirs. That seems to compound the problem it was designed to address.

One approach to solving that particular problem might be to amend that provision to have those interests pass to heirs as joint tenants with the right of survivorship so that it passes to heirs equally, but ends up ultimately in one single owner in one intact piece.

I use that as an example, Mr. Chairman, of a possibility of an amendment.

The CHAIRMAN. Thank you very much, Professor Nash.

Ms. Russell, you are here on behalf of the Coalition of Large Tribes, an interTribal organization recently formed to represent the interests of Tribes with large land bases. Does the land fractionation problem affect large Tribes differently than those with smaller land bases? If so, can you please explain this?

Ms. RUSSELL. Yes, Chairman Akaka. The large land-based Tribes, predominantly in the West, are Tribes that oftentimes don't have a lot of other opportunity for economic development but to utilize their lands. Most of the Tribes in the COLT organization are Tribes that have large agricultural operations and have that opportunity, as well as mineral development, oil and gas. And when you have a fractionated parcel that you have to obtain consent from the owners for practical beneficial use, it becomes very, very cumbersome and expensive, and sometimes impossible. If you need a right-of-way for a pipeline so that you can do oil development, you are going to need to get consents from the owners of the property, and if you have a large number of owners, then that becomes very difficult.

So I would say that in order for those Tribes, and a lot of them are Tribes that don't have a lot of other resources or opportunity for resource development, fractionation creates a major obstacle to economic development and impacts them very negatively.

The CHAIRMAN. Ms. Redthunder, as Acting Director of the Indian Land Working Group, your professional focus is on the restoration and recovery of Tribal land bases. In your opinion, what types of

technical assistance should be provided to Tribes in implementing AIPRA?

Ms. REDTHUNDER. Okay, to the Tribes, the Tribes should be able to pass their Tribal probate codes, and that is something that hasn't really been happening with a lot of Tribes nationally. I myself, I am an enrolled member of the Colville Confederated Tribes in the State of Washington, and they tried to pass their constitution bylaws to allow them to institute a Tribal probate code, and it didn't pass.

But Tribes need to be able to adopt Tribal probate codes. They also need to adopt land consolidation plans so that way they will know where they want to purchase and identify their consolidation areas. Also, the forthwith, the acquisition of undivided fee interest in order to place that into trust. Tribes buy a lot of fee interest at tax sales, and what they need to do is have the authority to place those properties back into trust without having to go through all of the red tape that a fee to trust requires.

So those three, I believe, are good for Tribes, and also to reduce fractionation to buy from willing landowners and possibly the forced portion, they call it forced partition, but actually what you are doing is you are buying those shares, and a lot of Tribes haven't been pushing those forced partitions because they don't want to force their individual Tribal members to sell. But those are the issues that I feel are valuable within AIPRA for Tribes.

The CHAIRMAN. Thank you very much.

Professor Nash, can you tell me whether the Institute has developed other types of estate planning documents besides wills for people to use?

Mr. NASH. Mr. Chairman, our projects provide a full range of estate planning documents and tools that we make available to individual Indian landowners. Wills, of course, are the primary device that people want in an estate plan, and all of our personnel are trained to counsel Indian landowners on how to best use a will to achieve the goals they want. Generally, an estate plan for Indian landowners also includes a durable power of attorney and a health care directive.

But outside of that we also offer information and advice to individual landowners about other alternatives they have. For example, one of the most frequently utilized is the gift deed, in which an Indian landowner can convey a trust interest to a family member, whoever they want it to go to, by gift. That is a process that requires an application to the Bureau of Indian Affairs and ultimately approval, and we caution Indian landowners that if they take that approach, once they do it, it is final; they can't undo it, much like a will can be revised or amended later on. One of the benefits that many people see in doing that is it avoids probate for that interest; it is done and passes outside of probate.

We offer information about consolidation opportunities they have at probate, when the probate actually takes place.

I think those are the two primary devices we utilize in counseling clients.

The CHAIRMAN. Thank you, Professor Nash.

Ms. Russell, I am aware that in the previous Administration you served as the Principal Deputy Assistant Secretary for Indian Af-

fairs at the Department of Interior. What were some of the challenges you had as an administrative official in implementing AIPRA? In your opinion, can anything be done legislatively or administratively to improve the implementation of AIPRA?

Ms. RUSSELL. Thank you, Chairman. I think my experience being an administrator and trying to work on implementation efforts was largely constrained by two things, two issues: one, of course, was resources. We seem to, of course, be very concerned about allocation of resources to these issues.

Second, I frankly have to say that there was a major concern about liability issues during that time that I was there was an administrator, so I think that some of the latitude that is allowed in AIPRA for full implementation that actually empowers landowners was not met with full enthusiasm, which I think now the climate is different and I think that we can now take provisions of AIPRA that truly empower Indian landowners and expand and clarify them.

And I think that issues such as allowing individual Indians to maybe waive valuation is one of those issues. Allowing individuals to do estate planning and putting some dollars behind that is key. So I think that the climate is different. I think with the settlement of *Cobell* we are in another era and we can actually effectuate some of the intents of Congress with these provisions in AIPRA.

The CHAIRMAN. Thank you.

Ms. Redthunder, do you have any recommendations for amendments to AIPRA or to the Department's regulations that would make estate planning easier for the Indian people?

Ms. REDTHUNDER. Well, one of the things that we did address in our paper is the improvements, the permanent improvements to property, real estate, that it is not trust. We recommended that be addressed because, for instance, myself, I have a home on my allotment, and if you separate those two, I would have a piece of personal property, which may be subject to taxation on the county tax rolls and my property would be trust. So I think we need to address that permanent structure, improvements on property and address that.

We should be addressing an easier process of owner management interest. If you make it easier, I think it requires 100 percent to enter into an owner management agreement. There are two ways you can owner management interest, if you have fractionated ownership and if you wanted to develop it. It should be easier than 100 percent ownership to enter into it or to dissolve it. You need to make it easier for landowners to develop their property and use it if you wanted an enterprise on it.

Also, there is a provision in the law that provides for family trusts. We need to address that. Indian Land Working Group has been discussing this with various landowners of trying to enter into a family trust, and I know, for instance, on the Colville we had one large landowner that had passed away; however, it was attorneys that went in and did a family trust, but they also included themselves in that trust.

So we need to go in and make it easier for families to go in and utilize their property. And I think if we address those in the law and make it easier, we should be able to help the Indian people at

the grassroots. Right now, under fractionation, there is little that they can do with their property.

The CHAIRMAN. I want to thank you so much for your remarks and your comments. I want to give you a final opportunity to express your opinion on the subject of our hearing today, maybe of things that you did not cover that you would like to. So this is your opportunity on this panel. Mr. Nash, Professor?

Mr. NASH. Thank you, Mr. Chairman. I guess the point I would highlight for you and the Committee's consideration, when we get down to the actual delivery of estate planning services to Indian people, how that is best done, how can that be done in a way that is effective, cost-efficient, and provides the results that Indian people need.

As I mentioned, our projects have utilized a variety of models to deliver services to Indian people and we have studied extensively the best approach to do that, and I would direct you and the Committee's or invite your attention to the new model that we have developed that would provide those estate planning services utilizing teleconferencing technology. We have looked at the cost of having full-time personnel on reservations; we have looked at utilizing attorneys, utilizing paralegals, and different combinations thereof, utilizing law students, as we do in our summer programs. But ultimately it comes down to a question of cost, and we believe that this is a way that professional services can be provided at a very cost-efficient rate. Thank you, sir.

The CHAIRMAN. Thank you very much.

Ms. Russell?

Ms. RUSSELL. Yes, thank you, Mr. Chairman. I think that anything we can do to actually reduce the number of fractionated owners per tract to allow Indians to be active landowners is far overdue. I think that Indian people can manage land, make decisions, develop land just like anyone else in this Country, but because of these burdensome constraints that were created by the Allotment Act, we have been prevented from that; and I think that Tribes and individual Indians can be the best stewards of the land if we can just figure out how to make it easier to consolidate and how to educate them on those opportunities.

So I think there are a lot of very good tools in AIPRA. We need to get the Department to be a cooperative partner and develop some regulations to make some of those provisions available and to allow them to work. Thank you.

The CHAIRMAN. Thank you so much.

Ms. Redthunder?

Ms. REDTHUNDER. On behalf of the Indian Land Working Group, I feel that we need to make things a lot easier. We need to have, I guess, speak to the people so they can understand. You read the AIPRA and it is very difficult to understand. I think there needs to be a lot of education to our grassroots people on the reservation, landowners all over the Country.

We also need to address timeliness. Timeliness needs to be addressed. You know, you look at your allotment landowner, and when you go into the agency and you want to do something, consolidate, you want to partition, and when they tell you right off the

bat it is going to take about five years, it discourages dealing in ownership.

So I feel that we need to do a lot of education. We need to implement things that we can from AIPRA and assist the individual landowners. And Indian Land Working Group is willing to assist. We have been doing that. We have been holding annual meetings. We try to reach out to the people and we have a lot of knowledge with our people that serve on the board. I have a board member, Marcella Giles, that is here with us today.

But we have a lot of expertise and I feel that we are trying to reach out to the people and trying to inform them and educate them on what can be done with their land. Thank you.

The CHAIRMAN. Well, thank you very much. Again, I want to express my warm mahalo and thank you to the witnesses at today's hearing. It is clear that in order for AIPRA to work, the Department of Interior must effectively communicate with Tribes and individual American Indians whose rights are affected by the Act.

The Committee looks forward to continuing to work with all of you to realize the important goals of AIPRA. I also encourage Tribes and other interested parties to submit their written testimony for the record. By hearing from you on this important issue, we can determine what legislative and administrative steps are necessary to help Tribes and individual Indians address the problem of land fractionation.

This has been a good hearing and what you have offered here will be helpful to us, and I thank you very much. But we still need to work together on this. And I thank you very much for that.

This hearing is adjourned.

[Whereupon, at 3:35 p.m. the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF CHERYL THREE STARS VALANDRA, ATTORNEY, INDIAN ESTATE PLANNING PROJECT, DAKOTA PLAINS LEGAL SERVICES

Introduction and Background of Dakota Plains Legal Services and the Native American Law Student Association at the University of South Dakota School of Law

My name is Cheryl Three Stars Valandra and I am an attorney with the Indian Estate Planning Project at Dakota Plains Legal Services (DPLS) in South Dakota. I am a member of the Oglala Sioux Tribe and have been working with the Indian Estate Planning Project at DPLS since 2005. Co-authors of this written testimony are Anthony Franken and Bradley Richardson, members of the Native American Law Student Association (NALSA) at the University of South Dakota School of Law in Vermillion, South Dakota.

Dakota Plains Legal Services is a non-profit legal services' program that has been providing civil legal services to low-income and age-eligible individuals since 1967. With six locations on or near Indian reservations in South and North Dakota, DPLS is uniquely situated to provide for the legal needs of Tribal members.

The Native American Law Student Association is a student group which aims, among other things, to "create an understanding and interest in issues affecting Native Americans and other minorities." In recent years, the organization has taken an active interest in the issue of fractionation, and more specifically its impact on Native American individuals on reservations across South Dakota.

We are submitting the following comments to supplement the testimony before the Senate Committee on Indian Affairs concerning the American Indian Probate Reform Act (AIPRA) and the ongoing efforts to combat the rampant problems of fractionation, as well as offer some commentary on some of the problematic areas of the AIPRA, as it relates to the individuals we serve.

Current Efforts in Indian Estate Planning

Dakota Plains Legal Services has been providing focused Indian Estate Planning Services since 2005, prompted by the implementation of the AIPRA as well as the BIA discontinuing its will-writing services. Since 2005, DPLS has opened 3,097 cases providing assistance in estate planning to Tribal members, including preparation of wills, gifts deeds, land sales, consolidation and exchange and partition applications as well as power of attorney directives. DPLS has also been providing will storage services since 2006. DPLS has consistently maintained a focus on reducing fractionation, and clients have responded well to these efforts. Once educated about the consequences of fractionation, most clients are able to choose a path which prevents further fractionation.

In recent years, Dakota Plains Legal Services partnered with student members of the Native American Law Student Association from the University of South Dakota School of Law to provide community education and will-writing events throughout the State of South Dakota and the Standing Rock reservation in North Dakota. At the community events, Tribal members learn about the effects of the AIPRA, how to prevent further fractionation of trust lands and receive assistance in drafting estate planning documents such as wills. In the summer months, DPLS hosts legal internships focused on estate planning. These partnerships provide a low-cost opportunity to better reach those in need of estate planning services, as well as expose future attorneys to the unique issues of land tenure in Indian country.

Reflections and Recommendations

A. Single Heir Rule

The so-called "Single Heir Rule"[1] is especially frustrating and divisive, for two reasons. First, trust lands in the upper Great Plains are some of the most highly fractionated in the country,[2] and are thus more frequently susceptible to this harsh rule of intestate descent. For some individuals, all or nearly all of their land is considered highly fractionated, so that by dying intestate, only one eligible relative will receive anything. Although this land may be of marginal economic value, the cultural value of land to many Tribal members is immeasurable.

Second, the Single Heir Rule defines a very narrow class of eligible heirs, escheating to the Tribe if a decedent had never had children.[3] It is quite common among our clients for an individual to raise a nephew or niece as they would a child, or to live with siblings in an extended family group setting. The Single Heir Rule, therefore, excludes many people whom these individuals would consider close family, causing interests to escheat to the Tribe instead of passing to a loved one of the decedent. With these things in mind, it may be time to examine broadening the list of eligible heirs of highly fractionated interests, to at least include those who would be considered "family", such as siblings and parents, as is defined under the eligible heirs of testamentary disposition.[4]

The policy concerns behind the Single Heir Rule are legitimate, but if this provision remains in effect, more effort should be given to educate individuals about its consequences. Studies have shown that the perception that an inheritance scheme is unfair to certain individuals can have lasting negative impacts on family groups.[5] However, education on the front-end may lead to a better understanding of why the trust interests will be split following the Single Heir Rule, or better yet, lead a person to write a will and avoid the unequal distribution of property that would otherwise occur.

B. Tenants in Common

The interpretation of wills in favor of a conveyance to heirs as joint tenants with right of survivorship has not raised many significant complaints. The passing of interests to a class of eligible heirs "in equal shares",[6] or in other words, as tenants in common, is contradictory to the whole purpose of the AIPRA. With this provision in place, fractionation continues to occur until an interest is less than five percent. Amending "in equal shares" to read "as joint tenants with right of survivorship" would better encompass the purpose of the AIPRA. With this change, heirs would still enjoy the benefits of the land for their lifetime and interests would remain in the family, two important goals expressed by our clients in estate planning sessions.

C. Funding and Implementation of Education and Estate Planning Services

The AIPRA authorized funding for estate planning services that would increase the use of wills and estate planning, protect the interests of individuals, and assist Indian landowners in accessing information.[7] Although the initial grant of $500,000 to the Indian Land Tenure Foundation and Institute of Indian Estate Planning and Probate at the Seattle University School of Law showed significant success in these areas,[8] the Department of Interior has not made any significant funds available since. In the midst of difficult budget decisions, the cost-saving benefits of estate planning should not be overlooked. Although not as quickly realized as consolidation buy-back programs, estate planning can significantly reduce the administrative costs of probate. More importantly, estate planning empowers individuals to make meaningful decisions about the inheritance of their trust property, rather than being passive spectators to a system that may be contrary to their wishes. Congress should take steps to mandate estate planning services in order to reduce costs and protect the rights and interests of individual Indians.

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[1] 25 U.S.C. § 2206(a)(2)(D)(iii).
[2] S. Rep. No. 108–341, at 44(2004).
[3] 25 U.S.C. § 2206(a)(2)(D)(iii)(IV).
[4] 25 U.S.C. § 2206(a)(2)(B).
[5] See, e.g. Deirdre G. Drake & Jeanette Lawrence, *Equality and Distribution of Inheritance in Families,* 13 Social Justice Research 271, 273 (2000) (noting that "Where inheritance distributions are concerned . . . perceptions of injustice may sour family relationships for generations").
[6] Id.
[7] 25 U.S.C. § 2206(f).
[8] Indian Land Tenure Foundation, *Final Report: Estate Planning Services Pilot of the American Indian Probate Reform Act Implementation Project* 16 (2007) (available online at *http://www.iltf.org/sites/default/files/DOI*__estate__planning__services__pilot__project__2007.pdf).

Funding should place an emphasis on direct services as well as education. Although the AIPRA has been in effect for several years, we encounter individuals who are learning about the AIPRA only through direct experience, having been adversely affected by the imposition of the Single Heir Rule or another provision of the complex statutory scheme. In our experience, education sessions in a familiar setting, such as a community center, meeting hall, or Tribal college, followed by an immediate opportunity to receive legal assistance has been a successful combination.

The ability to build a relationship with Tribal members in the communities we serve is essential to creating an environment where clients feel safe seeking assistance with the very personal and sensitive issues involving the inheritance of their trust lands. This places non-profit legal services organizations established within Indian communities at an advantage in making a meaningful impact in reducing fractionation through estate planning services. In our opinion, face-to-face, one-on-one contact with individuals continues to be the most consistent method of ensuring that a will is completed. While the teleconference model suggested in Douglas Nash's written testimony may work in some areas, we believe that many individuals in our service area would be highly uncomfortable and/or unwilling to seek estate planning assistance by these methods.

It was suggested in Ms. Majel Russell's written testimony that a professional will drafting service should be created and funded within the Bureau of Indian Affairs and that wills should again be stored by the BIA. Instead of mandating the storage of wills, protocol that requires participating non-profit agencies to inform the BIA that a will is on file for a trust interest holder may reduce the costs associated with finding a will upon the death of an individual, as well as preventing the liability incurred by the BIA in storing said wills.

Conclusion

The problem of fractionation is a serious one, and the AIPRA goes a long way in combating the problem. However, a few minor changes could help carry out the intent of the AIPRA more fully, while making efforts in combating fractionation easier for practitioners in the field. Furthermore, adequate funding should be made available to empower individual Native Americans. The ability to make educated decisions about their trust lands, through the drafting of a proper will and other estate planning processes, will decrease the administrative costs associated with probate. The cost savings at probate will free up resources that can be better spent on more pressing needs in Indian country. We would respectfully request that this committee seriously consider the appropriations authorized in 25 U.S.C § 2206 Section (f) to better serve the interests of Native American individuals and communities as a whole.

PREPARED STATEMENT OF HELEN SANDERS, QUINALT RESERVATION

Thankyou for the opportunity to present this statement for the record. My name is Helen Sanders. I live on the Quinalt Reservation in Washington State and I am an allottee.

I havaattached a list of concerns about AIPRA that affects landowners with trust property on our reservation.

American Indian Reform Act (AIPRA) is not understood by the Bureau of Indian Affairs employees from the top down. Most important the Solicitors department.

Our family chose an **advertised sale** of our trust allotments because of **AIPRA** and the mismanagement of the reservation where our lands were located. The Department of the Interior will work with only one of the tribes for which the reservation was created . That tribe does not represent the majority of the allotted land owners on this reservation which was 100 % allotted.

My family decided that we could not have managed the resources (timber) on our property because of those two facts that affected what we could do for the benefit of our children and grandchildren. Our only choice was to sell which was authorized under **25 CFR 152.26 Advertised sales.**

When the sale was being finalized, the Northwest Regional Director, Stanley Speaks decided for this **advertised sale** they should insert **AIPRA 2216 (f) a probate law** that did not apply. This decision by the Regional Director let him determine that the Tribe should have the right to match the high bid and title to the lands. The Tribe was not the high bidder. The BIA actually followed the procedures as outlined in **25 CFR 152.26** but inserted **AIPRA** to satisfy their own wishes.

The position of the **solicitors office NW Regional** was that the Allottees would not be harmed because we would be paid the amount of the high bid only by the Tribe not the high bidder. That is the written opinion of the solicitors office NW Regional office BIA. That opinion sounds reasonable on the outside, **however!—**

The Bureau of Indian Affairs does follow this opinion. For future sales the advertisement would contain the language "the Tribe has the right to meet the high bid" and the Tribe would be the only bidder. **Example** there is an individual who has tried to sell his allotments to the Quinault tribe (same as our sale) He has tried for several years to sell his holdings on the reservation via negotiation. The Tribe has passed resolutions in favor of the purchase but have never gone through with the sale.

The local Bureau of Indian Affairs. Dominated by the Quinault Business Committee will not do an **Advertised Sale** for him without the language of the Tribe having the right to match the high bid. In this case the Tribe does not qualify for that language because they have already been offered the sale to them and they declined to purchase.

The bottom line is this if a trust landowner on this reservation wishes to sell his land in the future he would have to sell to the government (Quinault). The majority of those individuals are from the other Tribes allotted there and are not represented by the Quinault Tribe. **Really, would anyone within the United Sates who wishes to sell his land, have to sell to the State ???** That is what our trust landowners are subject to because someone inserted AIPRA where it did not belong.

I am eager to see the land working group ILWG able to advise the trust landowners the facts concerning AIPRA and ILCA. ILCA should be a land consolidation act separate from the Probate code AIPRA.

A really important thing that must be done is get rid of the deadwood in the BIA. Old employees already retired and back taking a job that someone now that would be eager to work for the people could be hired.

PREPARED STATEMENT OF LEONA A. IKE, YAKAMA NATION

I saw that you have scheduled a hearing on Probate Reform, although your Committee will only have leaders of Tribes or professors testify, it is important to hear the voice of a common person.

My father was a Chief, who had strong, traditional and cultural values. He died of cancer in 2003. My fathers name was Chief Frederick Ike Sr., head Chief of the Middle Columbia and he was an enrolled member of Yakama Nation in Washington State (he also served several terms on Tribal council). My father, was not in his right mind a few months before his death, and he was manipulated by his live-in girlfriend to write a will leaving all his land to her. My brothers and sisters and I are enrolled in the Warm Springs Tribes in Oregon. My father and mother separated in the 1972 but due to their beliefs they remained married until my fathers death. My father, who spoke to us over his last years stated he always regretted not financially supporting us like he should have. He was very thankful to my mom for raising us and making us strong. My father had many pieces of property and he last had it appraised in the 1990's. He shared that upon his passing, he would be leaving everything to us, his children. He stated because we were enrolled in Warm Springs, except one son, we would be paid in shares and the land would be returned to Yakama Nation. He felt this would help us build a home or save for our children and grandchildren. He felt so happy that he could make up for his inability to pay child support when we were growing up.

In his last days, his girlfriend and her lawyer friend came up with a will that left her everything. My dads girlfriend tried to take him around the Indian Agency in Yakama to have it notarized, but thankfully Tribal officials refused to notarize it because this document was going against my fathers traditional values and beliefs. They then had her sons girlfriend and one of my brothers girlfriends witness it. My brothers girlfriend said my fathers girlfriend yelled at her and made her sign it. We tried to fight this, but the federal probate judge refused to recognize our rights or any testimony of what our dad wanted for us and our children. All this land was handed down generation to generation, but now it lies in the hands of someone who had no blood ties. The federal probate judge was hostile to all of us children and to my mother. He yelled at us, interrupted our testimony, told us to shut up, and many more things. We filed an appeal, but the same judge heard the appeal and upheld his own ruling.

Three days after my dads' funeral, this girlfriend moved a new man into my fathers house. We felt at a loss, but we learned to live with this deception.

I ask your honorable Committee to make safeguards for the many like us. Watch who you appoint to judgeships over probate matters of Indian lands. Have safeguards and compassion for families of landholders. Judges who are familiar with our cultural and traditional values. Indian families do not leave assets to those who are not related by blood, we believe it be handled generation to generation according to bloodline. Please insure our Indian families are protected from injustices like our family experienced. Thank you for reading my input.

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